

Tilburg University

The human right of free access to public legal information

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Publication date:
2019

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):

Mitee, L. E. (2019). *The human right of free access to public legal information: Proposals for its universal recognition and for adequate public access*. Tilburg University.

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The Human Right of Free Access to Public Legal Information

Proposals for its Universal Recognition and for Adequate Public Access

Proefschrift

ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. K. Sijtsma, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op vrijdag 20 december 2019 om 10.00 uur

door

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The Human Right of Free Access to Public Legal Information: Proposals for its Universal Recognition and for Adequate Public Access

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Book formatting and cover design by Leesi Ebenezer Mitee

Printed by Studio (powered by Canon), Library Building, Tilburg University, The Netherlands

The Human Right of Free Access to Public Legal Information

Proposals for its Universal Recognition and for Adequate Public Access

Thesis

for obtaining the degree of doctor at Tilburg University under the authority of the Rector Magnificus, Prof. Dr. K. Sijtsma, to be defended in public in the presence of a committee appointed by the Doctorate Board in the University's Auditorium on Friday 20 December 2019 at 10.00 am

by

Leesi Ebenezer Mitee

born in Kegbara Dere, Nigeria

ENGLISH ABSTRACT

Inadequate access to public legal information is a persistent global problem that denies the right of every person to know the laws that regulate the person's conduct and activities. That denial violates the rule of law and several human rights, including the omnibus right of access to justice, and makes the application of the *ignorantia juris non excusat* doctrine (where the law is inaccessible and thereby unknowable) a potent instrument of State injustice, etc. The problem exists in both developed and developing countries and it has defied all the existing ancient and modern efforts to solve it. This thesis identifies the lack of the political will of governments at all levels as the primary cause of the problem and examines the desirability of the use of a universal legal mechanism that can specifically require governments worldwide to provide adequate access to their public legal information, protect the people's right to know the law, and remedy the said injustice in applying the *ignorantia juris non excusat* doctrine wrongly. This interdisciplinary doctrinal research used the human rights-based approach, new human rights-advocacy approach, and technological tools to examine the different aspects of the problem, with Lon Fuller's theory of legal certainty as its overriding theoretical framework. The major findings of this study are that the existing international legal framework is inadequate for the global protection, promotion, and actualisation of the right of free access to public legal information; and the four existing methods of ascertainment of indigenous customary law are neither public access-adequate nor human rights-compliant. Additionally, there is no mechanism for identifying any country's official public legal information websites, which are presumed to be reliable; and those official public legal information websites exist either in total isolation or they are not properly interconnected, thereby making it difficult for people to find them. The thesis argues that the effectual solution to the problem is the formal universal recognition of the right of free access to public legal information as a human right. It goes further to make a comprehensive proposal for that recognition under the framework of a new United Nations Convention on the Right of Free Access to Public Legal Information. The thesis devises the <.officiallaws> strictly regulated generic top-level domain and develops the concept of official networked one-stop legal information websites as the mechanisms for easy identification of official public legal information websites globally and for optimal access to the whole

stock of any country's online public legal information, respectively. Further, it formulates the counterbalancing universal defence of 'ignorance of inaccessible law is an excuse' as the direct remedy for the injustice from the *Ignorantia juris non excusat* doctrine. It also develops *huricompatisation* as a new model for ascertainment of indigenous customary law that can ensure adequate access and also comply with the general human rights and indigenous rights. This thesis makes far-reaching recommendations on global access to public legal information and provides law-reform and policy-relevant guidelines that the United Nations, governments, indigenous communities, policymakers, etc. can implement worldwide.

Keywords: Human right of free access to public legal information; Ignorance of inaccessible law is an excuse; Official networked one-stop legal information websites; Official public legal information gTLD; Huricompatisation customary law ascertainment; New human rights-advocacy approach; Customary law human rights-based approach

DUTCH ABSTRACT

Ontoereikende toegang tot openbare juridische informatie is wereldwijd een hardnekkig probleem dat mensen belemmert om kennis te nemen van de wetten waarin hun rechten en plichten zijn vastgelegd. Die belemmering schendt verschillende mensenrechten, waaronder het recht op toegang tot de rechter, en het maakt de toepassing van de doctrine van *ignorantia juris non excusat* (een ieder wordt geacht de wet te kennen) een krachtig instrument van statelijke onrechtvaardigheid. Het probleem bestaat in zowel ontwikkelde als ontwikkelingslanden en het heeft alle bestaande oude en moderne pogingen om het op te lossen weerstaan. Dit proefschrift identificeert het gebrek aan politieke wil van allerlei overheden aard als de primaire oorzaak van het probleem en het onderzoekt de wenselijkheid van een universeel juridisch mechanisme dat een wereldwijde verplichting creëert voor overheden om adequate toegang te bieden tot openbare juridische informatie, het recht van burgers om kennis te nemen van de wet beschermt en het genoemde onrecht te verhelpen waarbij de leer van de *ignorantia juris non excusat* verkeerd wordt toegepast. Deze leerstellige studie gebruikt een interdisciplinaire benadering, een op mensenrechten gebaseerde benadering en een nieuwe benadering voor het verdedigen van de mensenrechten teneinde de verschillende aspecten van het probleem te onderzoeken, met de theorie van Lon Fuller over rechtszekerheid als belangrijkste theoretisch kader. De belangrijkste bevindingen van deze studie zijn dat het bestaande internationale juridisch kader ontoereikend is voor de algemene bescherming, de promotie en de actualisering van het recht op vrije toegang tot openbare juridische informatie, alsmede dat de vier bestaande methoden voor het vaststellen van het inheemse gewoonterecht niet adequaat zijn voor publieke toegang tot dat recht en mensenrechten schenden. Bovendien is er geen mechanisme voor het identificeren van nationale, betrouwbaar te achten officiële openbare websites met juridische informatie; daarnaast zijn dergelijke officiële openbare websites met juridische informatie vaak volledig geïsoleerd of zijn ze niet goed met elkaar verbonden, waardoor ze moeilijk vindbaar zijn. Het proefschrift betoogt dat de effectieve oplossing voor het gesignaleerde probleem bestaat in de formele universele erkenning van het recht op vrije toegang tot openbare juridische informatie als een mensenrecht. Voorts bevat het een alomvattend voorstel voor die erkenning door middel van een

nieuw Verdrag van de Verenigde Naties inzake het recht op vrije toegang tot openbare juridische informatie. Het proefschrift ontwerpt het strikt gereguleerde generieke topleveldomein <.officiallaws> en ontwikkelt het concept van officiële, onderling verbonden *one-stop* juridische informatiewebsites, enerzijds als mechanisme voor eenvoudige en wereldwijde identificatie van officiële openbare juridische informatiewebsites en anderzijds voor een optimale toegang tot alle online openbare juridische informatie van ieder individueel land. Voorts introduceert het proefschrift het beginsel ‘onbekendheid met ontoegankelijk recht is een excuus’ als directe remedie tegen het onrecht van de *ignorantia juris non excusat* doctrine. Het proefschrift ontwikkelt ook *huricompatisation* (*human rights-compliant public access to the customary law of indigenous communities*) als een nieuw model voor het vaststellen van inheems gewoonterecht. Dit model garandeert afdoende toegang en voldoet aan algemene mensenrechten en inheemse rechten. Ten slotte doet dit proefschrift verrijkende aanbevelingen over wereldwijde toegang tot openbare juridische informatie en doet het suggesties voor juridische hervormingen en beleidsrelevante richtlijnen die de Verenigde Naties, nationale regeringen, inheemse gemeenschappen, beleidsmakers en anderen wereldwijd kunnen implementeren.

Sleutelwoorden: mensenrecht op vrije toegang tot openbare juridische informatie; onbekendheid met een ontoegankelijke wet is een excuus; officiële verbonden one-stop-websites met juridische informatie; generiek *toplevel domain* voor officiële openbare juridische informatie; *Huricompatisation* voor vaststelling van gewoonterecht; nieuwe benadering van verdediging mensenrechten; op gewoonterecht gebaseerde mensenrechtenbenadering

DEDICATION

To the blessed memories of my father, Mr Ebenezer Kponanyie Mitee; my mother, Mrs Hannah Ebenezer Mitee; my uncle, His Royal Highness, Chief Cromwell Anazor Mitee and his wife Mrs Lydia Nkoo Anazor Mitee, my aunt; my daughter who passed on at birth, Miss Beulah Leesi Mitee; and Apostle Geoffrey Dabibi Numbere (1944–2014)

To my beloved beautiful wife, Dr. Mrs Telimoye Leesi Mitee; my great son, Mr Rephael Leesi Mitee; and my great and lovely daughter, Miss Sharon Leesi Mitee

ACKNOWLEDGMENTS

This doctoral (PhD) thesis is the product of many years of a pleasant and adventurous journey through the hard paths of black letters in books and all types of publications called literature. The journey brought me in contact with several persons who deserve all my sincere appreciation.

I am profoundly grateful to my supervisors (who are also members of my PhD Committee) for their guidance, patience, encouragement, and motivation that helped me throughout the long years of my PhD research. They are Prof. Dr. Ernst M. H. Hirsch Ballin, Distinguished University Professor (Tilburg University), President of the Asser Institute for International and European Law at The Hague, and Professor of Human Rights Law at the University of Amsterdam, The Netherlands; and Prof. Dr. Sofia Ranchordás, Chair of European and Comparative Public Law & Rosalind Franklin Fellow, University of Groningen, The Netherlands. Their insightful and thought-provoking comments taught me invaluable academic thinking, research, and writing skills.

Due to the multidisciplinary nature of my research, two experts most graciously assisted my supervisors to review two aspects of my work. They are Dr. Marc van Opijnen, an expert in legal informatics, Adviser on Legal Informatics at the Publications Office of the Netherlands (UBR|KOOP), and Project Coordinator of Building on European Case Law Identifier (BO-ECLI) project; and Prof. Dr. P. (Panos) Merkouris of the University of Groningen also in The Netherlands, an expert in the sources of international law, particularly customary international law. I am indeed very grateful to them. I further thank Dr. Marc van Opijnen for kindly translating the English version of the abstract into Dutch.

My immense thanks to the other members of my PhD Committee (the examiners) for reading my thesis—my long thesis that seeks to solve a complex, multifaceted problem—and their insightful remarks on the thesis. They are Prof. Dr. Ph. Eijlander, Prof. Dr. N.M.C.P. Jägers, Prof. Dr. T.M. van Engers (external examiner), and Prof. Dr. W.J.M. Voermans (external examiner).

I am also most grateful to the kind and truly professional staff of Tilburg University and Tilburg Law School who graciously attended to my welfare as a PhD researcher of the University. They include Prof. Han Somsen, Prof. Dr. Jurgen de Poorter, Jacqueline Wayers, Dr. Sabine K. Gabriël, Marga Verdonschot, Marjolein Blom, Ellen Marsé, Jacoba de Jong, Marianne Scholing, Anneke Overbosch, Yvonne

Sminia, and Gloria Kirovska. I extend the same gratitude to Ms. Annelies Verkerk, Executive Assistant to the Board of the Asser Institute for International and European Law in The Hague, The Netherlands.

I am most grateful to His Excellency Chief (Barr.) Nyesom Ezenwo Wike CON, the Governor of Rivers State of Nigeria; Hon. Isaac Kamalu, Rivers State Commissioner for Finance; and Prof. Princewill Chike, Rivers State Commissioner for Health who showed me great kindness and support during my PhD research.

Immense thanks also to Dr. Sam B. Kalagbor, Chris Woke, Esq., and Ambrose N. Duson, Esq. (the Rector, Registrar, and Acting Dean of the Institute of Global and Legal Studies of the Port Harcourt Polytechnic, respectively); Pastor George Izunwa; Ms Kabia Blessing Gbirigbe, Mrs Victoria Izuogu, Dr. Festus & Mrs Ilami Igbagiri, and Dr. Samuel Okerenta (residents of the United Kingdom, my overseas destination before and during the years of my PhD) for your support and kindness.

My sincere appreciation to Mrs Mercy Legbara, Engr. Fegalo Anazor Mitee, Ledum Anazor Mitee, Batom Anazor Mitee, Monabe Anazor Mitee (my first cousins); Baridi Legbara (my second cousin); Mrs Augusta Adinee Firima, Mrs Grace Ledor Gbarabe, Mrs Janet Anubor Silaa, Mrs Lenu Abel Bornu, Mrs Iyeleema TonuBari Kunamon (my sisters); and Mrs Rhoda Daw (my mother-in-law) for always being there for me as family. Their support and encouragement over the years have indeed been most remarkable.

My beloved, great, and adorable children, Mr. Rephael Leesi Mitee and Miss Sharon Leesi Mitee, experienced loss of time with me during the long years of my PhD research. You knew that I was working on an important project for several years, but I made sure you did not know it was my PhD research, just for your pleasant surprise. Thank you so much for your understanding and for always caring for your Dad.

My beloved beautiful wife, Dr. Mrs. Telimoye Leesi Mitee, is the only person who knew about every stage of my PhD research, apart from my supervisors. Precious, I cannot thank you enough for all your love, care, kindness, encouragement, motivation, and support that helped me throughout my intensive PhD journey. I love you; I always will.

Leesi Ebenezer Mitee

Tilburg City, The Netherlands

31 July 2019

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ABBREVIATIONS AND ACRONYMS

AALL	American Association of Law Libraries
ABA	American Bar Association
ACHPR	African Commission on Human and Peoples' Rights
AGB	gTLD Applicant Guidebook
Akoma Ntoso	Architecture for Knowledge-Oriented Management of African Normative Texts using Open Standards and Ontologies
ALRC	Australian Law Reform Commission
APA	American Psychological Association Style
ASCII	American Standard Code for Information Interchange
ASIS&T	Association for Information Science and Technology
AT	Assistive Technology
AustLII	Australasian Legal Information Institute
BAILII	Irish Legal Information Institute
BBC	British Broadcasting Corporation
BILETA	British and Irish Law Education and Technology Association
Brexit	United Kingdom Referendum of 23 June 2016 to Leave the European Union
CanLII	Canadian Legal Information Institute
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Creative Commons
CCLC	Community Customary Law Council
ccTLD	Country-code top-level domain
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CLRHC	Customary Law Reform and Huricompatisation Commission
CNBC	Consumer News and Business Channel
CNN	Cable Network News
CNZ	Courts of New Zealand
COHRE	Centre on Housing Rights and Evictions
CommonLII	Commonwealth Legal Information Institute

CoS	Courts of Service
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DLID	Dedicated legal information domain
DNS	Domain Name System
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EISB	Electronic Irish Statute Book
EU	European Union
FALM	Free Access to Law Movement
FCA	Federal Court of Australia
FCCA	Federal Circuit Court of Australia
FCoA	Family Court of Australia
FDsys	Federal Digital System
FICHL	Forum for International Criminal and Humanitarian Law
FIM	Freedom of Information Movement
FMG	Female genital mutilation
FOIA	Freedom of Information Act
FRL	Federal Register of Legislation
FTC	Federal Trade Commission
GDPR	General Data Protection Regulation
GLIN	Global Legal Information Network
gTLD	Generic top-level domain
HCA	High Court of Australia
HMRC	Her Majesty's Revenue and Customs
HRBA	Human Rights-Based Approach
Huricompatisation	Human Rights-Compliant Public Access to Indigenous Customary Law
IANA	Internet Assigned Numbers Authority
IBM	International Business Machines
ICANN	Internet Corporation for Assigned Names and Numbers
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICNL	International Centre for Nigerian Law
ICT	Information and Communications Technology
IDN	Internationalized Domain Name
IDR	Interdisciplinary Research
IEEE	Institute of Electrical and Electronics Engineers
IFLA	International Federation of Library Associations
IGO	Intergovernmental Organisation
ILO	International Labour Organization
ILSA	International Law Students' Association
IMS	Integrated Multipronged Structure
IP	Internet Protocol
ISE	Internet Search Engine
ISO	International Organization for Standardization
ITC	International Trade Centre
JDO	Judicial Decisions Online
JLW	Justice Laws Website
LIDNS	Legal Information Domain Name System
LII	Legal Information Institute
LIS	Legal Information System
MLIA	Multilingual Information Access
MT	Machine Translation
NGO	Non-Governmental Organisation
NHRAA	New Human Rights-Advocacy Approach
NOLIW	National Official Legal Information Website
NOSAF	Networked One-Stop Access Feature
NRC	American National Research Council
NZL	New Zealand Legislation Website
NZLII	New Zealand Legal Information Institute
OAS	Organization of American States
OCR	Optical Character Recognition
ODA	Overseas Development Assistance
ODS	Official Document System (United Nations)

OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
OLIW	Official Legal Information Website
ONOLIW	Official Networked One-Stop Legal Information Website
OPLIW	Official Public Legal Information Website
OSCOLA	Oxford University Standard for Citation of Legal Authorities
PACER	Public Access to Court Electronic Records
PACLI	Pacific Islands Legal Information Institute
PDF	Portable Document Format
PFCA	Principal Federal Court of Australia
PLI	Public Legal Information
Res	Resolution
RLID	Regulated Legal Information Domain
RTI	Right of Access to Information
SAFLI	Southern African Legal Information Institute
SALI	Saskatchewan Access to Legal Information Project
SEO	Search Engine optimisation
SeyLI	Seychelles Legal Information Institute
SLD	Second-Level Domain
SLID	Shared Legal Information Domain
SMU	Southern Methodist University
SSRN	Social Science Research Network
TDR	Traditional Dispute Resolution
TISL	Transparency International Sri Lanka
TLD	Top-level domain
UDHR	Universal Declaration of Human Rights
UIDLR	Unilateral Interdisciplinary Legal Research
ULI	Uganda Legal Information Institute
UN	United Nations
UN Doc	United Nations Document
UNCTAD	United Nations Conference on Trade and Development
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe

UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNRIC	United Nations Regional Information Centre for Western Europe
UNSDG	United Nations Sustainable Development Group
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
UNWLIO	United Nations World Legal Information Organization
UNWTO	United Nations World Tourism Organization
UPR	Third Universal Periodic Review
UPS	United Parcel Service
URI	Uniform Resource Identifier
URL	Uniform Resource Locator
URN:LEX	Uniform Resource Name Namespace for Sources of Law
W3C	World Wide Web Consortium
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WLIF	World Legal Information Foundation
WorldLII	World Legal Information Institute
WTO	World Trade Organization
WZB	Berlin Social Science Center
XML	eXtensible Markup Language
XSD	XML Schema Definition

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CHAPTER ONE

Introduction

“Innovation is hard. It really is. Because most people don’t get it. Remember, the automobile, the airplane, the telephone, these were all considered toys at their introduction because they had no constituency. They were too new.” **Nolan Bushnell** (born 1943)¹

¹ Nolan Bushnell is an American engineer, technology pioneer, scientist, and entrepreneur who is widely acclaimed as ‘the father of the video game industry’. See Indiana University Southeast, ‘Father of the Video Game Industry, Founder of Chuck E. Cheese Coming to IU Southeast’ (*Indiana University Southeast*, 1 November 2017) <<https://now.ius.edu/2017/11/father-of-the-video-game-industry-founder-of-chuck-e-cheese-coming-to-iu-southeast/>> accessed 23 June 2019.

1. Background

The right of every person to know the laws that regulate the person's conduct and activities is denied where there is *no* access or there is *inadequate* access to *public legal information*, i.e. the laws and law-related information made or created by the government and intergovernmental organisations (IGOs) that have the power to make laws.² Such denial violates the rule of law and several human rights,³ including the omnibus right of access to justice that encompasses the specific right to self-representation, the general right to adequate facilities for every defence, and the right against adversely retroactive or *ex post facto* laws; and it hinders sustainable development.⁴ This denial also adversely affects numerous legal relationships such as global business operations. Additionally, it makes the application of the universal doctrine⁵ of *ignorance of the law is no excuse*⁶ (*ignorantia juris* doctrine) a potent instrument of State injustice, as it has happened progressively over several centuries in different countries, e.g. from the nineteenth century case of *Rex v Bailey*⁷ to *United States v Casson*⁸ in the last century, and *Ostrowski v Palmer*⁹ in this twenty-first century. The reason is

² For the definition of 'public legal information', see Section 3.2 below.

³ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 57–58.

⁴ Access to public legal information is an indispensable component of the rule of law, access to justice, and public access to information in Goal 16.3 & 16.10 of the UN 2030 Agenda for Sustainable Development. See UNGA Res 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1 <<https://undocs.org/A/RES/70/1>> accessed 6 May 2019 (UN 2030 Agenda for Sustainable Development).

⁵ Frederick G McKean Jr, 'The Presumption of Legal Knowledge' (1927) 12 St Louis Law Review 96, 97 <https://openscholarship.wustl.edu/law_lawreview/vol12/iss2/2> accessed 12 July 2019.

⁶ The Latin maxim is *ignorantia juris non excusat* ('ignorance of the law is no excuse') or *ignorantia juris neminem excusat* ('ignorance of the law excuses no one').

⁷ *Rex v Bailey* (1800) 168 Eng Rep 651 (England). For a summary of the facts of this case, see Section 2.1 below.

⁸ *United States v Casson*, 434 F.2d 415 (DC Cir 1970) (United States). For a summary of the facts of this case, see Section 2.1 below.

⁹ *Ostrowski v Palmer* [2004] HCA 30 (Australia) <<http://eresources.hcourt.gov.au/downloadPdf/2004/HCA/30>> accessed 5 May 2019. For a summary of the facts of this case, see Section 2.1 below.

that, as the law does not compel the doing of an impossible thing (which is enshrined in the ‘venerable legal Latinism’¹⁰ *lex non cogit ad impossibilia*), it is therefore an injustice of unimaginable proportions for any government to punish any person for contravening any law that the person could not have known, due to its non-publication or inadequate publication. That is what Jeremy Bentham meant when he said, nearly 200 years ago: ‘We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.’¹¹ There is therefore the urgent need for the global solution to such global injustice and the violations of the rule of law and human rights mentioned above.

Awareness of the need to remedy the above-mentioned injustice and solve the other problems from inaccessible laws, led kings and governments throughout human history to use the available writing, printing, and publishing methods or technologies to provide public access to their laws.¹² One prominent example of the ancient provision of *free* access to public legal information is the Code of Hammurabi that was inscribed on stone and placed in a *public place* for people to see, read, and know,¹³ although it is likely that many people were not literate at that time. In the modern era, developments in information and communications technology (ICT) in the twentieth century (including the invention of the Internet in 1969¹⁴) revolutionised printing and publishing, and led to the digitisation of public legal information.

¹⁰ Re Grand Jury Proceedings, 744 F. 3d 211 – Court of Appeals, 1st Circuit 2014, 212 (United States).

¹¹ Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham*, vol 5 (William Tait 1843) 547.

¹² For a historical account of the publishing of laws, see Frederick W Dingley, ‘From Stele to Silicon: Publication of Statutes, Public Access to the Law, and the Uniform Electronic Legal Material Act’ (2019) 111(2) Law Library Journal 165–195 <https://www.aallnet.org/wp-content/uploads/2019/05/LLJ_111n2_00_full_issue_WEB.pdf> accessed 2 August 2019.

¹³ The Louvre Museum, ‘Law Code of Hammurabi, King of Babylon’ (*The Louvre Museum*) <www.louvre.fr/en/oeuvre-notices/law-code-hammurabi-king-babylon> accessed 1 June 2019.

¹⁴ Barry M Leiner and others, ‘A Brief History of the Internet’ (2009) 39(5) Computer Communication Review 22–31 <www.cs.ucsb.edu/~almeroth/classes/F10.176A/papers/internet-history-09.pdf> accessed 1 June 2019.

The invention of the World Wide Web (Web) by Sir Timothy Berners-Lee in March 1989¹⁵ (which was launched as a resource on the Internet in the summer of 1991¹⁶) ushered in the era of unprecedented global dissemination of all categories of public information, including legal information. Shortly after the launch of the Web, Thomas R. Bruce and Peter W. Martin founded the Legal Information Institute (LII) at Cornell Law School in 1992,¹⁷ and thus pioneered the first generation of legal information websites that provided *free* global public access.¹⁸

The evident prospects of the landmark free-access Cornell Law School LII project and the global enthusiasm that it generated quickly birthed similar projects, led to the formation of the Free Access to Law Movement (FALM) in 2002 and, in the same year, its famous Montreal Declaration on Free Access to Law 2002.¹⁹ Today, FALM has not less than 65 members across the world, from Abyssinia to Zimbabwe.²⁰ Members of FALM 'are involved in significant activities facilitating free access to one or more types [or categories] of 'public legal information' (PLI).'²¹

As an indication of the importance of the contribution of FALM to global free access to public legal information, more than 30 million people from over 240 countries and territories visit the website²² of Cornell Law School LII (the pioneer

¹⁵ World Wide Web Consortium, 'Sir Timothy Berners-Lee OM, KBE, FRS, FREng, FRSA: Longer Biography' (*World Wide Web Consortium*) <www.w3.org/People/Berners-Lee/Longer.html> accessed 1 June 2019; Dan Connolly, 'A Little History of the World Wide Web' (*World Wide Web Consortium*, 29 August 2016) <www.w3.org/History.html> accessed 1 June 2019.

¹⁶ Ibid

¹⁷ Legal Information Institute, 'About: Who We Are' (*Legal Information Institute*) <www.law.cornell.edu/lii/about/who_we_are> accessed 7 July 2019; Graham Greenleaf, 'Legal Information Institutes and the Free Access to Law Movement' (2008) *GlobaLex* <www.nyulawglobal.org/globalex/Legal_Information_Institutes.html> accessed 23 June 2019.

¹⁸ Section 2.4 of Chapter Three.

¹⁹ Montreal Declaration on Free Access to Law (Montreal 2002) <www.falm.info/declaration/> accessed 7 July 2019.

²⁰ Free Access to Law Movement, 'Members of the Free Access to Law Movement (FALM)' (*Free Access to Law Movement*) <<http://falm.info/members/current/>> accessed 27 March 2019.

²¹ Free Access to Law Movement, 'Guidelines for Membership of the Free Access to Law Movement (FALM)' (*Free Access to Law Movement*, November 2015) <http://falm.info/members/Membership_criteria.pdf> accessed 7 July 2019.

²² *Legal Information Institute* <www.law.cornell.edu/> accessed 7 July 2019.

member of FALM) every year.²³ Since 1997, FALM has been organising its popular annual Law Via Internet (LVI) Conference²⁴—an expression of its sustained commitment to global free access to public legal information.

FALM's said Montreal Declaration on Free Access to Law 2002 paved the way for several international, regional, and national initiatives; declarations; principles; and commitments on the provision of free access to public legal information. These include The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008; Law.Gov Principles and Declaration 2010; and The Hague Conference and the European Commission Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters 2012.²⁵ The others are the Johannesburg Outcome Statement of the International Conference on Access to African Supranational and Regional Law 2012;²⁶ and the IFLA Statement on Government Provision of Public Legal Information in the Digital Age 2016.²⁷ Other declarations that are relevant to the provision of access to public legal information include the Windhoek Declaration on Promoting an Independent and Pluralistic African Press 1991²⁸ and the Banjul Declaration of Principles on Freedom of

²³ Thomas Bruce, 'Statement for the Side Event: Providing Access to Legal Information to Accelerate Sustainable Development' (Intergovernmental Negotiations on the Post-2015 Development Agenda Conference, New York, June 2015) 1 <<https://goo.gl/FMAiJ2>> accessed 18 April 2018.

²⁴ Graham Greenleaf, 'Free Access to Legal Information, LIs, and the Free Access to Law Movement' in Richard A Danner and Jules Winterton (eds), *The IALL International Handbook of Legal Information Management* (Ashgate Publishing 2011) 201, 206.

²⁵ The Hague Conference and the European Commission Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters 2012 (*The Hague Conference on Private International Law*, 17 February 2012) <<https://assets.hcch.net/docs/b093f152-a4b3-4530-949e-65c1bfc9cda1.pdf>> accessed 2 August 2019.

²⁶ Johannesburg Outcome Statement of the International Conference on Access to African Supranational and Regional Law 2012 (Johannesburg 6 November 2012) <<https://africanlii.org/conference-report>> accessed 25 June 2019.

²⁷ IFLA Statement on Government Provision of Public Legal Information in the Digital Age 2016 (International Federation of Library Associations 13 December 2016) <www.ifla.org/publications/node/11064> accessed 7 July 2019 (IFLA Statement 2016); Section D.II.7 of Chapter Two.

²⁸ Windhoek Declaration on Promoting an Independent and Pluralistic African Press 1991 (Windhoek 3 May 1991)

Expression in Africa 2002.²⁹ One of the two crucially relevant provisions in Article 18 of the Universal Declaration on Linguistic Rights 1996 (Barcelona Declaration), made by '61 NGOs, 41 PEN Centers and 40 experts in linguistic rights from all over the world . . . with the moral and technical support of UNESCO',³⁰ states: 'All language communities have the right for laws and other legal provisions which concern them to be published in the language proper to the territory.'³¹

In the public sector, four years after the establishment of Cornell Law School LII, the US Library of Congress created the Global Legal Information Network (GLIN) in 1996, which the United States government funded until 2012.³² Post-2012, GLIN, 'a network of Member States and designated International Organizations committed to making their laws and legal decisions accessible',³³ now plans to replace the original system with a modern 'searchable repository of authentic versions of laws and related legislative documentation'.³⁴

The governments of various countries around the world responded to the new era and began publishing public legal information on their official websites, as a continuation of the age-old dispensational practice of utilising the prevailing publishing technologies to provide public access to the primary sources of law and other categories of public legal information. The IFLA Statement on Government Provision of Public Legal Information in the Digital Age 2016 aptly captured this

<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/409_windhoek_/409_windhoek_en.pdf> accessed 25 June 2019.

²⁹ African Commission on Human and Peoples' Rights, 'Banjul Declaration of Principles on Freedom of Expression in Africa' (23 October 2002) ACHPR/Res.62(XXXII)02 <<https://www.achpr.org/presspublic/publication?id=3>> accessed 25 June 2019.

³⁰ Universal Declaration of Linguistic Rights Follow-up Committee, *Universal Declaration of Linguistic Rights* (Universal Declaration of Linguistic Rights Follow-up Committee 1998) 11 <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019.

³¹ Universal Declaration on Linguistic Rights (Barcelona 9 June 1996) (Barcelona Declaration) art 18(1) <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019.

³² Global Legal Information Network, 'About Us' (*Global Legal Information Network*) <www.glinf.org/about> accessed 27 March 2019.

³³ Ibid

³⁴ Global Legal Information Network, 'Vision for GLIN 2' (*Global Legal Information Network*) <www.glinf.org/rfi-rfp/vision-glin2> accessed 16 May 2018.

modern trend of provision of online access to the various categories of public legal information, especially legislation and judicial decisions,³⁵ to guarantee equitable, seamless, and constant access.³⁶

Websites thus became—and continue to be—an *indispensable* technological tool for the provision of free access to all categories of online information, including public legal information. However, many people still do not have this free access to public legal information.

Publishing public legal information online is the most cost-effective—and the only—means of meeting the free access requirement for national and global access,³⁷ beyond local access that requires physical facilities, such as libraries. Online access was particularly advantageous right from 1992 because of its unparalleled minimal cost.³⁸ According to Greenleaf (a world-renowned expert in legal information systems), ‘From the mid-1990s the web has provided the necessary technical platform to enable free public access to computerised legal information—a low cost distribution mechanism.’³⁹ He revealed that the Web was particularly advantageous because, ‘For publishers it was close to a “no cost” distribution mechanism if they were not required to pay for outgoing bandwidth.’⁴⁰ The Hague Conference and the European Commission Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters 2012 described online access to public legal information as ‘effective, cost-efficient and prompt access’⁴¹ and recommended that ‘States should make available without cost to users legislation and relevant case law online.’⁴²

³⁵ IFLA Statement 2016.

³⁶ Ibid

³⁷ Graham Greenleaf, ‘Free Access to Legal Information, LILs, and the Free Access to Law Movement’ (2011) University of New South Wales Faculty of Law Research Series <<http://classic.austlii.edu.au/au/journals/UNSWLRS/2011/40.html>> accessed 7 August 2019.

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ The Hague Conference and the European Commission Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters 2012 (*The Hague Conference on Private International Law*, 17 February 2012) Recommendation 7 <<https://assets.hcch.net/docs/b093f152-a4b3-4530-949e-65c1bfc9cda1.pdf>> accessed 2 August 2019.

⁴² Ibid Recommendation 8.

Indeed, free online public access is vital to meeting the twenty-first century demands of globalisation and the unprecedented breakthroughs in information and communications technology. From their 2016 study of access to public legal information in Zambia, Masson and Tahir concluded: 'Accessibility of legal information was seen to be best facilitated by the use of free and reliable online resources.'⁴³

It should be noted that public-sector enthusiasm in the provision of online public legal information emanated from the general concept of e-Government (electronic government) that originated in the United States in 1993 when President Bill Clinton launched his National Performance Review, headed by Vice President Al Gore.⁴⁴ The American National Research Council (NRC) has aptly defined 'e-Government' as 'the application of the Internet and other information technology (IT) to provide governmental information and services electronically.'⁴⁵ According to the said NRC, e-Government 'offers the potential of increased convenience to the public by making such services available 24 hours a day, 7 days a week.'⁴⁶ Additionally, it has 'the advantages of improved accuracy and also reduced cost to the government, deriving from its requiring little or no direct interaction with a government employee.'⁴⁷

However, despite the indispensability of online information, including public legal information, the *print* version is still useful because there are people who depend on it for their own access. The reasons are that, not every person is computer literate and not all computer literate persons have access to the Internet. For instance, recent statistics show that the global Internet penetration rate (the

⁴³ Marc Masson and Ovais Tahir, 'The Legal Information Needs of Civil Society in Zambia' (2016) 4 Journal of Open Access Law 1, 4 <<https://ojs.law.cornell.edu/index.php/joal/article/view/45/61>> accessed 5 September 2017.

⁴⁴ Andrew Chadwick, E-Government, *Encyclopædia Britannica* <www.britannica.com/topic/e-government> accessed 27 March 2019; A Brief History of the National Performance Review (*Govinfo*, February 1997) <<https://govinfo.library.unt.edu/npr/library/papers/bkgrd/brief.html>> accessed 27 March 2019.

⁴⁵ National Research Council, *Social Security Administration Electronic Service Provision: A Strategic Assessment* (The National Academies Press 2007) 149 <<https://doi.org/10.17226/11920>> accessed 27 March 2019.

⁴⁶ Ibid

⁴⁷ Ibid

percentage of the total population that uses the Internet), as of 30 June 2019, was 57.3 %, representing 4.4 billion users.⁴⁸

It is important to mention that, as a result of the Freedom of Information Movement (FIM) of the 1990s⁴⁹ (a renaissance of FIM that originated in the 1930s⁵⁰), not less than 127 countries (including two countries not formally recognised by the United Nations) had national or federal laws usually styled 'Freedom of Information Act' (FOIA) or provisions in national laws that guaranteed the right to freedom of information, as of May 2019.⁵¹ Such laws are relevant to the provision of access to public legal information because public legal information is a component, indeed a major component, of public information.⁵² That is the reason FOIAs can be used to demand access, albeit limited in its scope,⁵³ to any particular item of public legal information (e.g. legislation), as the Missouri Court of Appeals held in the US case of *Deaton v Kidd*.⁵⁴ According to the United Nations Educational, Scientific and Cultural Organization (UNESCO),

Freedom of Information (FOI) can be defined as the right to access information held by public bodies. It is an integral part of the fundamental right of freedom of expression, as recognized by Resolution 59 of the UN General Assembly adopted in 1946,⁵⁵ as well as by Article 19 of the

⁴⁸ Internet World Stats, 'World Internet Usage and Population Statistics: June, 2019 – Updated' (*Internet World Stats*, 30 June 2019) <<https://www.internetworldstats.com/stats.htm>> accessed 31 July 2019.

⁴⁹ Thomas Blanton, 'The World's Right to Know' (2002) 131 *Foreign Policy* 50–58 <www.jstor.org/stable/3183417> accessed 17 May 2018.

⁵⁰ Martin E Halstuk and Bill F Chamberlin, 'The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To' (2006) 11(4) *Communication Law and Policy* 511, 517–518 <https://doi.org/10.1207/s15326926clp1104_3> accessed 17 May 2018.

⁵¹ Open Society Justice Initiative, 'States that Guarantee a Right of Access to Information (RTI) in National/Federal Laws or Decrees' (*Open Society Justice Initiative*, May 2019) <www.right2info.org/resources/publications/countries-with-ati-laws-1/at_download/file> accessed 31 July 2019.

⁵² *Deaton v Kidd*, 932 S.W.2d 804, 806 (Mo. Ct. App. 1996).

⁵³ Section C.I of Chapter Two.

⁵⁴ 932 S.W.2d 804 (Missouri Court of Appeals 1996).

⁵⁵ Calling of an International Conference on Freedom of Information, UNGA Res 59 (14 December 1946) <<https://documents-dds->

Universal Declaration of Human Rights (1948), which states that the fundamental right of freedom of expression encompasses the freedom to 'to seek, receive and impart information and ideas through any media and regardless of frontiers'.⁵⁶

UNESCO's definition and explanation of the meaning of FOI above rightly state the relationship between 'the right to access information held by public bodies' and 'the fundamental right of freedom of expression' which is crucial to the overriding theme of this thesis. It is so because that relationship is pivotal to the concept of the right of free access to public legal information. For example, the Inter-American Court of Human Rights ruled *explicitly* in *Claude-Reyes v Chile*⁵⁷ that the right to freedom of thought and expression in Article 13 of the American Convention on Human Rights⁵⁸ guarantees every person's right of access to government-held information and the duty of the government to provide the required access. Accordingly, the Court ordered the government of Chile to provide the information that some citizens requested and 'adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information'.⁵⁹ The Court monitored its order to ensure compliance by the government of Chile.⁶⁰ However, unlike the Inter-American Court of Human

ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement> accessed 9 August 2019. Resolution 59 was one of the resolutions adopted by the UN General Assembly during its first session in 1946. See UN General Assembly, 'Resolutions Adopted by the General Assembly During its First Session' (UN General Assembly) <<https://www.un.org/documents/ga/res/1/ares1.htm>> accessed 9 August 2019 (footnote added).

⁵⁶ UNESCO, 'Freedom of Information' (UNESCO) <www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/> accessed 16 May 2018.

⁵⁷ *Claude-Reyes v Chile*, Inter-American Court of Human Rights (Ser. C No. 151) (19 September 2006) <<https://iachr.ils.edu/cases/claude-reyes-et-al-v-chile>> accessed 19 July 2019.

⁵⁸ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 <<https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>> accessed 8 August 2019.

⁵⁹ *Claude Reyes v Chile*, Order of the Inter-American Court of Human Rights, Judgment of 19 September 2006 (Merits, Reparations and Costs) 61 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf> accessed 22 July 2019.

⁶⁰ *Claude Reyes v Chile*, Order of the Inter-American Court of Human Rights, 2 May 2008 (Monitoring Compliance with Judgment)

Rights, the European Court of Human Rights only recognised the right *implicitly* in *Matky v Czech Republic*.⁶¹ The 2013 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression described the right of access to public information as ‘one of the central components of the right to freedom of opinion and expression.’⁶² Therefore, the relationship between the right of access to public information and the right of freedom of expression has human rights implications for the right of free access to public legal information which is a component of the right of access to public information.

The more recent concept of open data and the mainstream freedom of information philosophy have conspired to produce an unprecedented robust opportunity for universal free access to public information which is government-held information. According to the Open Knowledge Foundation, the core features of open data are ‘availability and access . . . re-use and redistribution . . . and universal participation’.⁶³ The open data principles advocate free online access and no copyright restrictions, like the other initiatives and movements discussed above. National and state (regional) governments of some countries have adopted the open data concept. For example, President Barack Obama made an executive order on open data in 2013, which began with the following statement: ‘Openness in government strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth.’⁶⁴ Indeed, there is evident unprecedented universal aspiration for free access to public information, a prominent subset of which is public legal information.

<http://www.worldcourts.com/iacthr/eng/decisions/2008.05.02_Claude_Reyes_v_Chile.pdf> accessed 19 July 2019.

⁶¹ *Matky v Czech Republic*, App no 19101/03 (ECtHR, 10 July 2006).

⁶² UNGA ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (4 September 2013) UN Doc A/68/362.

⁶³ Open Knowledge International, ‘What is Open Data?’ in ‘Open Data Handbook’ (*Open Knowledge International*, 2010) <<http://opendatahandbook.org/guide/en/what-is-open-data/>> accessed 16 July 2019.

⁶⁴ Making Open and Machine Readable the New Default for Government Information, Executive Order 13642 of 9 May 2013 (United States) <<https://www.govinfo.gov/content/pkg/CFR-2014-title3-vol1/pdf/CFR-2014-title3-vol1-eo13642.pdf>> accessed 16 July 2019.

2. The Research Problem

2.1 Statement of the Problem

One pertinent question arises from the foregoing background: Have the abovementioned ancient and modern attempts to provide access to public legal information achieved adequate access that is required for the enjoyment of the right to know the law? Whether such access exists or not, is self-evident to any keen observer because where there is adequate access to public legal information, which means people enjoy their right of free access to public legal information, the following loose groups of features exist.⁶⁵ First, the stock of the public legal information is comprehensive so that all of its categories⁶⁶ are readily available; it is translated into the required languages for intelligible access to satisfy the peoples' linguistic rights;⁶⁷ and its alternate formats are available for all categories of its users, including persons with disabilities, e.g. Braille for the blind. Second, there is no copyright in its texts nor in its value-added features (that enhance understanding of the law) produced with public funds, e.g. annotations and digests; and its stock is current or up to date so that the users—the government itself, corporate organisations, judges, lawyers, and all the other members of the public—can know the exact position of the law. Third, it is authentic and has evidentiary value so that it is reliable for all purposes, including its use in court proceedings; and it is preserved for both present users and future generations. Fourth, it is published *permanently* in both physical and online digital formats and there is *free access* to its physical and digital versions.⁶⁸

However, in the world today, many people do not enjoy their right of free access to public legal information because it is difficult—and sometimes impossible—to know the law, as governments do not provide adequate access to their public legal information, thereby violating the rule of law and several human rights. That means there is substantial non-conformance to the situation described in the

⁶⁵ That is, the grouping is not defined according to specific parameters, but just for convenience.

⁶⁶ For the definition of 'public legal information' and its categories, see Section 3.2 below.

⁶⁷ Universal Declaration on Linguistic Rights (Barcelona Declaration), World Conference on Linguistic Rights (9 June 1996) art 18 <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019.

⁶⁸ Section D.III.2 of Chapter Two.

immediately preceding paragraph. That substantial non-conformance is *the global problem of inadequate access to all categories of public legal information* that this thesis examines. For example, in his 2008 judgment in *Regina v Chambers*, Lord Justice Toulson revealed the existence of the problem and its effects where, for instance, the stock of the laws published online by any government is not comprehensive or it is not up to date:

[T]here is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in many cases unable to discover what the law is . . .⁶⁹

It is a serious state of affairs when the relevant legislation is not accessible, the Government's own public information website (OPSI) is incomplete and the prosecution in an excise case unintentionally misleads the court as to the relevant Regulations in force.⁷⁰

A study that Greenleaf, Chung and Mowbray published more than a decade ago showed the global nature of the problem,⁷¹ which still persists today.⁷² The problem adversely affects every person and all institutions worldwide: all the citizens of any country, including lawyers; all types of organisations; and even the governments that make the laws. The reason is that law regulates the conduct and activities of every person and every institution, and ignorance of the law is no excuse or defence for its violation. Interestingly, governments also suffer the consequences of not providing adequate access to their own laws. For example, they incur costs from wrong and needless prosecutions, e.g. the UK tobacco smuggling cases that involved thousands of defendants that Her Majesty's Revenue and Customs prosecuted under a repealed law because they were not

⁶⁹ *Regina v Chambers* [2008] EWCA (Crim) 2467, para 68 (England) <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html>> accessed 16 July 2019.

⁷⁰ Ibid para 72.

⁷¹ Graham Greenleaf, Philip Chung and Andrew Mowbray, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies 2002–2005' (2007) 4(4) SCRIPT-ed 319, 322 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 16 May 2018.

⁷² Discussed in Chapter Four.

aware of the change in the law due to its inaccessibility.⁷³ Further, governments can incur liability from their refusal to provide access to public information (which includes public legal information). For example, the government of Chile paid the sum of US\$10,000.00 to the victims of such refusal, as the Inter-American Court of Human Rights ordered in *Claude Reyes v Chile*.⁷⁴

The global problem of inadequate access to public legal information exists in both developed and developing countries, but it is worse in developing countries⁷⁵ where governments are known for corruption, poor democracy, provision of poor public services,⁷⁶ lack of transparency, and reckless violation of human rights. Some specific examples of the manifestations of the problem of inadequate access to public legal information are outlined below.

The United Kingdom provides one glaring example of the existence of the problem in developed countries. Over a period of about seven years, the England and Wales Court of Appeal itself, the lawyers that appeared before the Court, and more than 2,615 defendants were all ignorant of the repeal of a law under which the charges that related to tobacco smuggling were brought. Delivering the Court's judgment in *Regina v Chambers*⁷⁷ in 2008 (in which the mass ignorance was discovered at last by 'a fortunate accident'), Lord Justice Toulson blamed the mass ignorance on inadequate access to UK laws when he said: 'To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it.'⁷⁸ Toulson also stated: 'It is a maxim that ignorance of the law is no excuse, but it is profoundly unsatisfactory if

⁷³ *Regina v Chambers* [2008] EWCA (Crim) 2467 (England) <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html>> accessed 16 July 2019.

⁷⁴ *Claude Reyes v Chile*, Order of the Inter-American Court of Human Rights, Judgment of 19 September 2006 (Merits, Reparations and Costs) 59 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf> accessed 22 July 2019.

⁷⁵ Ibid

⁷⁶ Ali Akbar Babaei and others, 'Household Recycling Knowledge, Attitudes and Practices Towards Solid Waste Management' (2015) 102 Resources, Conservation and Recycling 94, 98 <<https://doi.org/10.1016/j.resconrec.2015.06.014>> accessed 24 July 2019.

⁷⁷ *Regina v Chambers* [2008] EWCA (Crim) 2467 (England).

⁷⁸ Ibid para 64.

the law itself is not practically accessible.⁷⁹ In 2009, about one year after the said judgment, Richard Nelson Solicitors revealed the extent of the injustice from the Court's *per incuriam* judgments and invited any person who was 'affected by a confiscation order relating to tobacco smuggling' for legal assistance:

Her Majesty's Revenue and Customs (HMRC) has confirmed it is conducting an urgent confiscation order review of 4,000 defendants convicted of tobacco smuggling. People have been forced into bankruptcy, to sell their family homes, and have lost their businesses to fulfil the confiscation demands. Many have served prison sentences.⁸⁰

As of 6 July 2017, there was an express statement that the UK legislation online database was neither comprehensive nor up-to-date.⁸¹ It is now that '[o]ver 97% of the Acts on legislation.gov.uk are fully up to date.'⁸² The National Archives that is responsible for publishing UK legislation online stated in 2013: 'Most (but not all) types of legislation, both primary and secondary, are carried on legislation.gov.uk.' The statement added that '[m]ost types of primary legislation (broadly speaking, those of a public general nature) are held in "revised" form', which meant that 'amendments made to them by subsequent legislation [were] incorporated into the text'. It finally revealed that '[m]ost types of secondary legislation [were] not revised and [were] held only in the form in which they were originally made.'⁸³ As stated above, there is inadequate access where the stock of public legal information published online or in print is not comprehensive or it is not up to date.

⁷⁹ Ibid

⁸⁰ Richard Nelson Solicitors, 'Defendants Urged to Seek Legal Advice after Tobacco Smuggling Prosecution Blunder' (*Richard Nelson Solicitors*, 13 October 2009) <<https://www.richardnelsonllp.co.uk/defendants-urged-to-seek-legal-advice-after-tobacco-smuggling-prosecution-blunder-2/>> accessed 21 June 2019.

⁸¹ See footnote 24 of Chapter Two.

⁸² United Kingdom National Archives, 'Help: Frequently Asked Questions (FAQs)' (*Legislation.Gov.Uk*) <www.legislation.gov.uk/help#aboutRevDate> accessed 27 March 2019.

⁸³ United Kingdom National Archives, 'Guide to Revised Legislation on Legislation.gov.uk' (*The National Archives*, October 2013) <www.legislation.gov.uk/pdfs/GuideToRevisedLegislation_Oct_2013.pdf> accessed 27 March 2019.

The US federal government charges fees for public access to online resources of its Public Access to Court Electronic Records (PACER) service⁸⁴ and '[s]ome states and municipalities in the United States assert copyright in their local legislation'⁸⁵ which hinder free access. This strange situation explains why Carl Malamud, for instance, has been protesting against aspects of inadequate access to US laws.⁸⁶ The United States Court of Appeals for the Eleventh Circuit recently gave a landmark judgment in 2018 in favour of Carl Malamud's Public.Resource.Org organisation when it held in *Code Revision Commissioner v Public.Resource.Org*⁸⁷ that the Government of the State of Georgia has neither copyright in the texts of its laws nor in their value-added features, including official annotations produced with public funds.⁸⁸

Regarding the situation in developing countries, a 2013 United Nations Development Programme (UNDP) report assessed the poor state of access to public legal information in Africa thus:

[L]aws are often not made available, simplified or translated and judgments are not routinely written or published. Poor law reporting, limited availability and inaccessibility of legal materials including primary legal information such as judgments and court decisions and secondary

⁸⁴ United States Public Access to Court Electronic Records, 'How Much Does PACER Cost?' (*Public Access to Court Electronic Records*) <www.pacer.gov/> accessed 6 July 2017.

⁸⁵ Michael W Carroll, 'The Movement for Open Access Law' (2006) 10 *Lewis & Clark Law Review* 741, 746 <https://digitalcommons.wcl.american.edu/facsch_lawrev/43/> accessed 22 July 2019. For a list of the countries that have copyright protection in their laws, see Mireille van Eechoud and Lucie Guibault, 'International Copyright Reform in Support of Open Legal Information' (Open Data Research Symposium, Madrid, Spain, 5 October 2016) 1, 10 <https://www.ivir.nl/publicaties/download/OpenDataCopyrightReform_ODRSdraft-WP_sep16.pdf> accessed 16 August 2019.

⁸⁶ *Public.Resource.Org* <<https://public.resource.org/index.html>> accessed 6 July 2017).

⁸⁷ *Code Revision Commissioner v Public.Resource.Org*, No. 17-11589 (11th Cir. 2018) (United States) <<http://media.ca11.uscourts.gov/opinions/pub/files/201711589.pdf>> accessed 13 May 2019.

⁸⁸ For a contrary opinion on the judgment, see Caroline L Osborne, 'A Research Tool Is Not Law: A Response to Code Revision Commission v. Public.Resource.Org, Inc.' (2019) West Virginia University College of Law Research Paper Series No 2019-017 <<https://dx.doi.org/10.2139/ssrn.3417680>> accessed 2 August 2019.

legal information such as legal articles and analyses compound the situation.⁸⁹

In Uganda, even ‘the Court of Appeals did not possess a complete version of the Laws of Uganda’ and *erroneously* dismissed cases ‘*sua sponte*⁹⁰ . . . for want of jurisdiction in the court below’ because of ignorance of the Land (Amendment) Act No. 3 of 2001 due to its inaccessibility.⁹¹ The Court, all the lawyers that appeared before it, and the litigants were unaware of the inaccessible amendment. Like the England and Wales Court of Appeal situation in the above-cited *Chambers* case, a student discovered the said amendment ‘[b]y a stroke of luck’ while working on a project.⁹² Milbrandt and Reinhardt concluded in 2012: ‘Uganda is an example of a developing nation where inaccessible law, to both citizens and the judiciary, is an impediment to justice.’⁹³

In the Ghanaian case of *Mensah v The Chairman Electoral Commission and Another*, the Supreme Court stated that ‘[t]he cardinal issue arising from this action is whether at the opening and close of nominations for the District Level elections there was any existing legislation covering the same.’⁹⁴ After declaring all the laws that the Electoral Commission’s lawyer used for the defence inapplicable to the matter, the Court said: ‘We have nonetheless taken all precautions to avoid rendering a judgment per incuriam in case there is some supporting legislation the parties are unaware of.’⁹⁵ One of the laws the defence lawyer had relied on was the Representation of the People (Parliamentary

⁸⁹ Allen Asimwe and others, ‘Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices’ (*United Nations Development Programme*, April 2013) 45 <https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/rule-of-law-and-access-to-justice-in-eastern-and-southern-africa.html> accessed 2 August 2019.

⁹⁰ A Latin phrase that means ‘on its own accord’ (reference added).

⁹¹ Jay Milbrandt and Mark Reinhardt, ‘Access Denied: Does Inaccessible Law Violate Human Rights’ (2012) 9 *Regent Journal of International Law* 55, 66.

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ *Mensah v The Chairman Electoral Commission and Another* (J1/11/2015) [2015] GHASC 10, 3 (27 February 2015) <<https://ghalii.org/gh/judgment/supreme-court/2015/10-6>> accessed 2 August 2019.

⁹⁵ *Ibid*

Constituencies) Instrument 2012 (C.I. 78), but he could not produce a copy of that law. The Court ruled on that issue as follows: ‘We noted that in the parliamentary Hansard debates . . . there was reference to a C.I. 78 . . . The reference to the said C.I. 78 proved illusory as its existence cannot be fathomed.’⁹⁶ The Court continued: ‘This mysterious legislation is not even listed in the manual of the Electoral Commission entitled Electoral Laws.’⁹⁷ Based on its findings above, the Supreme Court of Ghana, which consisted of seven Justices, unanimously held: ‘For all the foregoing reasons we are driven to hold and we so hold that at the time the upcoming District level elections processes were set on foot there was no legislation covering the same.’⁹⁸ That *per incuriam* judgment, due to the *inaccessibility* of an existing law (C.I. 78) that had entered into force since 2 October 2012⁹⁹ (more than two years before the judgment), led to the postponement of the *nationwide* District Assembly Elections that were scheduled to hold less than one week after the judgment.¹⁰⁰ The Chairman of the Electoral Commission told the Ghanaian parliament that the postponement would cost the Ghanaian government 90 million Ghanaian Cedi¹⁰¹ (the equivalent of about 13.35 million Euros toady¹⁰²).

As of 2018, Cayman Islands did not provide free access even to the online version of its laws. It charged the following access subscription fees: annual

⁹⁶ Ibid 3–4.

⁹⁷ Ibid 4.

⁹⁸ Ibid

⁹⁹ GhanaWeb, ‘C.I. 78 Turns Law, Yesterday’ (*GhanaWeb*, 3 October 2012) <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/C-I-78-Turns-Law-Yesterday-252128>> accessed 2 August 2019; AllAfrica, ‘Ghana: Passage of CI 78 is Welcome News – EC’ (*AllAfrica*, 4 October 2012) <<https://allafrica.com/stories/201210051399.html>> accessed 2 August 2019.

¹⁰⁰ Gilbert Ankrah and Raymond Kwofie, ‘EC Boss Proposes New Date for District Assembly Elections’ (*Government of Ghana*) <<http://ghana.gov.gh/index.php/governance/58-ministries/228-ec-boss-proposes-new-date-for-district-assembly-elections>> accessed 2 August 2019.

¹⁰¹ Ibid

¹⁰² XE, ‘80,000,000 GHS to EUR = 13,347,293.84 Euros’ (XE, 3 August 2019 11:25 Coordinated Universal Time) <<https://www.xe.com/currencyconverter/convert/?Amount=80%2C000%2C000&From=GHS&To=EUR>> accessed 3 August 2019.

(CI\$350/US\$420), monthly (CI\$40/US\$48), and weekly (CI\$10/US\$12).¹⁰³ Nigeria and Gambia sell the digital version of their laws on the website of LexisNexis South Africa¹⁰⁴ under commercial arrangements with the company, instead of providing free online access to those laws on their government official websites. These developing countries sell their laws to their citizens, most of whom are poor and live in extreme hardship, as a revenue-generating business. According to a survey, 'In 2015, Sub-Saharan Africa was home to 27 of the world's 28 poorest countries and had more extremely poor people than in the rest of the world combined. Nigeria is expected to pass India as the country with the most people living in extreme poverty, if it hasn't already.'¹⁰⁵

The consequences of inadequate access to public legal information reveal the magnitude of the problem. They include the following: denial of the omnibus right of access to justice that encompasses various aspects of fair trial;¹⁰⁶ injustice from *per incuriam* judicial decisions due to ignorance of the current state of the law (e.g. as *Regina v Chambers* revealed in the United Kingdom¹⁰⁷ and as it happened in Uganda¹⁰⁸ and Ghana¹⁰⁹); poor legal scholarship; ignorance of rights and obligations; and problems with the operation of the rule of law. They also include wrong and needless prosecutions and the attendant adverse financial implications

¹⁰³ *Laws of the Cayman Islands (Cayman Islands Judicial Administration)* <www.judicial.ky/laws> accessed 11 April 2018.

¹⁰⁴ LexisNexis, 'Laws of the Federation of Nigeria' <<https://store.lexisnexis.co.za/products/laws-of-the-federation-of-nigeria-skuZASKUPG1032>> accessed 9 April 2017; LexisNexis, 'Revised Laws of Gambia' <<https://goo.gl/BF8cLe>> accessed 9 April 2017.

¹⁰⁵ Donna Barne and Divyanshi Wadhwa, 'Year in Review: 2018 in 14 Charts' (*World Bank*, 21 December 2018) <<https://www.worldbank.org/en/news/feature/2018/12/21/year-in-review-2018-in-14-charts>> accessed 31 July 2019.

¹⁰⁶ Council of Europe, *Handbook on European Law Relating to Access to Justice* (European Union Agency for Fundamental Rights and Council of Europe 2016) 16 <www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf> accessed 16 April 2018 ('Access to justice encompasses a number of core human rights, such as the right to a fair trial . . . and the right to an effective remedy . . .').

¹⁰⁷ *Regina v Chambers* [2008] EWCA (Crim) 2467 (England).

¹⁰⁸ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 *Regent Journal of International Law* 55, 66.

¹⁰⁹ *Mensah v The Chairman Electoral Commission and Another* (J1/11/2015) [2015] GHASC 10 (27 February 2015) <<https://ghalii.org/gh/judgment/supreme-court/2015/10-6>> accessed 2 August 2019.

for taxpayers' money¹¹⁰ and injustice to the defendants, as it happened in the United Kingdom, Chile, and Ghana,¹¹¹ adverse implications for national and global business, and for sustainable development; and lack of transparency that is a cardinal principle of democracy.

Further, slavish application of the *ignorantia juris* doctrine whereby people are punished for contravening laws they cannot know, either because those laws were not published at all or because they were not adequately published, causes untold injustice, as several cases have shown. For example, in *Rex v Bailey*,¹¹² an English court held Richard Bailey, the captain of a vessel, guilty under a new law that criminalised a conduct that previously was not a criminal offence, even after the court had found that the law was enacted while he was on the high seas and that it was *impossible* for him to know that law, in the circumstances. Instead of outrightly acquitting him, the court recommended pardon as the remedy for its injustice after convicting him, just because the court felt it was bound to apply the *ignorantia juris* doctrine.

In *United States v Casson*,¹¹³ a US court held that an amending legislation (enacted just about six hours before the accused person committed a federal crime) was applicable to him, even though it was obvious that people could not have known of the existence of the law and its contents within such a short period.¹¹⁴

In *Ostrowski v Palmer*,¹¹⁵ the High Court of Australia found, as a matter of fact, that a fisherman had made requests to the responsible State Government fisheries department for the regulations governing the places where commercial rock lobster fishing was prohibited and that he had acted on the copy of the regulations that the department gave him and told him was the complete law. The Court also

¹¹⁰ Tom McMahon, 'Improving Access to the Law in Canada with Digital Media' (1999) 16 Government Information in Canada <<https://dx.doi.org/10.2139/ssrn.163669>> accessed 20 July 2019.

¹¹¹ Mentioned above in this Section.

¹¹² *Rex v Bailey* (1800) 168 Eng. Rep. 651.

¹¹³ *United States v Casson*, 434 F.2d 415 (D.C. Cir. 1970).

¹¹⁴ *Ibid*

¹¹⁵ *Ostrowski v Palmer* [2004] HCA 30 (Australia) <<http://eresources.hcourt.gov.au/downloadPdf/2004/HCA/30>> accessed 5 May 2019.

found that he ‘was led to believe that the documentary material he was given contained a complete reference to the places in which commercial rock lobster fishing was prohibited’,¹¹⁶ that ‘it was reasonable of him to have that belief, and that the belief was mistaken.’¹¹⁷ Yet the Court held him guilty of violating the provision of Regulation 34 of the Fish Resources Management Regulations 1995, made under the Western Australia Fish Resources Management Act 1994, even though that regulation was not part of the regulations the department gave him and, therefore, he could not have known of the existence of the missing part. The magnitude of the injustice in the case brought widespread public condemnation of the judgment.¹¹⁸

2.2 The Primary Cause of the Problem

Why has the global problem of inadequate access, and in some cases abysmally poor access, to public legal information persisted, despite all the ancient and modern efforts to solve it?¹¹⁹ Those efforts have been ineffective, based on the major reasons outlined below.

First, third parties (i.e. non-State publishers of public legal information, including the legal information institutes) cannot provide adequate access to public legal information because they, themselves, depend on the *willingness* of governments that are the custodians of public legal information for their own access. For example, the British and Irish Legal Information Institute (BAILII) that is one of the most popular legal information institutes in the world, gives one of the reasons for the non-availability of more English High Court judgments on its websites as follows: ‘Handed down first-instance decisions of the England and Wales and Northern Ireland High Courts are generally only provided to BAILII where the Judge

¹¹⁶ Ibid 3.

¹¹⁷ Ibid

¹¹⁸ Konrad de Kerloy and Katja Levy, ‘The High Court’s Human Sacrifice to the Alter of High Policy: An Alternative Solution to the Slaughter’ (2005) 32 University of Western Australia Law Review 145–163 <<http://classic.austlii.edu.au/au/journals/UWALawRw/2005/2.html>> accessed 6 May 2019.

¹¹⁹ Sections 1 and 2.1 above.

giving the judgment indicates that they are of sufficient interest to be made available for publication on the Internet.¹²⁰

Second, third parties lack the objective and the capability to provide access to the whole stock of any country's public legal information, i.e. all categories of the public legal information of the national, states (regional), and local governments.

Third, third parties do not produce physical alternate versions of public legal information for persons with disabilities nor the print versions needed for physical access in public libraries, which many people depend on. They only provide online access.

Fourth, the numerous declarations, principles, statements, etc. on access to public legal information (some of which are mentioned in Section 1 above) have no force of law to compel any government to provide access, as they are mere aspirations.

Fifth, the national or federal freedom of information laws that are available in 127 countries¹²¹ cannot provide the proper legal framework that can impose obligations on governments to provide adequate access to their public legal information. The reason is that FOIAs depend on individual requests for provision of *specific* information on a *piecemeal* basis, whereas adequate access to public legal information requires that the whole stock of a government's public legal information be published permanently for use by every person, at anytime, anywhere.¹²²

Sixth, the writ of mandamus is ineffectual for the purpose of compelling the government or its agents to provide access to public legal information where it is a discretionary act, depending on the jurisdiction and their applicable laws. The reason is that it is trite that a writ of mandamus is not available to compel any act

¹²⁰ British and Irish Legal Information Institute, 'Frequently Asked Questions: Why are there not more English High Court judgments available on BAILII' (*British and Irish Legal Information Institute*) <www.bailii.org/bailii/faq.html#ewhc> accessed 18 May 2018.

¹²¹ Section 1 above.

¹²² Section C.I of Chapter Two.

that is discretionary, as a US District Court held recently in *Mendez v Trump*.¹²³ For instance, in *Victoria University of Wellington Students Association v Shearer (Government Printer)*,¹²⁴ the New Zealand Supreme Court recognized the duty of the State to provide access to its laws, but it declined to compel the Government Printer to produce and supply copies of the law that the plaintiff needed, because mandamus could not lie against the Government Printer who was a servant of the Crown. But in *Tañada v. Tuvera*,¹²⁵ the Supreme Court of the Philippines granted a writ of mandamus and ordered the respondents to publish the laws in question.

Seventh, third parties cannot provide adequate access to public legal information because they have no duty to provide any access at all, and therefore they cannot be compelled to do so. Only governments (and IGOs) that are the makers of public legal information have that duty to provide access under the *rule of law*.¹²⁶ It also means that governments who alone are the duty-bearers are responsible for the problem of inadequate access to public legal information worldwide.

The question, then, is why many governments have not been able to provide the require adequate access to their public legal information. The answer is that, whenever any problem persists and defies attempts to solve it, a valid conclusion is that the solution that can address its *primary cause* has not be found. An adequate understanding of the primary cause of any problem is crucial to developing its effective solution or recommendations for such solution. It is therefore necessary to identify what may be the primary cause of the persistent global problem of inadequate access to public legal information so that its solution can be determined and applied. This discussion is a practical analysis of the relevant issues, based on the existing literature, the author's expertise in the design and management of websites, and his knowledge of the concept of free access to public legal information.

¹²³ *Mendez v Trump*, No. 1:2018cv01164 – Document 4 (DDC 2018) (United States) <<https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2018cv01164/196966/4/>> accessed 18 July 2019.

¹²⁴ *Victoria University of Wellington Students Association v Shearer (Government Printer)* [1973] 2 NZLR 21 (SC) (New Zealand).

¹²⁵ *Tañada v Tuvera*, G.R. No. L-63915, 136 SCRA 27 (1985) (Philippines) <www.lawphil.net/judjuris/juri1985/apr1985/gr_l63915_1985.html> accessed 5 May 2019.

¹²⁶ Section 4.3.1 below.

There appears to be a consensus among experts that the main factors that affect the provision of modern access to public legal information, which must include free online access, are political will, costs, technical expertise (human capacity), and technology. For example, Jamar stated it thus: ‘With the *maturing* of several technologies, open and wide access to the law of any state can be created quite quickly provided the *will*, *know-how*, and *money* can be found.’¹²⁷ According to Anderson, the factors are ‘staffing, funding, and obtaining the political will of governments to freely publicize laws’.¹²⁸ Yates and Shapiro considered the factors to be ‘adoption of technology’ [which, when they published their work, was] at a slower pace [in developing countries], primarily due to the lack of resources and in some instances, the lack of political will and capacity.’¹²⁹

Although there is controversy on what ‘political will’ means,¹³⁰ which may appear to some people as strange, its plain-language meaning, as used in this thesis, is simply any government’s *willingness* to act or its *commitment* to a particular cause. What appears to be the most popular definition of political will is that of Brinkerhof: ‘[T]he commitment of actors to undertake actions to achieve a set of objectives . . . and to sustain the costs of those actions over time.’¹³¹ Therefore, the lack of political will means any government’s reluctance, unwillingness, or outright refusal to pursue any cause. The absence of an enabling law on a particular cause, because the government is not committed to that cause, means

¹²⁷ Steven D Jamar, ‘The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law’ 2001 1(2) Global Jurist Topics 1, 8 <<https://doi.org/10.2202/1535-167X.1032>> accessed 15 April 2018 (emphasis added).

¹²⁸ Brian D Anderson, ‘Compiling Online Legal Information in Transitional States: Challenges and Opportunities’ (Law Via the Internet Conference, Jersey, September 2013) <<http://dx.doi.org/10.2139/ssrn.2437880>> accessed 23 April 2019.

¹²⁹ Kenneth A Yates and Charles E Shapiro, ‘Establishing a Sustainable Legal Information System in a Developing Country: A Practical Guide’ (2010) 42(8) Electronic Journal on Information Systems in Developing Countries 1, 2 <<https://doi.org/10.1002/j.1681-4835.2010.tb00304.x>> accessed 23 April 2019.

¹³⁰ See, for example, Jonatan A Lassa, ‘Measuring Political Will: An Index of Commitment to Disaster Risk Reduction’ (2019) 34 International Journal of Disaster Risk Reduction 64, 65 <<https://doi-org.tilburguniversity.idm.oclc.org/10.1016/j.ijdrr.2018.11.006>> accessed 9 August 2019.

¹³¹ Derick W Brinkerhoff, ‘Building Political Will for HIV Response: An Operational Model and Strategy Options’ (2015) 31(4) The International Journal of Health Planning and Management 470, 472 <<https://doi.org/10.1002/hpm.2330>> accessed 7 August 2019.

there is a lack of the necessary political will to enact the required law.¹³² Love and Lynch rightly stated that '[t]he opportunity of all people . . . to enjoy their human rights can be compromised by a *reluctance* on the part of those in power to grant such rights'.¹³³ Expressing a similar thought, Pham, Gibbons and Vinck stated: 'Political will is often cited as a crucial element in progress on any socio-political issue, be it anti-corruption, climate change, poverty reduction, or advancing human rights and combatting impunity.'¹³⁴ It may therefore be a valid *hypothesis* that the lack of political may be a crucial factor that is responsible for the persistent global problem of inadequate access to public legal information (the consequence of which is the denial of the right of free access to public legal information) because only governments have the duty under the rule of law to provide the required access. Simply put, governments' reluctance, unwillingness, or outright refusal to provide adequate access to *their own* public legal information may be the primary cause of the problem.

The provision of free *online* access to public legal information can be used as an example to understand what is the primary cause of the persistent global problem of inadequate access to public legal information. The reason is that online media has the advantage of being the easiest means of verifying all the processes involved in providing access to public legal information. A project for the provision of adequate online access to public legal information can be executed in three interrelated phases, summarised below.

The first phase of the provision of online access to public legal information is *digitisation* of the legal information in the print format which requires scanning such information into editable texts, using optical character recognition (OCR)

¹³² Carol Johnson and Manon Tremblay, 'Comparing Same-Sex Marriage in Australia and Canada: Institutions and Political Will' (2018) 53(1) Government and Opposition 131, 133 <<https://doi.org/10.1017/gov.2016.36>> accessed 30 July 2019.

¹³³ John G Love and Rory Lynch, 'Enablement and Positive Ageing: A Human Rights-Based Approach to Older People and Changing Demographics' (2018) 22(1) The International Journal of Human Rights 90, 90 <<https://doi.org/10.1080/13642987.2017.1390310>> accessed 13 April 2018 (emphasis added).

¹³⁴ Phuong N Pham, Niamh Gibbons and Patrick Vinck, 'A Framework for Assessing Political Will in Transitional Justice Contexts' (2019) The International Journal of Human Rights 23(6) 993, 993 <<https://doi.org/10.1080/13642987.2019.1579712>> accessed 9 August 2019.

computer application.¹³⁵ There are professional-grade, multifunction document and book scanners with OCR that cost below \$500 each; a stand-alone scanner or printer-scanner combo equipment even costs far less, some under \$100.¹³⁶ Stand-alone OCR software is equally affordable.¹³⁷ The lowest-grade computer-literate staff can use such equipment to scan books or documents into editable texts. The editable texts are proofread, e.g. by government lawyers in the Ministry of Justice, to ensure they are the same with the original version. Legal information in the modern era does not require scanning because they are *born-digital*, i.e. they are originally created in electronic form. Therefore, publishing such born-digital legal information on websites 'is typically a simple process'.¹³⁸ This phase—which should start with the laws in force—could take just a couple of years to complete, depending on the volume of information in the print format and the manpower devoted to it. For example, Milbrandt and Reinhardt suggested that '[d]igitizing Uganda's paper precedent and converting it into a searchable format for online publication is estimated to take more than a year of full-time work.'¹³⁹ Government employees can carry out the digitisation adequately; therefore, no consultancy or contract is needed for it.

Phase two, which is the *transition phase*, involves buying the required domain name or web address for the website (e.g. www.publiclegalinformation.com), development of the website, and publishing the digitised legal information on it. A dotcom (.com) domain name, for example, costs about \$15, which is renewed usually at the same rate annually.¹⁴⁰ For easy access, the author recommends a *one-stop website* that contains all categories of the public legal information of each level of government, i.e. one website for the national government, one for each state, and one for each local government.¹⁴¹ Hosting a website (i.e. making

¹³⁵ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 69–70.

¹³⁶ Information on these products is available online on the websites of various stores.

¹³⁷ Ibid

¹³⁸ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 69.

¹³⁹ Ibid 62.

¹⁴⁰ Information available on the websites of numerous companies (registrars) worldwide that sell domain names and host websites.

¹⁴¹ Section 3 of Chapter Four.

it available online or on the World Wide Web) costs between \$100 to \$400 annually, depending on the required level of sophistication and capacity.¹⁴² There are different types of *free* or *open-source* software for developing sophisticated websites; therefore, there may be no need to buy any web development software. The world's most popular open-source software are WordPress, Joomla!, and Drupal.¹⁴³ WordPress, which is the most popular of the three, powers more than 32% of the world's more than one billion¹⁴⁴ websites,¹⁴⁵ including those of renowned companies such as CNN, Forbes, Reuters, New York Times, UPS, Microsoft News, and IBM Jobs.¹⁴⁶ Computer Science graduates employed by the government can develop the website, publish the digitised legal information on it, and manage it adequately because using WordPress, for instance, does not even require any computer science degree.¹⁴⁷ Therefore, the 'significant technological expertise' that Milbrandt and Reinhardt thought was required for 'digital online publishing' (in their 2012 article)¹⁴⁸ has been readily available for a long time now. Later in the said article, the authors admitted: 'Fortunately, many developing nations are beginning to acquire [the] skills' needed for publishing public legal information online and 'maintaining properly functioning computer systems.'¹⁴⁹ This phase can provide good online access to every piece of the public legal information of any country's national, state (regional), or local government, although it lacks certain sophisticated features of phase three.

The third and *permanent phase* requires the use of a specialised *legal information system* (LIS) to publish and manage the online public legal information. LISs are purpose-built to handle the specific requirements of legal information, such as

¹⁴² Information on web hosting packages and their costs is available online on the websites of hosting companies.

¹⁴³ Jose-Manuel Martinez-Caro, 'A Comparative Study of Web Content Management Systems' (2018) 9(2) Information 1–15 <<https://doi.org/10.3390/info9020027>> accessed 20 May 2018.

¹⁴⁴ Netcraft, 'April 2019 Web Server Survey' (Netcraft, 22 April 2019) <<https://news.netcraft.com/archives/category/web-server-survey/>> accessed 2 May 2019.

¹⁴⁵ WordPress, 'About Us' (WordPress) <<https://wordpress.com/about/>> accessed 31 July 2019.

¹⁴⁶ WordPress, 'Notable WordPress Users' (WordPress) <<https://wordpress.com/notable-users/>> accessed 20 May 2018.

¹⁴⁷ Jordi Cabot, 'WordPress: A Content Management System to Democratize Publishing' (2018) 35(3) Institute of Electrical and Electronics Engineers Software 89, 89 <<https://doi.org/10.1109/MS.2018.2141016>> accessed 20 May 2018.

¹⁴⁸ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 62.

¹⁴⁹ Ibid 68.

automatic incorporation of amendments into the affected legislation and point-in-time functionality to show the state of the legislation at any desired time in the past, e.g. the Tasmanian EnAct system.¹⁵⁰ LISs have advanced search features to help people to easily find the information they need. Such LISs are expensive; but happily, any country, state (regional), or local government that cannot afford such systems can use free, open-source software for its system. According to Poulin (a renowned expert in advanced legal information systems), Canada's official legislation website¹⁵¹ and the Canadian Legal Information Institute (CanLII) website¹⁵² were developed with open-source software.¹⁵³ These are modern, world-class public legal information websites.

From the foregoing practical analysis, neither costs, technical expertise (human capacity), nor technology can be properly identified as the primary cause of the global problem of inadequate access to online public legal information. The reason is that every government can afford the costs, technical expertise, and the technology required to provide adequate access, as shown in the foregoing discussion. In fact, it can be said that any government that cannot provide adequate online access to its laws lacks the legitimacy and moral authority required for governance by the rule of law. To reiterate the fact of the affordability of online access to public legal information, it is significant that Greenleaf (a world-renowned expert in legal information systems) authoritatively stated that publishing public legal information online, right from the mid-1990s, was particularly advantageous because '[f]or publishers it was close to a *'no cost' distribution mechanism* if they were not required to pay for outgoing

¹⁵⁰ Tasmania, 'About EnAct' (*Tasmanian Legislation*, 8 September 2017) <www.legislation.tas.gov.au/about/enact> accessed 21 May 2018.

¹⁵¹ Government of Canada, 'Justice Laws Website' (*Government of Canada*) <www.laws.justice.gc.ca/> accessed 21 May 2018.

¹⁵² *The Canadian Legal Information Institute* <www.canlii.org/en/> accessed 21 May 2018.

¹⁵³ Daniel Poulin, 'Open Access to Law in Developing Countries' (2004) 9(12) *First Monday* <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 21 May 2018. Daniel Poulin, the founder and president of the renowned Lexum, was a professor at the Université de Montréal when he pioneered Canada's free access to law. He designed and oversaw the development of CanLII. See 'Daniel Poulin has been appointed as Professor Emeritus at the Université de Montréal' (*Lexum*, 5 May 2014) <<https://lexum.com/en/blog/daniel-poulin-has-been-appointed-as-professor-emeritus-at-the-universite-de-montreal/>> accessed 21 May 2018.

bandwidth.¹⁵⁴ The bandwidth payment mentioned in Greenleaf's statement refers to the cost of web hosting which is cheap, as mentioned above. Greenleaf's correct assertion is still valid today, as shown in the analysis above.

Therefore, the lack of the political will of governments (i.e. the 'reluctance on the part of those in power'¹⁵⁵) is considered to be the primary cause of the problem because every *willing* government should be able to provide, for example, adequate *free online* access to the whole stock of its public legal information. One reason for this conclusion is that political will is the preeminent or first factor in the conception and execution of government projects.¹⁵⁶ The United Nations recognises political will as central to the achievement of its global development goals.¹⁵⁷ A list of some of the scholars who have mentioned political will as a factor that is relevant to the provision of access to public legal information is presented in Table 1 in Appendix A to this Chapter.

The lack of political will manifests, for example, in non-prioritisation of the compilation and publication of judicial decisions, due to the executive arm of government's deliberate poor allocation of the available national budgetary funds to the judiciary.¹⁵⁸ It also manifests in the assertion of government copyright

¹⁵⁴ Graham Greenleaf, 'Free Access to Legal Information, LIIs, and the Free Access to Law Movement' (2011) University of New South Wales Faculty of Law Research Series <<http://classic.austlii.edu.au/au/journals/UNSWLRS/2011/40.html>> accessed 7 August 2019 (emphasis added).

¹⁵⁵ John G Love and Rory Lynch, 'Enablement and Positive Ageing: A Human Rights-Based Approach to Older People and Changing Demographics' (2018) 22(1) The International Journal of Human Rights 90, 90 <<https://doi.org/10.1080/13642987.2017.1390310>> accessed 13 April 2018.

¹⁵⁶ For discussion of the importance of political will, see Anna Persson and Martin Sjöstedt, 'Responsive and Responsible Leaders: A Matter of Political Will?' (2012) 10(3) Perspectives on Politics 617-632 <<https://doi.org/10.1017/S1537592712001648>> accessed 20 May 2018; Ebenezer Olatunji Olugbenga, 'Workable Social Health Insurance Systems in Sub-Saharan Africa: Insights from Four Countries' (2017) XLII(1) Africa Development 147-175 <www.ajol.info/index.php/ad/article/view/163629/153106> accessed 20 May 2018.

¹⁵⁷ Ban Ki-moon, 'Opening Remarks at Press Conference Launch of 2010 Millennium Development Goals Report' (United Nations, 23 June 2010) <www.un.org/sg/en/content/sg/speeches/2010-06-23/opening-remarks-press-conference-launch-2010-millennium-development> accessed 20 May 2018.

¹⁵⁸ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 62. On insufficient budgetary allocation to the

protection in laws and their official value-added publications that are necessary to help the people to know the law so that they can abide by it. A recent 2018 example of assertion of copyright in public legal information is the US State of Georgia in *Code Revision Commissioner v Public.Resource.Org*.¹⁵⁹

Weylandt described political will as ‘the *sine qua non* of governance reform – the essential ingredient without which all other efforts, no matter how well-conceptualised or intentioned, will fail.’¹⁶⁰ According to the United Nations, the ‘political will of Member States’ is ‘the key to success’ in ‘[p]romoting human rights [which] is one of the core purposes of the United Nations, and the Organization has pursued [that] mission since its founding.’¹⁶¹ The political will of every government is necessary to effect reforms, execute projects, and provide public services (including access to public legal information) for its people. It is the importance of political will that makes human rights obligations a necessary intervention to ensure that States perform their obligations and refrain from acts that violate international human rights standards.

The examples of the countries mentioned in Section 2.1 above (the United States, United Kingdom, Uganda, Ghana, Nigeria, Cayman Islands, and Gambia) corroborate the fact of the lack of political will. For instance, Nigeria has remained one of the world’s major oil-and-gas-producing countries for decades and has

Ugandan Judiciary, see Anthony Wesaka, ‘Judiciary Not Free, Says Odoki’ *Daily Monitor* (Kampala, 11 September 2011) <<https://mobile.monitor.co.ug/News/2466686-1233650-format-xhtml-137pwsr/index.html>> accessed 15 April 2019.

¹⁵⁹ *Code Revision Commissioner v Public.Resource.Org*, No. 17-11589 (11th Cir. 2018) (United States) <<http://media.ca11.uscourts.gov/opinions/pub/files/201711589.pdf>> accessed 13 May 2019. For a list of the countries that have copyright protection in their laws, see Mireille van Eechoud and Lucie Guibault, ‘International Copyright Reform in Support of Open Legal Information’ (Open Data Research Symposium, Madrid, Spain, 5 October 2016) 1, 10–12 <https://www.ivir.nl/publicaties/download/OpendataCopyrightReform_ODRSdraft-WP_sep16.pdf> accessed 16 August 2019.

¹⁶⁰ Max Weylandt, ‘Public Enterprise Governance in Namibia: An updated Situation Analysis’ (*Institute for Public Policy Research*, September 2017) 11 <https://ippr.org.na/wp-content/uploads/2017/09/IPPR_HSF_PEGNamibia_WEB.pdf> accessed 23 April 2019.

¹⁶¹ Press Release of the Secretary-General, ‘Political Will of Member States Key to Successful Promotion of Human Rights, Secretary-General Says in Message for Observance’ (6 December 2013) SG/SM/15527-HR/5165-OBV/1290 <<https://www.un.org/press/en/2013/sgsm15527.doc.htm>> accessed 30 July 2019.

been Africa's leading economy, yet neither its federal government nor any of its thirty-six states has an official online public legal information database. Nigeria's online federal laws are *sold* on LexisNexis South Africa website. In addition, it is indeed puzzling that even *private free-access* websites owned by ordinary patriotic Nigerians (enthusiastic legal bloggers)¹⁶² contain more federal laws than Nigeria's official federal legislature website.¹⁶³

The United States is the world's ever-biggest economy, yet it charges access fees for its so-called online Public Access to Court Electronic Records (PACER) service (against which its citizens have been campaigning for several years now) and some States in the United States assert government copyright in their laws.¹⁶⁴

The United Kingdom is one of the world's richest countries and a leading developed country in technology and expertise, yet online access to its laws has been inadequate over the years, as Lord Justice Toulson revealed in *Regina v Chambers*¹⁶⁵ and as the National Archives that publishes its laws online stated in its *Guide to Revised Legislation on Legislation.gov.uk* in 2013.¹⁶⁶ Further, and quite surprisingly, the UK Parliament, on its website, recommends the third-party British and Irish Legal Information Institute's unofficial database for access to some judgments of UK courts: 'The archived House of Lords judgments are the only case law that Parliament holds. For any other court decision you will need to use a legal information service such as the British and Irish Legal Information Institute (BAILII), which is free to access.'¹⁶⁷

¹⁶² Examples: *Law Nigeria* <<http://lawnigeria.com/>>; *Lawyard* <www.lawyard.ng/>; *Policy and Legal Advocacy Centre* <<http://lawsofnigeria.placng.org/>> all accessed 21 May 2018.

¹⁶³ Federal Republic of Nigeria National Assembly, 'Acts, Bills & Other Legislative Documents' (*Federal Republic of Nigeria National Assembly*) <<http://www.nassnig.org/>> accessed 1 June 2019.

¹⁶⁴ Section B of Chapter Two.

¹⁶⁵ *Regina v Chambers* [2008] EWCA (Crim) 2467, para 68 (England) <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html>> accessed 16 July 2019.

¹⁶⁶ The National Archives, *Guide to Revised Legislation on Legislation.gov.uk* (The National Archives October 2013) 6 <www.legislation.gov.uk/pdfs/GuideToRevisedLegislation_Oct_2013.pdf> accessed 27 March 2019.

¹⁶⁷ United Kingdom Parliament, 'Judgments' (*United Kingdom Parliament*) <<https://www.parliament.uk/about/how/business/judgments/>> accessed 20 July 2019.

Beyond the online access discussed above, willing governments can also provide adequate *physical access* to their public legal information because it is their fundamental legal and moral obligation to do so. All it takes to provide physical access is to use government printing facilities to produce the print version of its legal information from its electronic database that was produced during the digitisation process in the first phase of its online access project. Every government is expected to have its printing facilities with which it produces its official publications. For security and as a cost-saving measure, there is no need to contract out or outsource the printing of government publications.

To ensure free access to the print version of public legal information, copies should be deposited in all possible government-owned public facilities, e.g. public schools, public libraries, libraries of public universities and other public tertiary institutions, specially designated depository libraries for government-held information, and community or town halls.

It is important to state that availability of *free access* to all categories of public legal information is so important to people, philanthropists, business organisations, nongovernmental organisations, intergovernmental organisations, universities and other types of tertiary institutions, law schools (faculties), and lawyers' professional bodies that they will be willing to support every genuine effort by every government to provide free access to its public legal information. This way, it will become even much easier for governments to provide both online and physical access to their public legal information.

Finally, it is necessary to emphasise the fact that every government, without any exception, has the moral and fundamental legal obligation under the rule of law to publish its laws so that people can know and obey them; justice demands it. No government should be allowed to make the issue of costs an excuse for not performing that fundamental moral and legal obligation to its citizens and residents. After all, the cost of providing adequate access to public legal information is an *inherent cost of democracy*, as McMahon rightly stated:

At the end of the day, the cost of publishing the law is a cost of democracy. Democracy has certain inherent costs that must be borne by the entire society for the benefit of society. Publication of the laws should not be seen

as an optional expense, as government's proprietary information and should not fall into a 'user-pay' model.¹⁶⁸

From the foregoing background to this thesis, the statement of the persistent global problem of inadequate access to all the categories of public legal information, and the discussion of the primary cause of the problem, the scope of this study can now be determined, to guide the theoretical framework, the review of the relevant literature, the research questions, and the methodology for this thesis.

3. Scope of the Thesis and Definitions of the Key Terms

3.1 Scope of the Thesis

The first aspect of the scope of this thesis, from its title, is that it is limited to 'public legal information' (as defined in Section 3.2 below) in contrast to private legal information and secondary sources of law, e.g. law textbooks, law encyclopaedias, law journals, and other types of law publications and periodicals that are commentaries or discussions on the law, not the law *itself*.

To be able to investigate the global problem of inadequate access to all the categories of public legal information, the scope of this thesis is limited to four crucial aspects of access to public legal information that reflect two realities of the contemporary world. First, the persistent emphasis on the protection of human rights, including indigenous rights, and the need for policies and projects to comply with international human rights standards. Second, the use of information and communications technology as an indispensable means of dissemination of all categories information worldwide, including public legal information.

The four crucial aspects of access to public legal information are as follows: the international legal framework for the right of free access to public legal information; easy identification of official public legal information websites for

¹⁶⁸ Tom McMahon, 'Improving Access to the Law in Canada with Digital Media' (1999) 16 Government Information in Canada <<https://dx.doi.org/10.2139/ssrn.163669>> accessed 20 July 2019.

reliable and authentic resources; and the organisation of a country's multiple official public legal information websites so that people can find them easily. They also include adequate public access to indigenous customary law to provide the opportunity for people to know the applicable rules, as its oral or unwritten nature makes it inherently inaccessible and thereby unknown to many people.

A *central research question* that covers the overall aim of the study and four *sub-questions* are formulated in Section 6 below with the objective of addressing all the foregoing subjects that fall within the scope of this study. As the subjects are varied, they require the use of several relevant concepts to situate them in the context of this thesis and delineate the scope of their application to the study, as discussed in Section 4 below.

3.2 Definitions of the Key Terms

The definitions of the key terms that are used throughout this thesis also help to delineate the scope of this research. The definitions are arranged thematically instead of alphabetically.

Public legal information: 'Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.'¹⁶⁹ The term simply refers to all categories of the laws and law-related¹⁷⁰ information produced by any government or any intergovernmental organisation (IGO). That means access to law books, law journals, law reports, and all other law-related publications that are not produced with funds from any government or IGO is outside the scope of this thesis. It is for this reason that the term '*public legal information*', which is self-explanatory, is preferred to mere '*legal information*' that was used in the

¹⁶⁹ Montreal Declaration on Free Access to Law 2002 (*Free Access to Law Movement*, 2002) <www.falm.info/declaration/> accessed 17 April 2019. This thesis adopts the definition by the Free Access to Law Movement.

¹⁷⁰ For the definition of 'laws and law-related' information or publications, see Section C of Chapter Two.

three articles that were already published (i.e. Chapter Two, Chapter Three, and Chapter Four) before the completion of the remaining three chapters (i.e. Chapter One, Chapter Five, and Chapter Six) and other parts of this thesis. The thesis title properly reflects the preference for ‘public legal information’.

Access to public legal information: The opportunities and facilities provided by any government (national, state, or local) or intergovernmental organisation (IGO) to enable people—in their different circumstances—to find, read, and know the full, up-to-date texts of the whole stock of its laws and law-related publications, which guarantee the availability and free use of all formats online and in public libraries, without copyright in their texts nor in their official value-added features produced by the government or IGO either directly or under any arrangement with a third party.¹⁷¹ This category or level of access, which may be referred to as *primary access* (i.e. availability via all the modes and formats of publication),¹⁷² is the primary focus of this study. The features of ‘adequate’ access to public legal information are listed in Section 2.1 above.

Right of free access to public legal information: The legal entitlement of every citizen, every resident, and every legal entity to access to the public legal information (as defined above) that is applicable to that citizen, resident, and legal entity.¹⁷³ As an illustration, John who is a resident of a local government area, has the right of free access to the public legal information of that particular local government area, that of the state to which that local government area belongs, and that of the national or federal government to which that state belongs. John also has the right of free access to the public legal information of any *other* local government area, state, or country that *affects his rights and liabilities*, either by physically being in that place (e.g. as a visitor) or by any legitimate relationship or

¹⁷¹ The author’s definition, which is the modified latest version of the original version in Section A of Chapter Two.

¹⁷² Laurens Mommers, ‘Access to Law in Europe’ in Simone van der Hof and Marga M Groothuis (eds), *Innovating Government: Normative, Policy and Technological Dimensions of Modern Government* (TMC Asser Press 2011) 383, 389-390 <<https://link.springer.com/content/pdf/10.1007%2F978-90-6704-731-9.pdf>> accessed 16 April 2019.

¹⁷³ The author’s definition. The stand-alone versions of the definition are in Section C of Chapter Two (the original definition) and Section 4.3 of Chapter Five (the improved latest definition).

transaction. This illustration explains how the right of free access to public legal information is necessary for the just application of the *ignorantia juris* doctrine and the demands of the twenty-first century technology-driven globalisation that has reduced our expansive world to, perhaps a global sitting room, much smaller than a global village. For instance, the court held in *Mohammad v State* that '[i]gnorance of law by a foreigner may be no legal defence but it is a matter to be taken into consideration in the matter of mitigation of punishment.'¹⁷⁴ In *Regina v Barronet*, the court rejected the defence that acting as seconds to their friend who died in the duel was lawful in their home country (France) and they were not aware that it was unlawful in Great Britain where they committed it.¹⁷⁵ Similarly, in *Regina v Esop*, the court rejected the defence that buggery (anal sexual intercourse) was lawful in the accused person's home country (Iraq) and he did not know it was unlawful under English law where he committed it.¹⁷⁶ As ignorance of a foreign law or the law of another jurisdiction or country is no excuse for violating it, every level of government (national or federal, state or regional or provincial, and local) therefore has the legal and moral duty to guarantee the universal right of free access to public legal information by providing adequate permanent access to all categories of its laws and law-related public legal information.

Indigenous customary law: 'Customary law refers to the laws, practices and customs of indigenous and local communities which are an intrinsic and central part of the way of life of these communities. Customary laws are embedded in the culture and values of a community or society; they govern acceptable standards of behavior and are actively enforced by members of the community.'¹⁷⁷ Indigenous customary law is a category of the primary sources of law and it consists of the valid and enforceable practices and rules of a particular indigenous community that are binding in that community.¹⁷⁸ As international customs are a

¹⁷⁴ *Mohammad v State*, 1953 AIR 227, para 19 (PB) (India).

¹⁷⁵ *Regina v Barronet* (1852) 169 Eng Rep 633 (QB) (England).

¹⁷⁶ *Regina v Esop* (1836) 173 Eng Rep 203 (England).

¹⁷⁷ Patricia Adjei, 'What Place for Customary Law in Protecting Traditional Knowledge?' (2010) 4 WIPO Magazine <www.wipo.int/wipo_magazine/en/2010/04/article_0007.html> accessed 1 May 2019. WIPO is the abbreviation of World Intellectual Property Organization.

¹⁷⁸ The author's definition.

primary source of international law, so are indigenous customs a primary source of domestic law in wholly indigenous legal systems and in plural legal systems.

Ascertainment of indigenous customary law: Ascertainment of indigenous customary law refers to the process of systematically recording or transmitting its oral or unwritten rules into writing, to provide concrete and permanent evidence of the existence of those rules and to make them accessible, transparent, knowable, and difficult to manipulate, which will thereby promote indigenous justice mechanisms. In the case of judicialization, it is the ad hoc judicial process to establish the existence and validity of any rule of indigenous customary law in dispute, the outcome of which is formally recorded in writing as part of the court proceedings.¹⁷⁹

Huricompatisation: Huricompatisation is a public access-adequate and human rights-compliant mechanism for systematically recording or transmitting all the binding oral or unwritten rules of *each* community's indigenous customary law into writing (whose aim is to guarantee the permanent evidence of the existence of those rules and provide free and adequate access to them, so as to make them knowable and transparent) in a manner that preserves the adaptive nature and bindingness of those rules and also protects the general human rights and the specific indigenous rights of *that particular community* and its members. This is the definition proposed in the article that forms Chapter Five of this thesis.¹⁸⁰

4. Theoretical Framework

Theoretical framework refers to 'the available theoretical information that can form a framework', foundation, or structure for discussing, examining, or

¹⁷⁹ The author's definition.

¹⁸⁰ The author's definition. *Huricompatisation* is the author's coinage, which has become a new word in indigenous customary-law jurisprudence by virtue of its use in the article that forms Chapter Two of this thesis which the *German Law Journal* published in 2017, as well as in the articles that form Chapter Three and Chapter Four that were published in 2017 and 2018, respectively. Its origin, meaning, and usage are explained in Section 7.1 of Chapter Five.

investigating the relevant aspects of any research subject.¹⁸¹ It also means ‘the general analytical tools developed by others . . . through observations of reality [which can help] to explain the phenomena [a researcher] is examining.’¹⁸² A theoretical framework ‘consists of concepts and, together with their definitions and reference to relevant scholarly literature, existing theory that is used for [a] particular study.’¹⁸³ It provides the overall design or blueprint that guides a research project, including the aim of the study, its scope, research questions,¹⁸⁴ methodology, literature review, and even insights into the contribution to knowledge.¹⁸⁵ As its name rightly suggests, theoretical framework provides the foundation and structure that give a particular research its unique design, identity, and scope. As Taekema rightly put it, theoretical framework ‘embed[s] the research project at hand in the state of the art’,¹⁸⁶ it ‘makes clear to which scholarly tradition a project is connected’,¹⁸⁷ and it is ‘a resource for various tools for conducting one’s research.’¹⁸⁸

¹⁸¹ Ilhami Arseven, ‘The Use of Qualitative Case Studies as an Experiential Teaching Method in the Training of Pre-Service Teachers’ (2018) 7(1) *International Journal of Higher Education* 111, 119 <<https://files.eric.ed.gov/fulltext/EJ1170597.pdf>> accessed 26 July 2019.

¹⁸² Sylvain Vézina and Sébastien Savard, ‘Active Offer, Actors, and the Health and Social Service System: An Analytical Framework’ in Marie Drolet, Pier Bouchard and Jacinthe Savard (eds), *Accessibility and Active Offer: Health Care and Social Services in Linguistic Minority Communities* (University of Ottawa Press 2017) 25, 26 <https://ruor.uottawa.ca/bitstream/10393/36974/1/9780776625645_WEB.pdf> accessed 26 July 2019.

¹⁸³ University of Southern California, ‘Organizing Your Social Sciences Research Paper: Theoretical Framework’ (*University of Southern California Library Research Guides*, 5 April 2019) <<http://libguides.usc.edu/writingguide/theoreticalframework>> accessed 5 April 2019.

¹⁸⁴ Sanne Taekema, ‘Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice’ (2018) *Law and Method* 1, 2 <www.lawandmethod.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010.pdf> accessed 23 May 2018.

¹⁸⁵ Roberta Heale and Helen Noble, ‘Integration of a Theoretical Framework into your Research Study’ (2019) 22(2) *Evidence-Based Nursing* 36, 36 <<https://doi.org/10.1136/ebnurs-2019-103077>> accessed 6 April 2019.

¹⁸⁶ Sanne Taekema, ‘Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice’ (2018) *Law and Method* 1, 4 <<https://doi.org/10.5553/REM/.000031>> accessed 5 August 2019.

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid* 5.

The overriding conceptual foundation of the right of free access to public legal information is the *theory of legal certainty*, an aspect of which is the concept of ascertainment of indigenous customary law. The specific concepts that also relate to the right of free access to public legal information include the duty-right relationship between the State and the people under the rule of law and the doctrine of ignorance of the law is no excuse.

Additionally, the concepts of the presumption of the reliability of information from official sources and findability are relevant because they underpin the techniques for providing adequate access to public legal information in today's world of information and communications technology. The discussion of the background to this thesis¹⁸⁹ and the research problem¹⁹⁰ reveals the indispensability of online access to public legal information from a broad viewpoint, including that of court judges.

4.1 The Theory of Legal Certainty

The concept of 'legal certainty' lacks the consensus of scholars on its exact definition, meaning, and scope, especially because it is a universal concept that has 'attracted the attention of many scholars from the most diverse theoretical backgrounds.'¹⁹¹ However, legal certainty broadly refers to the state of the applicable legal rules and principles in which 'full knowledge of the law makes it possible to predict the outcome of its application in any given case'.¹⁹² Popelier considers it to be 'a requirement of *accessibility* and predictability of the law, so that those affected by the law can reasonably anticipate the consequences of their actions.'¹⁹³ The inclusion of the term 'accessibility' in Popelier's definition of legal certainty is particularly relevant to this thesis, as explained below.

¹⁸⁹ Section 1 above.

¹⁹⁰ Section 2 above.

¹⁹¹ Stefano Berteà, 'Towards A New Paradigm of Legal Certainty' (2008) 2(1) *Legisprudence* 25, 26 <<https://doi.org/10.1080/17521467.2008.11424672>> accessed 17 July 2019.

¹⁹² Lorenzo Gradoni and Luca Pasquet, 'Dialogue Concerning Legal Un-certainty and Other Prodigies' (2019) 30(1) *The European Journal of International Law* 129, 129 <<https://doi.org/10.1093/ejil/chz011>> accessed 16 July 2019.

¹⁹³ Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2008) 2(1) *Legisprudence* 47, 48 <<https://doi.org/10.1080/17521467.2008.11424673>> accessed 17 July 2019 (emphasis added).

Legal certainty is fundamental to the well-being of people because it helps them to exercise their human rights to the dignity of the human person and to the personal freedom to make informed choices or decisions that have legal consequences. As rightly stated in the 2015 report of the Notaries of Europe (a body of the 22 Latin civil law EU Member States),

legal certainty is demanded by freedom of choice and its counterpart, the *legitimate expectation* of subjects of the norm. Without legal certainty, freedom of choice is a mere trap as subjects of the norm cannot exercise the freedom granted to them in full knowledge of the facts.¹⁹⁴

It is understandable that the prediction of legal outcomes may not always be perfect, as legal certainty is a social concept that depends on human factors. Therefore, its imperfection in terms of predictability of legal outcomes does not derogate from its indispensability to the operation of the rule of law and to the attainment and promotion of justice in the application of the law.

As there are various aspects of legal certainty,¹⁹⁵ it is therefore important to state from the outset that its specific aspect that is the theoretical framework for this study is primary access to all the provisions and principles of the law through *adequate publication*, which is the main theme of this thesis. Adequate publication, itself, includes publication in the language of the people that the law applies to, which is an aspect of *intelligible access* to the law. There are necessary references to the requirement of plain language and precision,¹⁹⁶ e.g. for the effective expression of the intention of the law in this study, but their discussion is outside the scope of this thesis.

¹⁹⁴ Bruno Deffains and Catherine Kessedjian, 'Index of Legal Certainty: Report for the Civil Law Initiative' (*Notaries of Europe*, May 2015) 7 <http://www.notaries-of-europe.eu/files/publications/NS_Rapport_complet_5_juin_2015_EN.pdf> accessed 16 July 2019 (emphasis added).

¹⁹⁵ For a list of some of the aspects of legal certainty, see Stefano Berteau, 'Towards A New Paradigm of Legal Certainty' (2008) 2(1) *Legisprudence* 25, 26 <<https://doi.org/10.1080/17521467.2008.11424672>> accessed 17 July 2019.

¹⁹⁶ For a counter to the 'claims that clear legal rules produce . . . legal certainty and predictability', see Ofer Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards may be Better for Capitalism and Liberalism' (2010) 19(2) *Public Interest Law Journal* 175–191 <<https://www.bu.edu/pilj/files/2015/09/19-2RabanArticle.pdf>> accessed 16 July 2019.

Legal certainty, which is as old as the law itself,¹⁹⁷ is an indispensable ‘fundamental principle’¹⁹⁸ and ‘a key characteristic of the rule of law’.¹⁹⁹ In fact, it is so fundamental to the operation of law in the society and interwoven with human rights that some scholars are now engaged in the discourse on whether it is also a human right.²⁰⁰

One of the other many unique features of legal certainty is that, it is ‘a key for developing trust, equality and legality [for example] in tax matters and public administration in general.’²⁰¹ The principle of trust is the foundation of the relationship between the State that makes laws and the people who are required to obey them. That is the reason secret laws and inaccessible laws destroy that trust and create suspicion and tension in the society; and it explains why such laws are considered to be acts of tyranny, repression, and oppression.²⁰² Kutz posited that ‘[t]he violence of the tyrant’s rule is not the basis of tyranny, but rather the effect of living without law, without a rational, public principle under which the law is known and articulated.’²⁰³

¹⁹⁷ Bruno Deffains and Catherine Kessedjian, ‘Index of Legal Certainty: Report for the Civil Law Initiative’ (*Notaries of Europe*, May 2015) 6 <http://www.notaries-of-europe.eu/files/publications/NS_Rapport_complet_5_juin_2015_EN.pdf> accessed 16 July 2019.

¹⁹⁸ Lucja Biel, ‘Theoretical and Methodological Challenges in Researching EU Legal Translation’ in Ingrid Simonnæs and Marita Kristiansen (eds), *Legal Translation: Current Issues and Challenges in Research, Methods and Applications* (Frank & Timme 2019) 25, 33.

¹⁹⁹ Peter Cumper and Tom Lewis, ‘Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights’ (2019) 68(3) *International & Comparative Law Quarterly* 611, 627 <<https://doi.org/10.1017/S0020589319000186>> accessed 16 July 2019.

²⁰⁰ See, for example, Jan Tryzna, ‘Is the Principle of Legal Certainty a Human Right?’ in Maciej Chmieleński and Michał Rupniewski (eds), *The Philosophy of Legal Change Theoretical Perspectives and Practical Processes* (Routledge 2019) (eBook) <<https://doi.org/10.4324/9780429504709>> accessed 16 July 2019.

²⁰¹ Dejan Ravšelj, Polonca Kovač and Aleksander Aristovnik, ‘Tax-Related Burden on SMEs in the European Union: The Case of Slovenia’ (2019) 10(2) *Mediterranean Journal of Social Sciences* 69, 78 <<https://doi.org/10.2478/mjss-2019-0024>> accessed 16 July 2019.

²⁰² David A J Richards, ‘Terror and the Law’ (1983) 5(2) *Human Rights Quarterly* 171–185 <<https://www.jstor.org/stable/762253>> accessed 16 July 2019; Watson W Galleher, ‘State Repressions’s Facade of Legality: The Military Courts in Chile’ (1988) 2(2) *Temple International and Comparative Law Journal* 183–198.

²⁰³ Christopher Kutz, ‘Secret Law and the Value of Publicity’ (2009) 22(2) *Ratio Juris* 197, 201 <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-9337.2009.00421.x>> accessed 16 July 2019.

Beyond *outrightly* secret laws, laws that are inaccessible and therefore unknowable, due to inadequate publication, resemble secret laws in their effect and therefore have tyrannical implications. Perhaps if democratic governments understand the magnitude of the injustice in denying their citizens their right of free access to their public legal information and the reputational implications of that denial, they would provide adequate access to their laws because every government has the capability to provide such access.²⁰⁴

There are different versions of the theory of legal certainty.²⁰⁵ The overriding theoretical framework for this thesis is Fuller's theory of legality because it is arguably the most comprehensive version of the theory of legal certainty on primary access to law, its contemporary relevance has not waned, and it is also the formulation that is most relevant to the emerging concept of the right of free access to public legal information. Fuller's theory satisfies the need 'to identify an existing theoretical model that can integrate a wide variety of perspectives'²⁰⁶ in complex studies, such as this thesis. Popelier underscored the relevance of Fuller's theory in contemporary scholarship as follows:

Fuller's definition of a legal system, based on eight 'principles of internal morality' reflects some key requirements of the principle of certainty of law, as accepted in legal systems such as the Belgian, the German and that of the EU. Fuller's eight principles concern the generality of laws, the demands that laws be published, be not retroactive, that they be clear and consistent, do not impose duties that are impossible to perform or are modified frequently, and that governmental action be in accordance with

²⁰⁴ Section 2.2 above.

²⁰⁵ For example, John Bradford Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal Philosophy 47, 75 <<http://classic.austlii.edu.au/au/journals/AUJLegPhil/2002/2.pdf>> accessed 16 July 2019; Stefano Berteau 'Towards A New Paradigm of Legal Certainty' (2008) 2(1) *Legisprudence* 25–45 <<https://doi.org/10.1080/17521467.2008.11424672>> accessed 17 July 2019.

²⁰⁶ Sylvain Vézina and Sébastien Savard, 'Active Offer, Actors, and the Health and Social Service System: An Analytical Framework' in Marie Drolet, Pier Bouchard and Jacinthe Savard (eds), *Accessibility and Active Offer: Health Care and Social Services in Linguistic Minority Communities* (University of Ottawa Press 2017) 25, 26 <https://ruor.uottawa.ca/bitstream/10393/36974/1/9780776625645_WEB.pdf> accessed 26 July 2019.

general laws which are laid down beforehand. In contemporary scholarship legal certainty is enumerated as a ‘principle of proper law making’. As such it still includes these eight criteria.

Fuller’s principles of internal morality that deal with crucial aspects of legal certainty, and how those principles underpin the concept of the right of free access to public legal information, are discussed in Section 4.2 below.

4.2 Lon Fuller’s Theory of Legality (Legal Certainty)

Lon Luvois Fuller formulated his *theory of legality* in his seminal book, *The Morality of Law*,²⁰⁷ that was first published in 1964. The book has been rightly acclaimed as ‘among the most important books in jurisprudence published in the twentieth century.’²⁰⁸ In the said book, Fuller masterfully used an allegory of Rex the monarch to illustrate his eight sacred principles of legality that every legal system, properly called, should uphold. I describe them as ‘sacred’ because, according to Fuller, ‘[a] total failure in any of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. . .’²⁰⁹ Fuller summarised the eight principles of his theory of legality thus:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that [1] does not exist, or [2] is kept secret from him, or [3] that came into existence only after he had acted, or [4] was unintelligible, or [5] was contradicted by another rule of the same system, or [6] commanded the impossible, or [7] changed every minute. [8] It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted.²¹⁰

²⁰⁷ Lon L Fuller, *The Morality of Law* (Revised edn, Yale University 1969).

²⁰⁸ Frank Lovett, ‘Lon Fuller, The Morality of Law’ in Jacob T Levy (ed), *The Oxford Handbook of Classics in Contemporary Political Theory* (Oxford University Press 2015) 1, 1 <<http://oxfordindex.oup.com/view/10.1093/oxfordhb/9780198717133.013.10>> accessed 6 June 2019.

²⁰⁹ Lon L Fuller, *The Morality of Law* (Revised edn, Yale University 1969) 39.

²¹⁰ Ibid

From the above statement, it is significant that six of Fuller's eight principles, numbered as 1, 2, 3, 4, 6, and 7 above, are *directly* relevant to the concept of the right of free access to public legal information and the application of the *ignorantia juris* doctrine that form the main theme of this thesis. Those six principles, summarised below, border on justice and have profound human rights implications for the rights to the dignity of the human person, personal freedom or self-determination, self-representation, adequate facilities for the preparation of every defence; and the right against adversely retroactive or *ex post facto* laws.

First, *no person should be required to obey any law that does not exist*. The most inaccessible, most unknowable, and most unjust laws are those laws that neither came into existence through formal enactment via the proper legislative process (including delegated legislation); through the valid declarations of the courts on the principles of the law via interpretation; nor through the organic evolution of accepted, unenacted norms, in the case of customary law.

The foundation of the universal concept of the rule of law is that laws that have been properly made, i.e. existing laws, should govern the human society and that all persons and institutions have the obligation to obey the law so as to avoid tyranny, anarchy, laissez-faire, and descent into the primordial state of survival of the fittest. The rule-of-law requirement of obedience to the law presupposes both the existence of the law and its adequate publication so that it can be known and obeyed.

Requiring obedience to a non-existent law is requiring the doing of the impossible, which is unimaginable injustice (*lex non cogit ad impossibilia*²¹¹) and a violation of human rights because non-existent laws are analogous to retroactive or *ex post facto* laws, as they are all *unknowable* laws that did not exist at the time the act in question was committed or performed.²¹² Additionally, non-existent and retroactive laws are both analogous to secret laws that are inaccessible and also unknowable.

Second, *no person should be required to obey any law that is kept secret from him*. Law is a living social organism that requires transparent processes from its

²¹¹ Re Grand Jury Proceedings, 744 F. 3d 211 – Court of Appeals, 1st Circuit 2014, 212.

²¹² Section 4.3.2 below; Section D.II.5 of Chapter Two.

conception to its birth, and throughout its existence, to its death. Transparency is law's vital oxygen; secrecy causes its malfunction and ultimate demise. This nature of law can be illustrated thus: the law-making process begins with public awareness of the intention of the government to introduce a new law through a bill which is published for people to know (its conception), and people are kept aware of legislative debates on it until the day it is enacted. People are told exactly when it is born (enactment and commencement). They are also told when its circumstances change (amendment) and when it dies (by repeal, consequentially, by obsolescence, or through effluxion of time in the case of sunset laws). Law therefore requires adequate publication for its effectiveness, for it to be able to function as an indispensable 'instrument of social control' or 'a coercive order', in the Kelsenian tradition.²¹³

Third, *no person should be required to obey any law that came into existence only after he had acted*. Any law that *came* into existence *after* a person's act is retroactive. Such a law is an instrument of State injustice and a violation of the human right against retroactive laws, *if* it holds the person *liable* for its contravention. The reason is that human beings are not endowed with the divine Omniscience that comes with the exact knowledge of the future. Therefore, requiring humans to order their *present conduct* in compliance with *future laws*, is tantamount to requiring them to do the impossible. In this sense, laws that are inaccessible (due to non-publication or inadequate publication) or retroactive are analogous to non-existent laws, because they all share the same problem of being unknowable. It is worth mentioning that unlike *adversely* retroactive laws, retroactive laws that are entirely for the benefit of people (e.g. to preserve accrued rights and benefits) and do not contain any *ex post facto* liability, do not violate any rights. Waldron rightly pointed out this distinction between 'penal retroactivity' and 'curative or beneficial retroactivity'.²¹⁴

²¹³ Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1949) 18–20

<<https://ia801601.us.archive.org/19/items/in.ernet.dli.2015.275060/2015.275060.General-Theory.pdf>> accessed 25 May 2018. But Lon Fuller, for example, prefers the view that law is a 'facilitation of human interaction'. See Lon L Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) *Brigham Young University Law Review* 89–96 <<https://digitalcommons.law.byu.edu/lawreview/vol1975/iss1/5>> accessed 25 May 2018.

²¹⁴ Jeremy Waldron, 'Retroactive Law: How Dodgy was Duynhoven?' (2004) 10(4) *Otago Law Review* 631, 638 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/otago10§ion=45> accessed 1 August 2019.

Fourth, *no person should be required to obey any law that is unintelligible*. Unintelligible laws lack *intelligible access* that enables people to understand the meaning and effect of laws, so that they are able to order their acts accordingly. Intelligible access requires that laws are written in such language that the people they apply to can understand; this includes the form or style of the language, its translation into the languages of those people, and the absence of ambiguities.

In *Lambert v California*, the US Supreme Court referred to writing the law ‘in print too fine to read or in a language foreign to the community’ as a great evil.²¹⁵ It is indeed a great evil because requiring people to know and obey laws written in any language they do not understand is requiring them to do the impossible, and it is therefore unjust.

Linguistic rights are human rights that empower people groups to use their indigenous languages,²¹⁶ and they constitute a major component of cultural rights.²¹⁷ Article 18(2) of the Universal Declaration on Linguistic Rights 1996 (Barcelona Declaration) states: ‘Public authorities who have more than one territorially historic language within their jurisdiction must publish all laws and other legal provisions of a general nature in each of these languages, whether or not their speakers understand other languages.’²¹⁸

Fifth, *no person should be required to obey any law that commands the impossible*. Any law that commands the impossible is morally and legally wrong and unjust. It is a venerable or even sacred legal maxim that the law does not command the impossible: *lex non cogit ad impossibilia*.²¹⁹ The European Court of Human Rights recently upheld the application of this timeless maxim in *Király and Dömötör v*

²¹⁵ *Lambert v California*, 225 U.S. 355 (1957).

²¹⁶ ICCPR art 27; United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res RES/61/295 (13 September 2007) UN Doc A/RES/61/295 arts 2, 3, 5, 8, 13, 14, 15, 16.

²¹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 1, 3, 6, 15; Claire Kramsch, *Language and Culture* (Oxford University Press 1998) 3.

²¹⁸ Universal Declaration on Linguistic Rights (Barcelona Declaration), World Conference on Linguistic Rights (9 June 1996) <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019.

²¹⁹ Re Grand Jury Proceedings, 744 F. 3d 211 – Court of Appeals, 1st Circuit 2014, 212.

Hungary.²²⁰ One way in which such injustice manifests is through the application of the universal *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable.²²¹ The underlying philosophy of free access to the law is that it is unimaginable injustice for the State to demand obedience to any law that is unknowable law because it is inaccessible.

Sixth, *no person should be required to obey any law that changes every minute*. Law should be stable so that people can have sufficient opportunity to know what its rules are, to be able to order their conduct properly and enjoy their right to personal freedom or self-determination. However, law should change so as to keep pace with the dynamic nature of the human society; but the change should be necessary, reasonable, and just.

One aspect of the relevance of the requirement of stability of the law to the right of free access to public legal information is the need for adequate publication. Adequate publication includes the stipulation of sufficient time between the date of enactment of any law and the date when it enters into force so that people can have adequate opportunity to know how the law affects them and order their conduct accordingly, especially in the case of any law that contains any liability for its violation.

Further, the ‘requirement of stability [of the law, which] is one aspect of the principle of legal certainty’²²² particularly supports the need to transmit the rules of indigenous customary law into a written, accessible permanent form. In today’s world where the affluent and the powerful are known to manipulate the rules of indigenous customary law when it suits them—thus making the rules ever-changing, unpredictable and uncertain—the proper publication of indigenous customary law is part of the solution to the problem. Interestingly, even the poor and powerless constantly change the rules of indigenous customary law, e.g. in the communities where marriage and land sale rites are inflated regularly as a means of income.

²²⁰ *Király and Dömötör v Hungary* App no 10851/13 (ECtHR, 17 April 2017) <<http://hudoc.echr.coe.int/eng?i=001-170391>> accessed 8 August 2019.

²²¹ Discussed in Section 4.3.2 below.

²²² Hans Gribnau, ‘Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: A Case Study’ (2013) 9(2) *Utrecht Law Review* 52, 53 <<https://www.utrechtlawreview.org/articles/10.18352/ulr.227/>> accessed 18 July 2019.

In addition to the six principles discussed above, Fuller rightly highlighted the direct relationship between human dignity, personal freedom (an aspect of self-determination²²³) and the right of free access to public legal information:

To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view of man as a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of the law's inner morality is an affront to man's *dignity* as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of *self-determination*.²²⁴

The said relationship is particularly relevant to this thesis because human dignity is part of the foundation of the concept of human rights,²²⁵ which therefore has implications for the right of free access to public legal information as a human right.

Although there are criticisms of Fuller's concept of the morality of law,²²⁶ the principles of his theory of legality are valid requirements for the proper functioning of any legal system, central to which is the right of free access to public legal information that this thesis examines. As it usually is with criticisms, some of them

²²³ Rocío Fernández-Ballesteros and others, 'Paternalism vs. Autonomy: Are They Alternative Types of Formal Care?' (2019) 10 *Frontiers in Psychology* 1, 2 <<https://doi.org/10.3389/fpsyg.2019.01460>> accessed 18 July 2019; Colleen M Gallagher, 'On Human Rights and Freedom in Biomedical Ethics: A Christian Response to Ellen Zhang' in Joseph Tham, Chris Durante and Alberto García Gómez (eds), *Religious Perspectives on Social Responsibility in Health: Towards a Dialogical Approach* (Springer International Publishing AG 2018) 33–36 <<https://link.springer.com/content/pdf/10.1007%2F978-3-319-71849-1.pdf>> accessed 18 July 2019.

²²⁴ Lon L Fuller, *The Morality of Law* (Revised edn, Yale University 1969) 162–163 (emphasis added). For a discussion of 'legal liability-responsibility' relating to Fuller's quote on human dignity, see William Lucy, *Law's Judgement* (Hart Publishing 2017) 89–96.

²²⁵ Section 5 below.

²²⁶ See, for example, Peter P Nicholson, 'The Internal Morality of Law: Fuller and His Critics' (1974) 84(4) *Ethics* 307–326 <<https://doi.org/10.1086/291928>> accessed 27 May 2018; Matthew Kramer, 'Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders' (1998) 18(2) *Oxford Journal of Legal Studies* 235–263, <https://doi.org/10.1093/ojls/18.2.235> accessed 27 May 2018.

are sometimes absurd. For instance, one of Fuller's critics—whose work was published in 2004—did not support the requirement that *every law* should be published.²²⁷ According to the author who laboured to distinguish between different publication requirements from his so-called 'functional' and 'political' perspectives,

[i]gnorance of the law is sometimes a bliss.²²⁸ . . . Under certain circumstances, it is better if people are not entirely aware of the laws governing their situation. . . . From a political perspective perhaps we would always want to put the law under glaring light, but there is something to be said for the need to resolve some subtleties if not quite in the darkness, at least in the twilight.²²⁹

The said author's position in the above statement is indeed absurd because it contradicts ethics and the sacred requirement that every law should be published, from all reasonable perspectives, including transparency, justice, common sense, the rule of law, and human rights. There is no moral or legal justification whatsoever for not publishing any law which affects the rights and obligations of people, e.g. criminal law that the said author used for his pro-secret-law argument.²³⁰

Murphy, one of the scholars who supports Fuller's theory of legality, rightly states: 'It is generally agreed that Lon Fuller's eight principles of legality capture the essence of the rule of law. Some argue that Fuller's criteria for the rule of law are incomplete, but few dispute the basic criteria Fuller identifies.'²³¹

Fuller's theory of legal certainty is directly relevant to all aspects of this thesis, i.e. the right of free access to all categories of public legal information and the duty of every government to provide adequate access to all categories of its public legal

²²⁷ Andrei Marmor, 'The Rule of Law and its Limits' (2004) 23 Law and Philosophy 1, 15–19 <<https://link.springer.com/content/pdf/10.1023/B:LAPH.0000004356.03016.d5.pdf>> accessed 25 May 2018.

²²⁸ Ibid 17.

²²⁹ Ibid 19.

²³⁰ Ibid 17–18.

²³¹ Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24(3) Law and Philosophy 239, 240 <www.jstor.org/stable/30040345> accessed 25 May 2018.

information (including indigenous customary law) as the *condition precedent* for the just application of the *ignorantia juris* doctrine.

4.3 Specific Concepts Relevant to the Theory of Legal Certainty and the Right of Free Access to Public Legal Information

4.3.1 The Duty-Right Relationship Between the State and the People under the Rule of Law

The rule of law is one of the most popular legal doctrines and it is a core principle of democracy and good governance. Albert Venn Dicey is the father of the doctrine, not because he created the phrase ‘the rule of law’ (of course, he did not create it), but because he elaborated and popularised its doctrine²³² in his seminal book, *Introduction to the Study of the Law of the Constitution*, first published in 1885.²³³ Earlier writings of Aristotle, John Locke, and Montesquieu before Dicey’s works, for example, contained references to aspects of the concept of the rule of law.²³⁴ Dicey used the phrases ‘the rule of law’ and ‘the supremacy of law’ interchangeably, as synonyms.²³⁵

Writing in the British context, Dicey postulated that the rule of law meant three principles: the absolute supremacy of the law over the affairs of the society, as well as over the prerogative and discretionary powers of the State; equality before the law (no man is above the law); and that the constitution derives its source from the rights of individuals from the principles of private law found in judicial decisions.²³⁶

²³² A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915; reprint, LibertyClassics 1982) 107, xx (Foreword by Roger Michener) <http://files.libertyfund.org/files/1714/0125_Bk.pdf> accessed 5 April 2019.

²³³ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885) Part II.

²³⁴ Jeremy Waldron, ‘The Rule of Law’, *The Stanford Encyclopedia of Philosophy* (Zalta EN (ed), Fall 2016 edn) <<https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>> accessed 11 April 2019.

²³⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915; reprint, LibertyClassics 1982) 107, 110 <http://files.libertyfund.org/files/1714/0125_Bk.pdf> accessed 5 April 2019.

²³⁶ *Ibid* 107–122.

The concept of the rule of law has so many different versions²³⁷ that it is analogous to the elephant that the six blind men of Hindustan described from the specific part of its body each of them touched and felt, in the classic poem, 'The Blind Men and the Elephant'.²³⁸ According to Dworkin, 'Firm adherents are locked in great disagreement about what the rule of law really is. These disagreements are well summarized in the working paper of the Venice Commission that is before us. They are also well articulated in Lord Bingham's book.'²³⁹

Only the aspects of the rule of law on the duty-right relationship between the State and the people that are directly relevant to the right of free access to public legal information are examined here. One of such relevant principles of the rule of law is *equality before the law*, which Dicey rightly identified as involving 'the duty of obedience to the law',²⁴⁰ and which Lord Bingham considered to be the core principle. According to Bingham, 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and *prospectively promulgated* and publicly administered in the courts.'²⁴¹

The law must also be 'accessible and so far as possible intelligible, clear and predictable'.²⁴² The European Court of Human Rights stated this requirement in the case of *Sunday Times v United Kingdom* that the 'law must be adequately accessible' so that people can regulate their conduct accordingly and be able 'to foresee, to a degree that is reasonable in the circumstances, the consequences

²³⁷ See, for example, John Alder and Keith Syrett, *Constitutional and Administrative Law* (11th edn, Palgrave 2017) 124–136; Richard Bellamy, 'The Rule of Law' in Richard Bellamy and Andrew Mason (eds), *Political Concepts* (Manchester University Press 2003) 118, 120 <<https://doi.org/10.7765/9781526137562.00014>> accessed 11 April 2019.

²³⁸ For the text of the poem, see Martin Walter, *Mathematics for the Environment* (Chapman & Hall/CRC 2011) 198.

²³⁹ R Dworkin, 'The Rule of Law' (2013) *Law of Ukraine: Legal Journal* 7, 7.

²⁴⁰ A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915; reprint, LibertyClassics 1982) 107, 120 <http://files.libertyfund.org/files/1714/0125_Bk.pdf> accessed 5 April 2019.

²⁴¹ Lord Bingham, 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67, 69 <www.jstor.org/stable/4500873> accessed 5 April 2019 (emphasis added).

²⁴² *Ibid* 69.

which a given action may entail.’²⁴³ Further, the law ‘must afford adequate protection of fundamental human rights.’²⁴⁴ it is also important that the State should perform its obligations to its citizens under both conventional international law and customary international law.²⁴⁵

The definition of the rule of law by the UN Secretary-General clearly highlights several principles that are relevant to the right of free access to public legal information:

The ‘rule of law’. . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are *accountable to laws* that are *publicly promulgated*, equally enforced and independently adjudicated, and which are *consistent with international human rights norms and standards*. It requires, as well, measures to ensure adherence to the principles of *supremacy of law*, *equality before the law*, *accountability to the law*, *fairness in the application of the law*, separation of powers, participation in decision-making, *legal certainty*, avoidance of arbitrariness and procedural and *legal transparency*.²⁴⁶

The *duty* of every government to provide free and adequate access to its public legal information and the *right* of every person to free and adequate access to public legal information emanate, fundamentally or naturally, from the *duty-right relationship* between the State and its people under the rule of law. In that relationship, the State that makes the law and demands obedience to it, has the moral and legal duty to publish it adequately;²⁴⁷ and every person has the right to

²⁴³ *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271, 149 (26 April 1979) <http://www.hrcr.org/safrica/limitations/sunday_times_uk.html> accessed 10 August 2019.

²⁴⁴ Lord Bingham, ‘The Rule of Law’ (2007) 66(1) *The Cambridge Law Journal* 67, 75 <www.jstor.org/stable/4500873> accessed 5 April 2019.

²⁴⁵ *Ibid* 81–82.

²⁴⁶ Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (23 August 2004) UN Doc S/2004/616 4 <<https://undocs.org/en/S/2004/616>> accessed 11 April 2019 (emphasis added).

²⁴⁷ Tom Bruce, ‘Public Legal Information: Focus and Future’ (2000) 1 *Journal of Information, Law and Technology* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/bruce/> accessed 6 May 2019. Bruce rightly referred to the consensus that ‘if ignorance of the law is no excuse, then there is an obligation to publish the law.’

know the law, to be able to obey it, otherwise it would be unconscionable and unjust to demand such obedience. The reasoning is that where there is a duty, there is *usually* a right; and where there is a right, there is *always* a duty to enforce that right.²⁴⁸

The rule of law is a just double-edged sword that swings both ways: It first imposes the duty to publish the law on the authority that makes and enforces it before imposing the duty to obey it on those who should do so. Both duties are mutual: Published—and therefore knowable—law should be obeyed.

Shenton's statement that '[l]aw which cannot be ascertained cannot be obeyed'²⁴⁹ validly extends to this relationship between adequate publication of the law and obedience to it, because it borders on certainty of the law. Ascertainment of any law, including indigenous customary law, provides the possibility of knowing that law with sufficient certainty so that people can order their actions accordingly.

Raz aptly summarised this duty-right relationship between the State and the people, which is the legal foundation for the concept of the provision of adequate access to public legal information and the right to it, as follows:

Let us, therefore, return to the literal sense of 'the rule of law'. It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. As was noted above, it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it.²⁵⁰

²⁴⁸ Hugh Gibbons and Nicholas Skinner, 'The Biological Basis of Human Rights' (2004) 13 Public Interest Law Journal 51, 70–73 <<http://biologyoflaw.org/Downloads/BiologicalBasisOfHumanRights.pdf>> accessed 17 April 2018.

²⁴⁹ Clarence G Shenton, 'Common-Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence' (1918) 23(2) Dickinson Law Review 37, 37.

²⁵⁰ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 210, 213–214

Recognition of the rule-of-law duty of the government to provide public access to the law and the right of the people to know the law, led to attempts throughout history to publish the law so that the people it applies to can know it, which informed the quest for the best method of publication. That quest has always been tied to the prevailing publishing mechanism or technology of each dispensation.

In conclusion, governments that have the duty²⁵¹ to provide adequate access to public legal information are therefore responsible for the global problem of inadequate public access which is tantamount to the denial of the right of free access to public legal information. It is therefore necessary to find an effective solution to the problem because, as Scott LJ rightly stated, 'Of supreme importance to the continuance of the rule of law . . . [is] the right of the public affected to know what that law is.'²⁵² That 1948 statement still holds true today.²⁵³

4.3.2 The Doctrine of Ignorance of the Law is no Excuse

The doctrine of ignorance of the law is no excuse (*ignorantia juris* doctrine) is arguably the best known legal doctrine.²⁵⁴ The reason is that it is the very foundation of a typical system of criminal justice worldwide. Two of the popular early statements of the doctrine, from *The Doctor and Student* by Christopher Saint Germain and *The Table Talk* by John Selden, respectively, are presented below:

<<https://dx.doi.org/10.1093/acprof:oso/9780198253457.003.0011>> accessed 16 April 2019 (emphasis included).

²⁵¹ For an extensive discussion of the duty of governments to provide access to their laws, see Joseph E Murphy, 'The Duty of the Government to Make the Law Known' (1982) 51 Fordham Law Review 255, 283-292.

²⁵² *Blackpool Corporation v Locker* [1948] 1 KB 349, 361. See also *Bellwether Properties v Duke Energy Indiana*, 87 NE 3d 462, 468 – Indiana Supreme Court 2017 (United States).

²⁵³ For a discussion of the importance of access to public legal information to the rule of law, see Brian D Anderson, 'Meaningful Access to Information as a Critical Element of the Rule of Law: How Law Libraries and Public Libraries Can Work Together to Promote Access' (*International Federation of Library Associations and Institutions World Library and Information Congress*, 2016) <<http://library.ifla.org/1376/1/179-anderson-en.pdf>> accessed 23 April 2019.

²⁵⁴ Sharon L Davies, 'The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance' (1998) 48(3) Duke Law Journal 341, 342-343 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1042&context=dlj>> accessed 27 April 2019.

Ignorance of the law (though it be invincible) doth not excuse as to the law but in few cases; for every man is bound at his peril to take knowledge what the law of the realm is . . . but ignorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases.²⁵⁵

Ignorance of the Law excuses no man; not that all Men know the Law, but because 'tis an excuse every man will plead, and no Man can tell how to confute him.²⁵⁶

One interesting aspect of the doctrine is that, it is an ancient²⁵⁷ and modern doctrine that is not less than 500 years old, yet it is still in vibrant use today worldwide. Its enviable longevity, despite its innumerable foes, is a sterling testimony to its utility. On its utility, as John Selden rightly stated in the second quote above, the doctrine is based on the fear that allowing the defence of ignorance of the law would make it every person's defence, which would lead to the prosecution's nightmarish problem of negating it each time an accused person pleads it. In that sense, it was devised as a *doctrine of necessity*. The court stated this fact in *R v Campbell* thus: 'The principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is justified because it is *necessary*, even though it will, sometimes produce an anomalous result.'²⁵⁸

From Christopher Saint Germain's quote above, 'every man is bound at his peril to take knowledge what the law' is, which means every person has the *duty to know the law*. The duty to know the law emanates from the duty to obey the law under the rule of law.²⁵⁹ The *ignorantia juris* doctrine is therefore based on the

²⁵⁵ Christopher Saint Germain, *Dialogues Between a Doctor of Divinity and a Student in the Laws of England* (1518, Robert Clarke & Co 1886) 248–249 <<https://archive.org/details/doctorstudentord00sain/page/248>> accessed 26 April 2019.

²⁵⁶ John Selden, *The Table-Talk of John Selden* (2nd edn, John Russell Smith 1856) 82 <<https://archive.org/details/tabletalkofjohns00seldiala>> accessed 26 April 2019.

²⁵⁷ *Bellwether Properties v Duke Energy Indiana*, 87 NE 3d 462, 468 – Indiana Supreme Court 2017 (United States).

²⁵⁸ *R v Campbell* [1972] 2 All ER 353 (England), *Cases and Materials on Criminal Law and Procedure* (5th edn, University of Toronto Press 1978) 522 (emphasis added).

²⁵⁹ Discussed in Section 4.3.1 above.

*presumption that every person knows the law*²⁶⁰ because of the duty to know the law which, in turn, presupposes that the law is freely and adequately accessible to make it knowable.²⁶¹ The Latin version of the presumption is *nemo censetur ignorare legem* (nobody is thought to be ignorant of the law) and its Dutch equivalent is *ieder wordt geacht de wet te kennen*.

The abovementioned presupposition that the law is freely and adequately accessible to make it knowable necessitates the right of free access to public legal information. Bannister rightly stated that ‘the presumption that everyone knows the law, and the concomitant rule that ignorance of the law is no excuse, are founded upon a public right of access to the sources of those laws.’²⁶² The right to know the law gives rise to the duty of every government to provide the required adequate access to its laws. As Bruce rightly stated, ‘if ignorance of the law is no excuse, then there is an obligation to publish the law.’²⁶³ Therefore, the *ignorantia juris* doctrine should not apply where the law is inaccessible and thereby unknowable, as its application in such a situation would cause serious injustice.

The *legality principle*,²⁶⁴ expressed in the Latin maxims *nullum crimen sine lege* (no crime without law) and *nullum poena sine lege* (no punishment without law), is a

²⁶⁰ It is difficult to agree with the assertion by some scholars that the doctrine of ignorance of the law is no excuse is not based on the presumption of knowledge of the law. See, for example, Frederick G McKean Jr, ‘The Presumption of Legal Knowledge’ (1927) 12 St Louis Law Review 96, 100–101 <https://openscholarship.wustl.edu/law_lawreview/vol12/iss2/2> accessed 12 July 2019.

²⁶¹ *Bellwether Properties v Duke Energy Indiana*, 87 NE 3d 462, 468 – Indiana Supreme Court 2017 (United States).

²⁶² Judith Bannister, ‘Open Access to Legal Sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox’ (1996) 3 Journal of Information Law & Technology <https://warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/> accessed 26 April 2019.

²⁶³ Tom Bruce, ‘Public Legal Information: Focus and Future’ (2000) 1 Journal of Information, Law and Technology <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/bruce/> accessed 6 May 2019.

²⁶⁴ Patrick J Keenan, ‘International Criminal Law and Climate Change’ (2019) 37 Boston University International Law Journal 89, 111–113; Xue Yang, ‘Changes in European Instruments as a Reflection of a Shift in Legal Philosophies Relating to Community Sanctions and Measures’ (2019) 25(2) European Journal on Criminal Policy and Research 153, 165 <<https://link.springer.com/article/10.1007/s10610-018-9369-2>> accessed 13 July 2019.

constitutional safeguard for fair trial in the system of criminal justice in national legal systems and a human-right principle in international human rights law. The principle is relevant to the requirement of adequate access to the law as a condition for the effectivity of the law and for the application of the *ignorantia juris* doctrine. The reason is that any law that is inaccessible is analogous to both non-existent and retroactive laws, as such laws are unknowable in all three circumstances, which makes it impossible for people to order their lives in accordance with their provisions. Barlow stated this fact, more than 200 years ago, thus:

Where a man is ignorant of [a positive regulation], he is in the same situation as if the law did not exist. To read it to him from the tribunal, where he stands arraigned for the breach of it, is to him precisely the same thing as it would be to originate it at the time by the same tribunal for the express purpose of his condemnation.²⁶⁵

On the requirement of justice and fairness that laws should be adequately published and made known before people can be bound by their provisions, Hegel rightly postulated that, 'If laws are to have a binding force, it follows that, in view of the right of self-consciousness they must be made universally known.'²⁶⁶ He, significantly, presented apt analogies of aspects of the concept of accessibility of laws:

To hang the laws at such a height that no citizen could read them, as Dionysius the Tyrant did, is an injustice [*Unrecht*] of exactly the same kind as to bury them in an extensive apparatus of learned books and collections of verdicts based on divergent judgements, opinions, practices, etc., all expressed in a foreign language, so that knowledge [*Kenntnis*] of the laws

²⁶⁵ Quoted in J Barlow, 'Advice to the Privileged Orders in the Several States of Europe' (1792), reprinted in *The Annals of America*, vol 3 (Encyclopædia Britannica 1968) 504, 511 (as cited in Ronald A Cass, 'Ignorance of the Law: A Maxim Reexamined' (1976) 17 William & Mary Law Review 671, 687 <<https://scholarship.law.wm.edu/wmlr/vol17/iss4/3>> accessed 13 July 2019.

²⁶⁶ Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (Allen W Wood ed, HB Nisbet tr, first published 1821, Cambridge University Press 1991) § 215 <<https://hscif.org/wp-content/uploads/2018/04/Hegel-Phil-of-Right.pdf>> accessed 12 July 2019.

currently in force is accessible only to those who have made them an object of scholarly study.²⁶⁷

Indeed, the magnitude of the injustice in denying people their right of access to the law, without which they cannot know the law that they are still bound to obey, makes such denial an act of a tyranny, as exemplified by Dionysius the Tyrant²⁶⁸ and in Bentham's famous quote.²⁶⁹ It is therefore unconscionable to deny a genuine defence of ignorance of the law in any situation where a person is denied adequate access to the applicable law, which amounts to denial of the person's right to know the law.

The *defence* of ignorance of the law as the *reason* for a person's act that amounted to the violation of the law has four categories. First, that the person simply did not know that the act was against the law. This is the commonest understanding of the defence in criminal law. Here, the issue that criminal law borders on is the *criminal state of the person's mind* at the time the person committed the act, which leads to the thorny jurisprudence on *mens rea* (criminal intent), one aspect of which is cultural defence, e.g. the act of scarification with tribal marks.²⁷⁰

Second, that: (1) there was total *non-publication* of the law in question (i.e. it was not published at all); and (2) the affected person did not know that law. Both conditions (non-publication and ignorance) are necessary for the defence because people may know an unpublished law through acquiring or being in possession of the archival or assented version of that law (the version on file), as it happens in some poor-access countries, e.g. Nigeria.²⁷¹ In *Tañada v Tuvera*, the Supreme

²⁶⁷ Ibid

²⁶⁸ Ibid

²⁶⁹ Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham*, vol 5 (William Tait 1843) 547.

²⁷⁰ Alison Dundes Renteln, 'A Justification of the Cultural Defense as Partial Excuse' (1993) 2 Southern California Review of Law and Women's Studies 437, 482–483.

²⁷¹ The author has personal experiences of such situations as a practising lawyer in Nigeria (like many other lawyers in Nigeria) and during the research for his book: Leesi Ebenezer Mitee, *Laws of Rivers State of Nigeria: An Encyclopaedic Guide* (2nd edn, Worldwide Business Resources 2010). The first edition of the book was published in 1994. Lawyers and nonlawyers make photocopies of unpublished laws from the file or assented version in the office of the Attorney-General or Solicitor-General in the Ministry of Justice.

Court of the Philippines '[ordered the] respondents to publish in the Official Gazette all unpublished presidential issuances which are of general application, and unless so published, they shall have no binding force and effect.'²⁷²

Third, that the person did not know that the act was against the law *because* the law was not published *adequately*, so the person could not have known it. That was what happened in *United States v Casson*,²⁷³ where the accused person had committed the alleged criminal act just about six hours after the *federal* law which prohibited that act was enacted.

Fourth, that the person did not know that the act was against the law *because*, although the law was published adequately, the person could not have known it due to the *peculiar circumstances of that person* at the time the person committed the act.²⁷⁴ An example of this situation is that of a sailor on the high seas without any means of knowing that the law was made or amended, as it happened in *Rex v Bailey*.²⁷⁵ In that case, the court acknowledged the serious injustice in applying the *ignorantia juris* doctrine, but surprisingly went ahead to convict the accused person, and thereafter recommended pardon to remedy the evident injustice.

It should be noted that, as a defence, the onus or burden of proving *excusable ignorance of the law* is on the person asserting it and the burden of proving that the accused person ought to have known the law in question is on the prosecution.

Further, the defence does not avail the accused person where the prosecution is able to prove that the accused person ought to have known that the act in question was unlawful or illegal, due to the *nature* of that act (e.g. kidnapping, rape, and murder), so that the issue of publication does not matter. This situation may border on the controversial issue of classification of crimes as *mala prohibita* (evil because prohibited) and *mala in se* (naturally evil).²⁷⁶ It should be noted that

²⁷² *Tañada v Tuvera*, GR No L-63915, 136 SCRA 27 (1985) (Philippines) <www.lawphil.net/judjuris/juri1985/apr1985/gr_l63915_1985.html> accessed 5 May 2019.

²⁷³ *United States v Casson*, 434 F.2d 415 (D.C. Cir. 1970).

²⁷⁴ *Rex v Bailey* (1800) 168 Eng Rep 651.

²⁷⁵ *Ibid*

²⁷⁶ The discussion and sources are in Section D.III.2.15 of Chapter Two.

this is a limited *necessary exception* to prevent abuse of the defence of inaccessible law through *deliberate ignorance of the law*.

There is therefore the need for *global* law reform under an adequate legal framework of international human rights law to remedy the injustice that the application of the *ignorantia juris* doctrine causes, where the law is *inaccessible and thereby unknowable*. That legal framework should also provide the same remedy for the fourth category of defence outlined above. The scale of such global law reform requires inquiry into the state of the existing international legal framework for the protection of the right of free access to public legal information.

4.3.3 The Concept of Ascertainment of Indigenous Customary Law

There is no universally acceptable definition of indigenous customary law, but it rightly refers to ‘the laws, practices and customs of indigenous and local communities which are an intrinsic and central part of the way of life of these communities.’²⁷⁷

One strange aspect of indigenous customary law is its numerous names, which include simply customary law, common law, folk law, indigenous law, informal law, living law, primitive law, traditional law, unwritten law, unofficial law, native law, and tribal law.²⁷⁸ The term ‘indigenous customary law’ is preferred in this thesis (and recommended) because it clearly distinguishes it from *customary international law* that is also simply referred to as ‘customary law’. Another intriguing aspect is that different categories of professionals lay claim to expertise in it, e.g. lawyers, folklorists, classicists, anthropologists, historians, sociologists, and philosophers.²⁷⁹

²⁷⁷ Patricia Adjei, ‘What Place for Customary Law in Protecting Traditional Knowledge?’ (*World Intellectual Property Organization*, August 2010), <www.wipo.int/wipo_magazine/en/2010/04/article_0007.html> accessed 16 July 2016.

²⁷⁸ Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) xiii; A Weis Bentzon, ‘Negotiated Law: The Use and Study of Law Data in International Development Research’ (1994) Roskilde University International Development Studies Occasional Paper No 13 92, 97 <<https://rossy.ruc.dk/index.php/ocpa/article/view/4158>> accessed 21 June 2019.

²⁷⁹ Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) xiii.

The concept of ascertainment of indigenous customary law (defined in Section 3.2 above) arose out of the need to record or transmit its oral or unwritten rules, which only exist in the *minds* of some people (especially the community leaders), into their written form so that those rules are certain, knowable, and accessible.

The four existing methods of ascertainment of indigenous customary law are judicial ascertainment (referred to as ‘judicialization’ in this thesis), codification, restatement, and self-statement.²⁸⁰ These methods form the existing concept of ascertainment of indigenous customary law. They were developed over several centuries, e.g. the Code of Hammurabi (18th century B.C.)²⁸¹ and the Natal Code of Native Law (1875–1878).²⁸²

Judicialization usually considers indigenous customary law a matter of fact, whose existence must either be proved before the court in an ongoing case or judicially noticed based on its sufficient proof in a previous case or in several cases, depending on the applicable rule in the jurisdiction. If the court accepts the existence of the rule, it then considers the validity of that rule as the final requirement before it can be enforced as binding. The court declares any rule of indigenous customary law that is contrary to public policy, repugnant, or incompatible with any existing law invalid and unenforceable.²⁸³ *Codification* is the formal legislative enactment of the rules of indigenous customary law, whereby such rules become legislation or statute law.²⁸⁴ *Restatement* leads to publication of the rules of indigenous customary law merely as a guide, without making those published rules binding.²⁸⁵ *Self-statement* is a version of restatement, but with two

²⁸⁰ Janine Ubink, ‘Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia’ (2011) International Development Law Organization Traditional Justice: Practitioners’ Perspectives’ Working Paper Series 1.

²⁸¹ The Louvre Museum, ‘Law Code of Hammurabi, King of Babylon’ (*The Louvre Museum*) <www.louvre.fr/en/oeuvre-notices/law-code-hammurabi-king-babylon accessed 1 June 2019.

²⁸² AN Allott, ‘The Judicial Ascertainment of Customary Law in British Africa’ (1957) 20(3) *The Modern Law Review* 244, 261.

²⁸³ Mikano E Kiye, ‘The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon’ (2015) 15(2) *African Studies Quarterly* 85, 87.

²⁸⁴ Eugene Cotran, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 *International and Comparative Law Quarterly Supplementary Publication* 72, 73.

²⁸⁵ MW Prinsloo, ‘Restatement of Indigenous Law’ (1987) 20 *Comparative and International Law Journal of Southern Africa* 411, 411 (emphasis added). See also Eugene Cotran, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 *International and Comparative Law Quarterly*

major differences: a community is expected to record its own rules of indigenous customary law by *itself* (not by outsiders) and those rules are binding.²⁸⁶

With the growing global interest in indigenous rights, following the UN General Assembly's adoption of the United Nations Declaration on the Rights of Indigenous Peoples²⁸⁷ (UNDRIP) in 2007 with an overwhelming majority of 144 states, the demands of human rights, and the right to know the law, there is the need to investigate the adequacy of all the four existing methods of ascertainment of indigenous customary law. It is significant that the United Nations has recently shown its interest in the ascertainment of indigenous customary law. For example, the United Nations Development Programme (UNDP) co-sponsored the ongoing massive South Sudan Customary Law Ascertainment project that began in 2012.²⁸⁸

Investigating the adequacy of all the four existing ascertainment methods should aim to find out if those methods provide adequate public access to the unwritten rules of indigenous customary law and if they (the methods) also comply with the relevant general human rights and the specific indigenous rights. The United Nations-endorsed human rights-based approach (HRBA)²⁸⁹ should be part of the essential tools for such study.

Supplementary Publication 72, 84; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 5. Cotran was responsible for the Kenya restatement of customary law projects.

²⁸⁶ Manfred O Hinz, 'The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For? The experience of the Customary Law Ascertainment Project in Namibia' (2012) 2(7) Oñati Socio-legal Series 85, 91 <<http://opo.iisj.net/index.php/osls/article/view/181>> accessed 19 July 2017.

²⁸⁷ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 <<https://undocs.org/A/RES/61/295>> accessed 13 May 2019.

²⁸⁸ United Nations Development Programme, 'Ascertainment of Customary Laws in South Sudan: Discussion Paper' (United Nations Development Programme) 3 <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

²⁸⁹ UNSDG 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (adopted by the United Nations Sustainable Development

4.3.4 The Presumption of the Reliability of Information from Official Sources

There is a general presumption of the reliability of information from *official* sources. The ‘official source’ of any information refers to the source from, and under the control of, the authority, organisation, or public body that has the formal, legal, or statutory responsibility for creating, storing, preserving, publishing, or distributing that information.

Information from an official source benefits from the evidentiary principle of *proper custody*. Several Evidence Acts provide that ‘[d]ocuments are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be . . .’²⁹⁰ Public documents from proper custody are presumed to be genuine and reliable.²⁹¹

For public or government-held information, the legislature is the official source of the laws it makes, the judiciary is the official source of the decisions of its courts, and the executive arm of government is the official source of the policies it makes. However, as the three arms of government form a separate but unified system under the democratic doctrine of separation of powers, the responsibility for publishing official government information may be delegated to any *designated* government agency. For instance, the Ministry of Justice may be given responsibility for publishing the laws made by the legislature, e.g. Jamaica’s Ministry of Justice.²⁹²

A statutory example of the presumption of the reliability of public legal information from official sources is in Section 86 of the Singaporean Evidence Act 1893²⁹³ that states:

86. The court is to presume the genuineness of every publication purporting — (a) to be printed or published under the authority of the

Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019 (UN Statement of Common Understanding 2003).

²⁹⁰ See, for example, Evidence Act 2011, s 156 (Nigeria).

²⁹¹ See, for example, Evidence Act 2011, s 148 (Nigeria).

²⁹² *Jamaica Laws Online* <<https://moj.gov.jm/laws>> accessed 1 June 2019.

²⁹³ Available at <https://sso.agc.gov.sg/Act/EA1893?ViewType=Pdf&_=20190329022603> accessed 7 April 2019. See also Evidence Act 1963, s 90 (Kenya).

government of any country and to contain any law of that country; or (b) to contain any official or authoritative report of a decision of a court of any country.

Thomas Bruce, the co-founder of the Cornell University Legal Information Institute that pioneered free global online to public legal information, validated the presumption of the reliability of information from official sources when, discussing the provision of online access to public legal information, he stated:

An informal and hasty survey of public-library web sites, for instance, shows that most favor 'official' government sites in their lists of public information resources, even when third-party sites offer greater functionality and hugely improved response. And the 'horse's mouth' argument is persuasive: who is a more reliable provider of government information than the government itself?²⁹⁴

In this twenty-first century when information and communications technology has revolutionised every aspect of publishing, websites are now indispensable to the provision of free and adequate access to all categories of information, including public legal information.²⁹⁵ However, the unregulated nature of the World Wide Web poses a real problem of the existence of unreliable information, as Catapano rightly stated:

The Internet poses some special problems for the researcher. Unlike material in scholarly books and journals that must be carefully reviewed by scholars in the field before it is published, the Internet is relatively unregulated. The researcher must take even more care in evaluating the reliability of Internet sources.²⁹⁶

Catapano suggested using the official source of any online information as a solution to the problem of unreliable online resources (i.e. visiting the official

²⁹⁴ Thomas R Bruce, 'Tears Shed Over Peer Gynt's Onion: Some Thoughts on the Constitution of Public Legal Information Providers' (2000) 2 *The Journal of Information, Law and Technology* <https://warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/bruce/> accessed 7 April 2019.

²⁹⁵ Section 1 above.

²⁹⁶ Peter Catapano, 'Primary and Secondary Sources: A Special Core Course Guide' (*University of California, Irvine*) <<https://eee.uci.edu/faculty/losh/research/S1.html>> accessed 7 April 2019.

website of the organisation that published the information), and if it is public information, the proper approach is to confirm that the website is ‘the official source for government documents’.²⁹⁷

A 2016 study confirmed the importance of official websites in the quest for reliable online information: ‘There was a general sense [from responses from the participants in the survey] that official sources provided more trustworthy, accurate, and reliable information.’²⁹⁸

As the solution to the problem of the existence of unreliable online information points to the use of official sources, the pertinent question is how easy identification of official public legal information websites can be achieved to enable users worldwide to avoid unreliable third-party websites. Kilpatrick,²⁹⁹ referring to general legal information, rightly noted that ‘[i]t can be difficult to determine if online legal information is credible or reliable if you do not [have] a background in the law.’³⁰⁰ Kilpatrick’s assertion is significant because *all* persons—not only those with a background in law—need free online access to all laws and all the categories of public legal information to be able to know the law that governs their conduct and activities, as ignorance of the law is no excuse for its violation.

The Internet Corporation for Assigned Names and Numbers (ICANN), which is the world’s body responsible for the operation of the Domain Name System (DNS) that determines the online addresses of websites, introduced its revolutionary New gTLD Program in 2012³⁰¹ to ‘to enhance competition, innovation and consumer

²⁹⁷ Ibid

²⁹⁸ Alyson L Young and others, ‘Evaluating the Credibility of English Web Sources as a Foreign-Language Searcher’ (2016) 53(1) Proceedings of the Association for Information Science and Technology 1, 6 <<https://doi.org/10.1002/pra2.2016.14505301042>> accessed 7 April 2019.

²⁹⁹ Reference Librarian at the Law Society of Saskatchewan Library, Canada.

³⁰⁰ Alan Kilpatrick, The Saskatchewan Access to Legal Information Project (SALI) (*Law Society of Saskatchewan Library*, 25 May 2017) <<https://lsslib.wordpress.com/2017/05/25/the-saskatchewan-access-to-legal-information-project-sali/>> accessed 8 April 2019.

³⁰¹ Internet Corporation for Assigned Names and Numbers, ‘New gTLD: Fast Facts’ (*Internet Corporation for Assigned Names and Numbers*) <<http://newgtlds.icann.org/en/about/program/materials/fast-facts-26jan15-en.pdf>> accessed 12 September 2017.

choice.³⁰² One aspect of the Program's 'consumer choice' objective is to help online users to identify websites that contain reliable information on what they are looking for, by simply observing any website's *domain name*. For example, any website with <.organic> gTLD (generic top-level domain) or domain extension, e.g. *www.example.organic*, has been approved by the proper regulatory organisation as a website that contains reliable, truly *organic* products and reliable information on such products. That means websites with the <.organic> domain extension are official sources of information on truly organic products.

Online users are becoming increasingly aware of the need to look for gTLDs that show or identify websites with official and reliable products and information. For example, the said 2016 survey found as follows:

There was a general sense that official sources provided more trustworthy, accurate, and reliable information. One of the ways they determined this was by examining the *domain extension*; they deemed websites with .edu [for approved educational institutions], .gov [for governments], and .org³⁰³ to be more credible.³⁰⁴

For public legal information, if there is the appropriate regulated public legal information gTLD, it can be used as a technological mechanism that can help all users of the World Wide Web to easily identify official websites that are the official sources of public legal information, as such official websites enjoy the presumption of the reliability of their resources and users tend to prefer them.

4.3.5 The Concept of Findability

Findability, which is a core component of information architecture, is a general concept that applies to finding and locating anything of interest, but its discussion in this thesis is confined to online public legal information.

³⁰² Ibid

³⁰³ Footnote added. However, the <.org> gTLD can be registered and used by any person or any organisation without any restriction. Therefore, it is not a reliable indication of any official source of online information.

³⁰⁴ Alyson L Young and others, 'Evaluating the Credibility of English Web Sources as a Foreign-Language Searcher' (2016) 53(1) Proceedings of the Association for Information Science and Technology 1, 6 <<https://doi.org/10.1002/pr2.2016.14505301042>> accessed 7 April 2019.

Morville, the cerebral author, defines ‘findability’ as the ‘quality of being locatable or navigable’, the ‘degree to which a particular object is easy to discover or locate’, and the ‘degree to which a system or environment supports navigation and retrieval’.³⁰⁵ According to Gotz, ‘The concept of findability . . . encompasses how you’ll find an item in a system. It includes browsing to an item, finding a shortcut to it, or using full-text search.’³⁰⁶

The whole wide world (www) now depends on the World Wide Web (WWW) for information on every aspect of life, which is why Internet search engines (ISEs) are among the most-used daily technological tools. It is also the reason Google (its parent company now called Alphabet), which is the world’s preeminent ISE, is today one of the best known and most valuable companies in the world,³⁰⁷ and ‘google’ has become an English word (a verb) associated with performing online search.³⁰⁸

The Information Architecture Institute defines ‘information architecture’ broadly as ‘the practice of deciding how to arrange the parts of something to be understandable.’³⁰⁹ According to Morville who is ‘widely recognized as a founding father of information architecture’,³¹⁰ information architecture involves ‘the art and science [of organising] websites so people can find what they are looking for’.³¹¹ Morville identifies the seven qualities of websites, which information

³⁰⁵ Peter Morville, *Ambient Findability: What We Find Changes Who We Become* (O’Reilly Media 2005) 4.

³⁰⁶ Ruven Gotz, *Practical SharePoint 2010 Information Architecture* (Apress 2012) 54.

³⁰⁷ Forbes, ‘The World’s Largest Public Companies’ (*Forbes*, 2019) <www.forbes.com/global2000/list/> accessed 29 May 2019; ‘Global 500 2019’ (*Brand Finance*, 2019) <<https://brandirectory.com/rankings/global-500-2019>> accessed 29 May 2019.

³⁰⁸ ‘google’ (*Oxford Dictionaries*, Oxford University Press) <<https://en.oxforddictionaries.com/definition/google>> accessed 29 May 2019; ‘google’ (*Vocabulary.Com Dictionary*) <www.vocabulary.com/dictionary/google> accessed 29 May 2019.

³⁰⁹ Information Architecture Institute, ‘What is Information Architecture?’ (*Information Architecture Institute*) <<https://www.ia institute.org/what-is-ia>> accessed 1 August 2019.

³¹⁰ Association for Information Science and Technology, ‘IA Summit 2009: March 18-22, 2009, Memphis, Tennessee’ (*Association for Information Science and Technology*) <www.asis.org/Conferences/IA09/seminars/Wed_IA_3.html> accessed 9 April 2019.

³¹¹ Peter Morville and Paula Sullenger, ‘Ambient Findability: Libraries, Serials, and the Internet of Things’ (2010) 58(1-4) *The Serials Librarian* 33, 33 <www.tandfonline.com/doi/pdf/10.1080/03615261003622999> accessed 9 April 2019.

architects should consider, as usability, usefulness, desirability, findability, accessibility, credibility, and valuableness.³¹²

There are two general methods of finding information of interest on the Web. First, by typing the address of a known website (e.g. www.publiclegalinformation.com), referred to as its URL (Uniform Resource Locator), in the Web browser's address bar to access that particular website. Second, by searching the entire Web with an Internet search engine, using the relevant keywords (e.g. 'public legal information') and keyphrases (e.g. 'public legal information is a human right'). Kopackova, Michalek, and Cejna rightly stated these methods as follows: 'To find something on the Internet, someone must either know the *exact URL address*, which is sometimes too complicated, or the right keywords for *searching*.'³¹³ Executing a proper and efficient Web search is not easy, as it requires good information literacy skills,³¹⁴ which explains why most online users are unable to perform such proper and efficient search.³¹⁵ Links on websites (hyperlinks) provide shortcut to onsite (internal) and offsite (external) online resources.

Why is findability of online information important? The reason is that the Web is a gigantic virtual or digital world that contains more than one billion websites³¹⁶ and incalculable pieces of available information.³¹⁷ Such staggering statistics

³¹² Ibid 34–35.

³¹³ Hana Kopackova, Karel Michalek and Karel Cejna, 'Accessibility and Findability of Local e-Government Websites in the Czech Republic' (2010) 9:1 Universal Access in the Information Society 51, 53 <<http://link.springer.com/article/10.1007/s10209-009-0159-y>> accessed 12 September 2017 (emphasis added).

³¹⁴ See, for example, Hannes Weber, Dominik Becker and Steffen Hillmert, 'Information-Seeking Behaviour and Academic Success in Higher Education: Which Search Strategies Matter for Grade Differences among University Students and how does this Relevance Differ by Field of Study?' (2019) 77(4) Higher Education 657–678 <<https://doi.org/10.1007/s10734-018-0296-4>> accessed 11 April 2019.

³¹⁵ Graham Greenleaf, Philip Chung and Andrew Mowbray, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies 2002–2005' (2007) 4(4) SCRIPT-ed 319, 361 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 16 May 2018.

³¹⁶ Netcraft, 'April 2019 Web Server Survey' (Netcraft, 22 April 2019) <<https://news.netcraft.com/archives/category/web-server-survey/>> accessed 2 May 2019.

³¹⁷ See, for example, Gareth Mitchell, 'How Much Data is on the Internet?' (*BBC Science Focus Magazine*) <www.sciencefocus.com/future-technology/how-much-data-is-on-the-internet/> accessed 9 April 2019.

reveal global online information overload that overwhelms the people who are looking for items of interest. In such a situation, looking for any particular piece of information on the Web is like literally ‘looking for a needle in the haystack’.

The volume of public legal information is arguably the largest among all the categories of public information, as available statistics suggest (some of which are presented below), as new laws and regulations are made, courts deliver new decisions, and law-related policies are produced every day. Its volume is so overwhelming that lawyers started bothering about it a long time ago. For instance, in his article published a hundred years ago, Shenton wrote:

A [well-known] publishing company sells the [legal] profession a sixty thousand page encyclopedia, citing 2,800,000 cases, the last volume being completed in 1912. Two huge volumes of annotations, citing 933,753 new cases, are added, and in 1916 half a dozen volumes of a still more comprehensive exposition have passed through the presses . . .³¹⁸

Today, the trend has not changed; instead, the volume of public legal information is ever-increasing, worldwide.³¹⁹ Lord Justice Toulson, in his reasons for inadequate access to the UK public legal information that had caused ignorance of a repealed law which led to *per incuriam* decisions of the England and Wales Court of Appeal over a period of about seven years, said in *Regina v Chambers*:

[T]he volume of legislation has increased very greatly over the last 40 years. . . . In 2005 there were 2868 pages of new Public General Acts and approximately 13,000 pages of new Statutory Instruments, making a total well in excess of 15,000 pages (which is equivalent to over 300 pages a week) excluding European Directives and European Regulations, which were responsible for over 5,000 additional pages of legislation.³²⁰

³¹⁸ Clarence G Shenton, ‘Common-Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence’ (1918) 23(2) Dickinson Law Review 37, 39–40.

³¹⁹ Ambedkar Kanapala, Sukomal Pal and Rajendra Pamula, ‘Text Summarization from Legal Documents: A Survey’ (2017) Artificial Intelligence Review, 1, 1–2 <<https://doi.org/10.1007/s10462-017-9566-2>> accessed 12 April 2018.

³²⁰ *Regina v Chambers* [2008] EWCA (Crim) 2467, para 66 (England) <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html>> accessed 16 July 2019.

The ever-increasing volume of public legal information is overwhelming, indeed. The concept of free access to public legal information via websites, which began in 1992, has spread across the world, leading to the creation of such websites by the executive, the judiciary, and the legislatures at all levels of government. Previous research has revealed the possibility of these websites existing independent of each other, thereby creating the obvious problem of finding them and accessing their resources. For example, Greenleaf, Chung and Mowbray (notable members of the Free Access to Law Movement and world-renowned experts in legal information systems) remarked as follows:

After ten years of free access to law on the Internet, what we mainly find is a multiplicity of ‘silos’ of what are usually small parts of national law, with no means of linking them into a comprehensive research facility. The problem is of course exacerbated if you need to find the law from more than one country or jurisdiction.³²¹

A study by Greenleaf and others confirmed the existence of this problem in India: ‘[I]nformation on legislation and judicial decisions is scattered and often buried in a maze of websites run by ministries at central, state and territory levels.’³²²

As the problem of multiplicity of unconnected public legal information websites involves all such websites in any country, its solution is beyond the use of the general methods of finding online information, earlier mentioned in this Section. Additionally, it is also beyond the application of findability best practices in the design of individual websites, suggested in Morville’s seminal book, for instance.³²³ Therefore, it is necessary to find the effective solution to this problem. The process of finding that solution should include an investigation of the extent of the problem, using direct virtual observation of the public legal information

³²¹ Graham Greenleaf, Philip Chung and Andrew Mowbray, ‘Emerging Global Networks for Free Access to Law: WorldLII’s Strategies 2002–2005’ (2007) 4(4) SCRIPT-ed 319, 323 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 16 May 2018.

³²² Graham Greenleaf and others, ‘Challenges for Free Access to Law in a Multi-Jurisdictional Developing Country: Building the Legal Information Institute of India’ (2011) 8(3) SCRIPTed 292, 296 <<https://script-ed.org/wp-content/uploads/2011/12/greenleaf.pdf>> accessed 11 April 2019.

³²³ Peter Morville, *Ambient Findability: What We Find Changes Who We Become* (O’Reilly Media 2005).

websites of as many countries as possible. Further, as the problem involves technology, its investigation and solution specifically require the interdisciplinary approach.

In addition to the relevant literature in the theoretical framework and the concepts discussed in this Section, it is necessary to review the specific literature on the right of free access to public legal information (with specific focus on its status as a human right) which is the main theme of this thesis. The review is presented in Section 5 below.

5. Review of the Literature on the Right of Free Access to Public Legal Information as a Human Right

The main theme of this study borders on the denial of the existing right of free access to public legal information, which manifests in inadequate and, in some cases, extremely poor public access globally. The issue of the status of that right and its effectuality are therefore crucial aspects of the inquiry. Therefore, a review of the specific literature on its status *as a human right*, which is the main thrust of this thesis (as expressed in the title of the thesis, the aim of the study, the central research question, and research sub-question 1) is what is relevant here. Its status as a legal right is already well-established under the rule of law and in existing literature.

This review examines the existing literature chronologically (beginning with the earliest known works) instead of thematically. As the existing works are few, they are first presented to show the exact scope of the discussion of the right by each of them, after which they are all critically reviewed together to reveal the gaps in them. A chronological literature review³²⁴ has the advantage of easily revealing any progressive or historical development of the subject.

³²⁴ For a chronological literature review, see, for example, Kimberley D Edwards, 'Prospect Theory: A Literature Review' (1996) 5(1) *International Review of Financial Analysis* 19–38 <[https://doi.org/10.1016/S1057-5219\(96\)90004-6](https://doi.org/10.1016/S1057-5219(96)90004-6)> accessed 15 April 2019; Shaynah Neshama Bannister and others, 'Clients' Expectations and Preferences for Marital Christian Counseling: A Chronological Literature Review and a Contemporary Evaluation' (2015) 42(1) *Social Work &*

It is surprising that, despite the abundance of literature and consensus on the existence of the legal right of free access to public legal information, literature on its status as a human right is not only few but also has a recent (twenty-first century) origin of less than two decades ago. Rice shared a similar thought when he stated: ‘A call for access to legal information is not new but, surprisingly perhaps, it has rarely been framed in human rights terms.’³²⁵

The right of free access to public legal information has different appellations, which include the ‘right of public access to legal information’ (also used in this thesis³²⁶); the ‘right of access to legal information’; the ‘right of access to law’; and even the ‘right of access to justice’. I argue in this thesis that the ‘right of free access to public legal information’ is the most explicit description of the right.³²⁷

The term ‘human rights’ has many different definitions. However, as Shelton rightly states, it generally refers to the ‘rights that all human beings have simply because they are human beings, independent of the infinite variety of individual characteristics and social circumstances.’³²⁸ A similar thought is expressed in the following definition by the United Nations: ‘Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.’³²⁹ The Inter-Parliamentary Union and the United Nations (UN Office of the High Commissioner for Human Rights) emphasised the critical importance of *human dignity* to the universal concept of human rights in the

Christianity 63–91 <www.nacsw.org/RC/49993957.pdf> accessed 16 April 2019; Soniya Lalwani and others, ‘A Survey on Parallel Particle Swarm Optimization Algorithms’ (2019) 44(4) Arabian Journal for Science and Engineering 2899–2923 <<https://doi.org/10.1007/s13369-018-03713-6>> accessed 16 April 2019.

³²⁵ Simon Rice, ‘Examining a “Right of Access to Law”’ (13 November 2017) Sydney Law School Legal Studies Research Paper No 17/93 <<https://dx.doi.org/10.2139/ssrn.3072054>> accessed 18 April 2019. Note that this is a *draft* paper dated 13 November 2017, posted on the Social Science Research Network (SSRN) website *after* the *German Law Journal* had published my first article on the subject.

³²⁶ In Chapter Two, Chapter Three, and Chapter Four that were published between 2017 and 2018 before the remaining chapters were written.

³²⁷ Section 3.2 above.

³²⁸ Dinah L Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar Publishing 2014) 1.

³²⁹ United Nations, ‘Human Rights’ (*United Nations*) <<https://www.un.org/en/sections/issues-depth/human-rights/>> accessed 11 July 2019.

definition in their 2016 co-published handbook: ‘Human rights are rights that every human being has by virtue of his or her human dignity.’³³⁰

It is significant that the word ‘dignity’ (in the context of human dignity or the dignity of the human person) occurs not less than 46 times in the Universal Declaration of Human Rights (UDHR), the nine core international human rights treaties and their optional protocols, put together. That magnitude of its frequency of occurrence reveals the importance of human dignity to the universal concept of human rights. The UDHR, in its preamble, identifies human dignity as part of the bedrock of human rights by stating that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. The preambles to the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) specifically state that ‘[human] rights derive from the inherent dignity of the human person’. The UN Charter, in its preamble, also affirms the indispensability of the concept of human dignity.

That criterion of human dignity has, from its origin in the UDHR, maintained its abiding, pervasive influence in international human rights law and discourse. Carozza rightly stated this trend thus: ‘As an affirmation of the equal moral value of all human beings, the idea of human dignity has emerged as the single most widely recognized and frequently invoked basis for grounding the idea of human rights generally, since the mid-twentieth century.’³³¹ Further, HelpAge International upheld the criterion of human dignity as a determinant factor for human rights intervention: ‘Human rights are intended to formally define the

³³⁰ Inter-Parliamentary Union and the UN Office of the High Commissioner for Human Rights, *Human Rights* (Inter-Parliamentary Union 2016) 19 <<https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf>> accessed 22 July 2019.

³³¹ Paolo G Carozza, ‘Human Dignity’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 346, 347 <<https://www.oxfordhandbooks.com/view/10.1093/law/9780199640133.001.0001/law-9780199640133-e-15>> accessed 11 July 2019.

thresholds that identify situations in which human dignity is threatened or violated.³³²

For the specific purpose of this thesis, a *functional definition* of the term ‘human rights’ could emerge from the broad, general, or mainstream definitions highlighted above. The reason for the functional definition is that, from the title of the thesis, it may require investigating the possibility of a proposal for a new human right in the event that there is a significant normative gap in the existing international legal framework for the right of free access to public legal information. In this context, therefore, I define human rights as the uniquely exalted category of legal rights that the international community has the collective obligation to protect, promote, and actualise, because they are so fundamentally interwoven with the existence, dignity, freedom, and holistic wellbeing of human beings that their violation, denial, or deprivation causes such grave injustices and consequences that the world cannot overlook. This definition includes the criterion of human dignity, reveals the basic nature of human rights, how human rights function or operate in the contemporary world, and the importance of their formal universal recognition whenever there is the genuine need for the global protection, promotion, and actualisation of any legal right whose status deserves elevation to that of human rights.

Available literature³³³—examined throughout the long years of this thesis—traces the first discussion of the right of free access to public legal information as a human right to Jamar in his 2001 article.³³⁴ According to Jamar, ‘[r]eady access to

³³² HelpAge International, ‘International Human Rights Law and Older People: Gaps, Fragments and Loopholes’ (*United Nations Department of Economic and Social Affairs*, 2012) 2 <<https://social.un.org/ageing-working-group/documents/GapsinprotectionofolderpeoplesrightsAugust2012.pdf>> accessed 11 July 2019.

³³³ See, for example, Simon Rice, ‘Examining a “Right of Access to Law”’ (13 November 2017) Sydney Law School Legal Studies Research Paper No. 17/93 <<https://dx.doi.org/10.2139/ssrn.3072054>> accessed 18 April 2019; Laurens Mommers, ‘Access to Law in Europe’ in Simone van der Hof and Marga M Groothuis (eds), *Innovating Government: Normative, Policy and Technological Dimensions of Modern Government* (TMC Asser Press 2011) 383, 395 <<https://link.springer.com/content/pdf/10.1007%2F978-90-6704-731-9.pdf>> accessed 16 April 2019.

³³⁴ Steven D Jamar, ‘The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law’ 2001 1(2) *Global Jurist Topics* 1, 6 <<https://doi.org/10.2202/1535-167X.1032>> accessed 15 April 2018.

the law is a human right.’ He noted that although no treaty expressly stated so, the right *derives* from three sources. First, explicitly from ‘core international human rights documents’, including Article 19 of the ICCPR;³³⁵ claiming that regional treaties replicate the said provisions, and that State laws on access to public documents also support the right.³³⁶ Second, ‘at least arguably from the recently adopted custom of an increasing number of nations.’³³⁷ Third, implicitly from provisions in the ICESCR on criminal procedure, e.g. arrest; equality before tribunals; and privacy.³³⁸

In 2010, Mommers set out to ‘discuss several existing rights that might be supportive in construing a right of access to legal information, or even a right of accessibility of legal information, and two rights that might hinder such a right, or its exercise.’³³⁹ According to him, the supportive rights are from the principle of legality, freedom of speech, right of access to justice, and transparency of government. After discussing those rights, he examined privacy and copyright that he claimed are the ‘two rights [that] might have the power to limit that right of access.’³⁴⁰ Mommers could not find even ‘one decisive basic right which implies [the] existence’ of the right of free access to public legal information, but he claimed that ‘an epistemic interpretation of the legality criterion provides strong support’ for such a right. He concluded by giving ‘a careful “yes”’ as his answer to his research question on whether ‘a right of access to legal information [can] be

³³⁵ That is, the right to freedom of opinion and expression as a right of access to information under Article 19 of the UDHR and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

³³⁶ Steven D Jamar, ‘The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law’ (2001) 1 Global Jurist Topics Number 2 Article 6 7 <www.degruyter.com/downloadpdf/j/gj.2001.1.2/gj.2001.1.2.1032/gj.2001.1.2.1032.pdf> accessed 12 September 2017.

³³⁷ Ibid 6.

³³⁸ Ibid 7.

³³⁹ Laurens Mommers, ‘Access to Law in Europe’ in Simone van der Hof and Marga M Groothuis (eds), *Innovating Government: Normative, Policy and Technological Dimensions of Modern Government* (TMC Asser Press 2011) 383, 392 <<https://link.springer.com/content/pdf/10.1007%2F978-90-6704-731-9.pdf>> accessed 16 April 2019.

³⁴⁰ Ibid 394.

construed from the current legislative framework applicable to legal information?’³⁴¹

In his 2012 article that ‘focuse[d] on the importance of free and open access to legal scholarship and commentary on the law’,³⁴² Danner identified the UDHR, ICESCR, and ICCPR as ‘the possible bases for a rights-based access argument.’ He noted that the Montreal Declaration on Free Access to Law 2002, the Budapest Open Access Initiative 2002, the Bethesda Statement on Open Access Publishing 2003, and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities 2003 neither ‘argue[d] for a right of open access to information’ nor discussed the said possible bases.³⁴³

Milbrandt and Reinhardt (2012) argued that ‘access to law is a fundamental subset of the emerging fundamental human right of access to information’ and that the lack of access to law is a clear violation of human rights.³⁴⁴ Like Jamar, they based the human right-derivative status of the right from its parent human right of freedom of expression in Article 19 of the ICCPR. They stated that Article 8 of the UDHR ‘indicates that access to law is at least an ancillary human right’ and that ‘perhaps *the most fundamental human right* is one’s right to know and access all the other rights guaranteed to her as a human being.’³⁴⁵ Further, they contended that, from the right of every accused person to ‘adequate time and facilities for the preparation of his defence’ in Article 14 of the ICCPR, ‘access to law as a stand-alone fundamental human right is directly implicated.’³⁴⁶ They concluded by recommending that ‘the global legal community must acknowledge and address access to law as a basic human right, fundamental to even the most basic human rights including due process.’³⁴⁷

³⁴¹ Ibid 395.

³⁴² Richard A Danner, ‘Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue’ (2012) 7(1) Journal of International Commercial Law and Technology 65, 65 <www.jiclt.com/index.php/jiclt/article/view/148/146> accessed 17 April 2018. His discussion is on pages 65–67.

³⁴³ Ibid 66.

³⁴⁴ Jay Milbrandt and Mark Reinhardt, ‘Access Denied: Does Inaccessible Law Violate Human Rights’ (2012) 9 Regent Journal of International Law 55, 57.

³⁴⁵ Ibid 59 (emphasis added).

³⁴⁶ Ibid 60.

³⁴⁷ Ibid 73.

In addition to the foregoing literature, there are supporting *statements* that the right of free access to public legal information is indeed a human right. Those statements are not accompanied with any discussion that could warrant a review, as they are either independent or an adoption of another author's positive claim that it is a human right. For example, Jones and Ilako (2015), in their article that discussed 'US and Ugandan perspectives on legal information as a human right', considered 'access to legal information as a fundamental human right', based on Danner's work.³⁴⁸ Hellum and Taj (2016) stated: 'Equal access to law and the right to legal information is a human right that, in principle, applies to all individuals regardless of time and place.'³⁴⁹ The IFLA Statement on Government Provision of Public Legal Information in the Digital Age (2016) declared: 'The freedom to seek and receive information is recognized as a basic human right by Article 19 of the UN Universal Declaration of Human Rights. This right of access to information is particularly important in regard to public legal information.'³⁵⁰

The foregoing literature has laid the foundation of the claim that the right of free access to public legal information is a human right, albeit with a mixture of unequivocal conviction (Jamar and Milbrandt and Reinhardt), passive assertion (Danner), and outright pessimism (Mommers). However, even the unequivocal claim for the human-right status of the right does not appear to be robust enough to withstand the stiff opposition against *human rights inflation*.³⁵¹ Rice specifically identified such deficiency in Jamar's work.³⁵² For instance, Jamar dwelt on the assertion of the derivative status of the right, without arguments on why it should

³⁴⁸ Yolanda Jones and Caroline Ilako, 'Dynamic Law Libraries: Access, Development and Transformation in Africa and the United States' (IFLA World Library and Information Congress, Cape Town, South Africa, August 2015) <<http://library.ifla.org/1120/1/114-jones-en.pdf>> accessed 18 April 2019.

³⁴⁹ Anne Hellum and Farhat Taj, 'Taking What Law Where and To Whom? Legal Literacy as Transcultural "Law-Making" in Oslo' in Hellum A, Ali SS and Griffiths A (eds), *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads* (Routledge 2016) 93.

³⁵⁰ IFLA Statement on Government Provision of Public Legal Information in the Digital Age 2016 (International Federation of Library Associations 13 December 2016) <www.ifla.org/publications/node/11064> accessed 7 July 2019.

³⁵¹ Section 7.2.3 below.

³⁵² Simon Rice, 'Examining a "Right of Access to Law"' (13 November 2017) Sydney Law School Legal Studies Research Paper No. 17/93 <<https://dx.doi.org/10.2139/ssrn.3072054>> accessed 18 April 2019.

be recognised as a human right. Milbrandt and Reinhardt, whose arguments are more detailed than those of the other scholars, concentrated on the effects of inaccessibility of the law, including the fact that it violates human rights.

There is therefore the need to use the existing claim for the existence of the right of free access to public legal information as a human right as part of a proper claim that is comprehensive and based on weightier, more convincing, and multipronged arguments.

Further, it should be stressed that even a successful claim that the right of free access to public legal information is a human right, *without more*, is insufficient to meet the ultimate objective of such academic enterprise—its optimal relevance to the society. Therein lies the importance of a proper proposal as the basis for the global advocacy for the universal recognition of the right of free access to public legal information as a stand-alone or substantive human right. No such proposal was found in any literature during the long years of this research.

A proper proposal should include scholarly discussion that contains weighty and substantial arguments that support its recognition as a human right, reveals the inadequacy of the existing legal framework, and demonstrates that the right has the potential for international consensus. Additionally, it should demonstrate that the right accords with the general practice of States and that the rights and obligations it creates are distinct and identifiable. It should also contain the discussion of how it relates to other human rights and to the relevant constitutional principles. Finally, the proposal should demonstrate expert knowledge of the subject by providing the essential principles and standards that should form the contents of the appropriate international human rights instrument for its protection, promotion, and actualisation. That is the reason Milbrandt and Reinhardt rightly recommended in their 2012 article: '[T]he global legal community should set standards for what meets the modern criteria for access to law.'³⁵³

As a postscript, there may be greater enthusiasm in the discussion of the right of free access to public legal information as a human right, after the 2016 article³⁵⁴

³⁵³ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 *Regent Journal of International Law* 55, 73.

³⁵⁴ Email from author to the *German Law Journal* (19 July 2016).

that forms Chapter Two of this thesis, *The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right*, which the *German Law Journal* published on 1 November 2017.³⁵⁵

The known example of such development is Rice's *draft* paper dated 13 November 2017, posted on the Social Science Research Network (SSRN) website on 17 November 2017.³⁵⁶ Rice's discussion contains more relevant issues on the right of free access to public legal information, unlike those of Jamar, Milbrandt and Reinhardt, Danner, and Mommers. For example, Rice discussed the important issue of rights inflation and rightly pointed out that any 'case for a "new" human right needs to be argued for rigorously, and cannot [be] made by mere assertion of [...] what may be a desirable position.'³⁵⁷ He noted that 'Jamar is one who has called for access to legal information in human rights terms, but not persuasively' because Jamar's work does not contain the required rigorous argument. He went on to examine the normative content of right of access to law, the scope of a right of access to law, the obligations on the State, the realisation of the right, and the importance of human dignity as an underlying consideration. Rice also discussed the procedural aspect of the right of access to law. He rightly argued that the right of access to law is a right to know the law and that the right is beyond the ad hoc nature of a right of access to information under the regime of freedom of information that deals with requests for access to government-held information. He concluded that the right of access to law is a substantive right that 'must be conceptualised as a free standing right.'³⁵⁸ The significance of Rice's *draft* paper, which he *posted* online after the *German Law Journal's* publication of my article on the same subject, is that it contributes to the discussion on the emerging right of free access to public legal information as a stand-alone or substantive human right, which is the main theme of this thesis.

³⁵⁵ Leesi Ebenezer Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right' (2017) 18(6) *German Law Journal* 429–1496 (68 pages) <<https://doi.org/10.1017/S2071832200022392>> accessed 14 April 2019 (available with free or open access on the Cambridge University Press website).

³⁵⁶ Simon Rice, 'Examining a "Right of Access to Law"' (13 November 2017) Sydney Law School Legal Studies Research Paper No 17/93 <<https://dx.doi.org/10.2139/ssrn.3072054>> accessed 18 April 2019

³⁵⁷ *Ibid*

³⁵⁸ *Ibid*

From the foregoing review, existing literature clearly points to the existence of the right of free access to public legal information as a human right. However, it is necessary to further examine different aspects of its human-right status in the light of the gaps in the literature highlighted above.

Based on the background to this thesis,³⁵⁹ the statement of the problem,³⁶⁰ the discussion of the primary cause of the problem,³⁶¹ the relevant literature in the theoretical framework and the concepts that underpin the varied but intertwined subjects of this research,³⁶² and this review, the overall aim of the study and the research questions that should guide the discussion of the methodology and all the other aspects of this thesis are formulated in Section 6 below.

6. Aim of the Study and the Research Questions

6.1 Aim of the Study

The enormity of the persistent global problem of inadequate access to public legal information³⁶³ demands an urgent effective solution, as the efforts to solve it have been ineffectual. The benefits of such solution are immense. For instance, it will protect the right of free access to public legal information by enhancing global access to all categories of public legal information and promote the omnibus human right of access to justice. Further, it will remedy the injustice from the application of the *ignorantia juris* doctrine and facilitate sustainable development in line with the public access to information target of Goal 16.10 of the UN 2030 Agenda for Sustainable Development,³⁶⁴ etc.

It is pertinent to note that any quest for the solution to the same problem, which continually uses the same proven ineffectual method, approach, or strategy, is

³⁵⁹ Section 1 above.

³⁶⁰ Section 2.1 above.

³⁶¹ Section 2.2 above.

³⁶² Section 4 above.

³⁶³ Discussed in Section 2.1 above.

³⁶⁴ UNGA Res 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1 <<https://undocs.org/A/RES/70/1>> accessed 6 May 2019.

imprudent, and it is usually unsuccessful. Deviating from the status quo and ‘thinking out of the box’ produces innovation or creativity³⁶⁵ that is a timeless problem-solving strategy. The author considers thinking out of the box to be a metaphorical expression which simply means thinking in a different way that defies the status quo, which may appear to some people as unconventional or unorthodox.³⁶⁶

Thinking out of the box ‘requires passion for discovery, intellectual challenge and restatement of the solution strategy for research problems.’³⁶⁷ It has been acclaimed as a good research attitude because ‘[s]ometimes, for a researcher, perceived barriers may prevent him from discovering a solution. He might need to [break through] barriers to find an output.’³⁶⁸ And as Nolan Bushnell’s quote—which is this Chapter’s epigraph—rightly reveals, people may not find innovative solutions appealing, from the beginning, simply because ‘[t]hey were too new.’³⁶⁹

The proper solution to the persistent global problem of inadequate access to public legal information should be such that can invoke all the available coercive powers of international human rights law to create and enforce the international obligations of governments to provide adequate access to their laws and all the other categories of their public legal information. The need for that approach is based on several reasons which include the global nature of the problem, the

³⁶⁵ Samantha Stone-Jovicich and others, ‘Expanding the Contribution of the Social Sciences to Social-Ecological Resilience Research’ (2018) 23(1) *Ecology and Society* Article 41 <<https://doi.org/10.5751/ES-10008-230141>> accessed 17 May 2018.

³⁶⁶ Kinaz Al Aytouni and Kinan M Naddeh, ‘Thinking Out of the Box: Non-Typical Research Methods in Business’ in Jorge Marx Gómez and Sulaiman Mouselli (eds), *Modernizing the Academic Teaching and Research Environment Methodologies and Cases in Business Research* (Springer 2018) 127, 127 <<https://link.springer.com/content/pdf/10.1007/978-3-319-74173-4.pdf>> accessed 17 May 2018.

³⁶⁷ Ibid 128.

³⁶⁸ Ibid

³⁶⁹ Indiana University Southeast, ‘Father of the Video Game Industry, Founder of Chuck E. Cheese Coming to IU Southeast’ (*Indiana University Southeast*, 1 November 2017) <<https://now.ius.edu/2017/11/father-of-the-video-game-industry-founder-of-chuck-e-cheese-coming-to-iu-southeast/>> accessed 23 June 2019. See Carol J Steiner, ‘A Philosophy for Innovation: The Role of Unconventional Individuals in Innovation Success’ (1995) 12(5) *Journal of Product Innovation Management* 431–440 <<https://doi.org/10.1111/1540-5885.1250431>> and <[https://doi.org/10.1016/0737-6782\(95\)00058-5](https://doi.org/10.1016/0737-6782(95)00058-5)> accessed 18 May 2018.

identification of the lack of the political will of governments as its primary cause, the sovereignty of each State in international law, the fact that people have the right to know the law they are bound to obey, and because the application of the *ignorantia juris* doctrine causes serious injustice worldwide.

The available coercive powers of international human rights law include the conventional and charter-based human rights protection mechanisms of the United Nations;³⁷⁰ sanctions;³⁷¹ enforcement by courts of human rights;³⁷² shaming;³⁷³ global human rights advocacy that has become a powerful tool to influence political will worldwide;³⁷⁴ and enforcement by national courts of States

³⁷⁰ United Nations, 'Protect Human Rights' (*United Nations*) <<https://www.un.org/en/sections/what-we-do/protect-human-rights/>> accessed 2 August 2019; UN Office of the High Commissioner for Human Rights, 'Human Rights Bodies' (*UN Office of the High Commissioner for Human Rights*) <<https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>> accessed 2 August 2019; Takhmina Karimova, Gilles Giacca and Stuart Casey-Maslen, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict* (Geneva Academy of International Humanitarian Law and Human Rights 2014) 27–34 <<https://www.geneva-academy.ch/joomlatools-files/docman-files/Protection%20of%20Education%20in%20Armed%20Conflict.pdf>> accessed 2 August 2019.

³⁷¹ United Nations, 'UN Sanctions: What They are, How They Work, and Who Uses Them' (*UN News Centre*, 4 May 2016) <www.un.org/apps/news/story.asp?NewsID=53850#.V13VY1QrLIV> accessed 2 August 2019.

³⁷² For example, the Inter-American Court of Human Rights ordered the State of Chile to provide access to the public information the aggrieved citizens had requested and to take the necessary measures to enact laws to protect the right of access to public information pursuant to Article 13 of the American Convention on Human Rights. Chile complied with both orders. See *Claude Reyes v Chile*, Order of the Inter-American Court of Human Rights, 2 May 2008 (Monitoring Compliance with Judgment) <http://www.worldcourts.com/iacthr/eng/decisions/2008.05.02_Claude_Reyes_v_Chile.pdf> accessed 19 July 2019. See also Pammela Quinn Saunders, 'The Integrated Enforcement of Human Rights' (2012) 45(1) *New York University Journal of International Law and Politics* 97, 99 <<http://nyujilp.org/wp-content/uploads/2013/04/45.1-Saunders.pdf>> accessed 2 August 2019.

³⁷³ Erika George, 'Instructions in Inequality: Development, Human Rights, Capabilities, and Gender Violence in School' (2005) 26(4) *Michigan Journal of International Law* 1139, 1174 <<http://repository.law.umich.edu/mjil/vol26/iss4/4>> accessed 25 April 2019.

³⁷⁴ *Ibid.* See also Damilola S Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press 2016) 180.

Parties.³⁷⁵ However, there is the need for better human rights enforcement for the proper protection, promotion, and actualisation of human rights worldwide.³⁷⁶

Human rights facilitate the application of the strongest and widest coercive force of law in both domestic and international legal systems and, as Wasserstrom rightly stated, they ‘constitute the strongest of all moral claims that all men can assert.’³⁷⁷ A study by Lohman and Amon found that a human rights-based advocacy approach increased political will which led to the application of ‘the technical solutions required, and the protection of the rights of millions of people suffering unnecessary pain worldwide.’³⁷⁸

Therefore, to proffer the primary-cause solution to this thesis’ research problem, this study aims to examine the desirability of the use of a universal legal mechanism for the proper normative framework that can specifically require governments worldwide to provide adequate access to their public legal information and thereby protect the people’s right of free access to public legal information. The mechanism should be such that can remedy the serious injustice in the application of the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable.

³⁷⁵ Arif Ahmed and Md Jahid Mustofa, ‘Mechanisms for Implementation of Human Rights: A Critical Analysis in Bangladesh Perspective’ (2016) 10(1) Prime University Journal 1, 6–12 <http://www.primeuniversity.edu.bd/070513/journals/v_10_n_1_J_J_2016/Mechanisms.pdf> accessed 2 August 2019.

³⁷⁶ Gráinne de Búrca, ‘Human Rights Experimentalism’ (2017) 111(2) American Journal of International Law 277–316 <<https://doi-org.tilburguniversity.idm.oclc.org/10.1017/ajil.2016.16>> accessed 2 August 2019; Arlene S Kanter, ‘Do Human Rights Treaties Matter: The Case for the United Nations Convention on the Rights of People with Disabilities’ (2019) 52(3) Vanderbilt Journal of Transnational Law 577–609 <<https://www.vanderbilt.edu/jotl/wp-content/uploads/sites/78/Arlene-Kanter.pdf>> accessed 2 August 2019.

³⁷⁷ R Wasserstrom, ‘Rights, Human Rights and Racial Discrimination’ in D Lyons (ed), *Rights* (Wadsworth Publishing Co 1979) 49–50.

³⁷⁸ Diederik Lohman and Joseph Amon, ‘Evaluating a Human Rights-Based Advocacy Approach to Expanding Access to Pain Medicines and Palliative Care: Global Advocacy and Case Studies from India, Kenya, and Ukraine’ (2015) 17(2) Health and Human Rights <www.hhrjournal.org/2015/12/evaluating-a-human-rights-based-advocacy-approach-to-expanding-access-to-pain-medicines-and-palliative-care-global-advocacy-and-case-studies-from-india-kenya-and-ukraine/> accessed 24 April 2019.

6.2 The Research Questions

The research questions that determine the methodology and the approaches for this study comprise a central research question and four sub-questions based on the background to this thesis, the nature of the research problem, the scope of the study, the theoretical framework and the relevant concepts (some of which are interdisciplinary), and the literature review on the right of free access to public legal information as a human right, discussed in Sections 1 to 5 above. The central research question reflects the overall aim of the study while the sub-questions function as the specific objectives to achieve that aim.

6.2.1 The Central Research Question

The central research question for this study (the core of which is italicised) is as follows: As the lack of the political will of governments is the primary cause of the persistent global problem of inadequate access to public legal information, *what legal mechanism can specifically require governments worldwide to perform their rule-of-law duty to provide adequate access to their public legal information and protect the people's right of free access to public legal information*, which will thereby enhance global access and remedy the serious injustice in the application of the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable?

The analysis in Section 2.2 above has identified the lack of the political will of governments as the primary cause of the global problem of inadequate access to public legal information. That conclusion explains why the central research question, which covers all aspects of this thesis (including its title, aim, and main theme) is on how to positively influence political will through the international obligations on governments to provide adequate access to all categories of their public legal information. The question is formulated in a comprehensive, yet precise, manner that ensures such wide but specific coverage.

As the central research question, it contains all the principles in the theoretical framework and all the concepts that underpin this thesis: the theory of legal certainty, the duty-right relationship under the rule of law, the doctrine of ignorance of the law is no excuse, the concept of ascertainment of indigenous

customary law, the presumption of the reliability of information from official sources, and the concept of findability.³⁷⁹

The doctrinal methodology or black-letter law will provide the legal principles and their application to all the different aspects of this study. The relevant research approaches are the interdisciplinary approach, human rights-based approach, and new human rights-advocacy approach. This central research question will guide the overall conclusion in Section 6 of Chapter Six of this thesis.

To answer all aspects of this central research question fully, four sub-questions are formulated. These sub-questions define the scope of this thesis. Each sub-question is the subject matter of each article that forms its corresponding chapter of this thesis. This structure clearly shows the interconnection of the four articles as the subthemes of the main theme of this thesis, all of which are crucial aspects of the right of free access to public legal information in the contemporary world.

6.2.2 The Research Sub-Questions

6.2.2.1 Research Sub-Question 1: The Right of Free Access to Public Legal Information as a Human Right

Does the right of free access to public legal information qualify for its universal recognition as a human right that can be part of the international legal framework for enhancing national and global access to public legal information; and, if it does, what are its essential principles that should be part of the contents of a binding international human rights instrument for its protection, promotion, and actualisation?

The review of the literature on the right of free access to public legal information as a human right has revealed an unequivocal claim by some scholars that it is indeed a human right while some others are cautious of such assertion.³⁸⁰ This sub-question therefore aims to find out three things: (1) if it is indeed a human right; (2) if it is proved to be a human right, whether it also qualifies for its universal

³⁷⁹ Section 4.3.5 above.

³⁸⁰ Section 5 above.

recognition as a stand-alone or substantive human right under its own distinct international legal framework, i.e. a UN Convention; and (3) its essential principles.

The discussion of this sub-question will require all aspects of the theoretical framework and the concepts that are relevant to this thesis.³⁸¹ The theory of legal certainty underlies the fundamental aspect of the concept of the right of access to public legal information. The discussion of public access to indigenous customary law will be based on the concept of its ascertainment, which is a specific aspect of the theory of legal certainty. The presumption of the reliability of the information from official sources and findability are relevant to the modern techniques for providing adequate access to public legal information via websites.

The interdisciplinary approach will be necessary for utilising the technological tools for the provision of adequate public access. The new human rights-advocacy approach, specifically formulated for this study, will provide the criteria that will determine whether the right of free access to public legal information qualifies for its universal recognition as a human right. The human rights-based approach will provide the tool for giving due consideration to all the human rights inherent in free access to public legal information, including the specific rights of indigenous communities.

6.2.2.2 Research Sub-Question 2: Easy Identification of Official Public Legal Information Websites

As websites are now indispensable to the provision of adequate access to public legal information, if there are unreliable third-party public legal information websites, how can easy identification of official public legal information websites be achieved to enable users worldwide to avoid such third-party websites?

As stated in Section 1 above (Background), it is now an accepted fact that publishing public information online is indispensable to every successful public access to legal information project or programme. However, one major problem with online information is the danger of its unreliability, as any person can publish anything, which may be unreliable due to several factors, e.g. ignorance, accidental error, digitisation or reprographic error, and deliberate falsification. A

³⁸¹ Section 4 above.

study has confirmed that some online users are aware of this problem and therefore prefer online information from *official* sources.³⁸²

The presumption of the reliability of information from official sources³⁸³ is the main conceptual foundation for this question. Online users need a mechanism that can help them to identify official public legal information websites. Answering this question will specifically require the interdisciplinary approach, due to the technical aspects of websites and the functioning of the Internet that are beyond the subject matter of law.

6.2.2.3 Research Sub-Question 3: Organisation of a Country's Official Public Legal Information Websites for their Optimal Findability

As websites are now indispensable to the provision of adequate access to public legal information, if there are multiple official public legal information websites of any country's different tiers of government (i.e. national or federal, state or regional, and local) and those websites exist in isolation or are not properly interconnected, how can all the websites be organised to achieve their optimal findability that will enhance national and transnational public access to that country's stock of official online public legal information?

The fact that websites have become indispensable to the provision of adequate access to public legal information is now beyond controversy. The use of multiple isolated or poorly interconnected public legal information websites makes it difficult (and sometimes impossible) for people to find those websites. The problem may be referred to as *organisational inaccessibility* that produces *technical unavailability*, as any existing thing that cannot be found is analogous to a thing that is non-existent or unavailable, until it is found. Information may exist, but it is not useful to any person who is unable to find it. Simply put, *inaccessible* information is not different from *unavailable* information. It is therefore necessary that people are able to find the available public legal information, and easily too.

From their discussion of findability of online legal information³⁸⁴ that is one of the concepts for this thesis, Greenleaf and others noted the existence of the said

³⁸² Section 4.3.4 above.

³⁸³ *Ibid*

³⁸⁴ Section 4.2.5 above.

problem in their works in (2005)³⁸⁵ and in (2011),³⁸⁶ citing India as an example of several countries where it exists. It is therefore necessary to investigate whether the problem still exists today and, if it does, to have a good idea of its global magnitude. Such investigation requires direct virtual observation of the government-owned public legal information websites of several countries, which may provide comparative insights into the situation in different jurisdictions.

Like sub-question 2 above, the interdisciplinary approach, which requires technical skills in website design, will be necessary for understanding and finding the practical solution to this technology-based problem.

6.2.2.4 Research Sub-Question 4: Human Rights-Compliant Adequate Public Access to Indigenous Customary Law

With the growing global prominence of indigenous rights and the right of every person to know the laws that regulate the person's conduct and activities, how can adequate public access to the unwritten rules of indigenous customary law be achieved in such a way that the method of providing that access also complies with the general human rights and the specific rights of indigenous communities?

As noted above,³⁸⁷ the UN General Assembly's adoption of UNDRIP in 2007 ushered in the present era of unprecedented global interest in indigenous affairs and the protection of their indigenous rights. That interest has led to, among other things, UNDP's co-sponsorship of the ongoing South Sudan Customary Law Ascertainment project that began in 2012, to provide access to indigenous customary law.³⁸⁸

³⁸⁵ Graham Greenleaf, Philip Chung and Andrew Mowbray, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies 2002–2005' (2007) 4(4) SCRIPT-ed 319, 323 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 20 April 2019.

³⁸⁶ Graham Greenleaf and others, 'Challenges for Free Access to Law in a Multi-Jurisdictional Developing Country: Building the Legal Information Institute of India' (2011) 8(3) SCRIPTed 292, 296 <<https://script-ed.org/wp-content/uploads/2011/12/greenleaf.pdf>> accessed 11 April 2019.

³⁸⁷ Section 4.3.3 above.

³⁸⁸ Ibid

The nature of indigenous customary law, which is predominantly in its oral or unwritten form,³⁸⁹ makes it inaccessible to many people who should know it, as it governs their conduct and activities. The need to transmit the unwritten rules of indigenous customary law into writing so that every person can know them, led to the concept of *ascertainment* which is an aspect to the theory of *legal certainty*, both of which are necessary for answering this sub-question.

The answer to this question requires the determination of what constitutes adequate public access to indigenous customary law, which can be adapted from the general principles of adequate access to the other categories of public legal information, e.g. legislation. The human rights-based approach will provide the human rights-compliant requirement for the ascertainment of indigenous customary law.

Understanding indigenous customary law requires some degree of multidisciplinary or at least interdisciplinarity, as it is a multidisciplinary subject that is outside mainstream (or pure) legal discourse and members of several other professions lay claim to expertise in it, e.g. anthropologists, classicists, folklorists, historians, philosophers, and sociologists.³⁹⁰

The answer to this sub-question requires an investigation of the existing methods of ascertainment of indigenous customary law, which may lead to the development of a new public access-adequate and human rights-compliant model of ascertainment, if those existing methods are found to be deficient.

7. Methodology

This thesis is a desktop or library-based legal research that uses the legal doctrinal methodology to examine the concept of the right of free access to public legal information as a human right and the interdisciplinary approach to explore the technological solutions to aspects of the persistent global problem of inadequate

³⁸⁹ See, for example, Rona Burns and others, 'Report on Access to Justice in Zimbabwe' (*Aberdeen University Lawyers Without Borders*) 5
<www.academia.edu/32030464/Report_on_Access_to_Justice_in_Zimbabwe> accessed 24 April 2019.

³⁹⁰ Section 4.3.3 above.

access to public legal information. The study is therefore an ‘interdisciplinary doctrinal research’,³⁹¹ as Taekema and van der Burg rightly categorised legal doctrinal research that integrates the interdisciplinary approach into its design. The study uses the human rights-based approach and the new human rights-advocacy approach to examine crucial aspects of the research problem.

7.1 Legal Doctrinal Methodology

Legal doctrinal methodology is also referred to as ‘black-letter law’ or ‘theoretical legal research’.³⁹² It is the traditional legal research method³⁹³ that is usually the foundation or starting-point of every legal research, as it presents the doctrines or principles of law that should guide the legal inquiry.³⁹⁴ For example, in empirical legal research, ‘doctrinal legal expertise is often crucial in order to be able to raise the right questions and determine which variables should be tested in attempting to explain a particular legal phenomenon.’³⁹⁵

³⁹¹ Sanne Taekema and Wibren van der Burg, ‘Introduction: The Incorporation Problem in Interdisciplinary Legal Research’ (2015) 2 *Erasmus Law Review* 39, 40 <<https://doi.org/10.5553/ELR.000050>> accessed 5 August 2019. An example of the use of the same categorisation for a research is Peter Yeoh, ‘Corporate Governance Failures and the Road to Crime’ (2015) 23(1) *Journal of Financial Crime* 216–230 <<https://doi.org/10.1108/JFC-10-2014-0044>> accessed 5 August 2019. On the need to incorporate the interdisciplinary approach into the legal doctrinal methodology, see Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) 3 *Erasmus Law Review* 130, 133 <<https://doi.org/10.5553/ELR.000055>> accessed 5 August 2019.

³⁹² Ian Dobinson and Francis Johns, ‘Legal Research as Qualitative Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 18, 20.

³⁹³ Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 1, 5.

³⁹⁴ Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) 3 *Erasmus Law Review* 130, 133 <<https://doi.org/10.5553/ELR.000055>> accessed 5 August 2019; Andria Naudé Fourie, ‘Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research: Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks’ (2015) 3 *Erasmus Law Review* 95, 106 <<https://doi.org/10.5553/ELR.000045>> accessed 5 August 2019.

³⁹⁵ Rob van Gestel and Hans-W Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe: What about Methodology?’ (2011) *European University Institute Working Paper Law* 2011/05 1, 25

Doctrinal methodology deals with the analysis and application of the legal principles embedded in the primary sources of law.³⁹⁶ It seeks to present the position of the law or 'what the law is' on any legal subject,³⁹⁷ without being bothered by external factors, influences, and implications of the position of the law.³⁹⁸ The ability of the researcher to find the relevant primary sources of law, as well as the secondary sources that provide the appropriate commentary on them, is vital to every doctrinal analysis.³⁹⁹

This study used the legal doctrinal methodology to identify, synthesise, and apply the relevant legal principles from legislation, judicial decisions, and international legal instruments to the different aspects of this thesis. They include the following: the duty of every government to publish the laws it makes; the requirement of obedience to the law and the consequences for violating the law; ignorance of the law is no excuse for its violation; judicial ascertainment of indigenous customary law; the evidentiary principle of proper custody; and all the numerous relevant human rights principles. The study used scholarly literature for insights into the current developments in the legal principles, including their inadequacies.

7.2 Legal Research Approaches

7.2.1 Interdisciplinary Approach

Although there is no one universally acceptable definition of interdisciplinary research (IDR), the following joint definition by the US National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine is apt:

<https://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf> accessed 5 August 2019.

³⁹⁶ Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 5, 7 <<https://doi.org/10.1080/14760400903195090>> accessed 29 April 2018.

³⁹⁷ Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 18, 21.

³⁹⁸ Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 1, 1.

³⁹⁹ *Ibid* 4.

Interdisciplinary research (IDR) is a mode of research by teams or individuals that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialized knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline or area of research practice.⁴⁰⁰

IDR helps researchers to extend the frontiers of existing knowledge, devise new methods, and propose unique solutions,⁴⁰¹ thereby engendering innovation.⁴⁰² That is reason for the current appeal of IDR through collaboration.

The use of IDR in legal research is necessary because law is arguably the only discipline that is associated with virtually all other disciplines, from legal history to space law. In legal research, like other types of research, IDR may be unilateral or multilateral.⁴⁰³ *Unilateral IDR* may be basic or advanced. In basic unilateral interdisciplinary legal research (UIDLR) a legal researcher merely uses relevant data from any non-law discipline,⁴⁰⁴ while in advanced UIDLR a legal researcher has expertise or sufficient competencies in any non-legal discipline that is applied to the research.⁴⁰⁵ *Multilateral IDR* involves at least two persons who are experts or possess sufficient competencies in their different disciplines. Interdisciplinary legal research is indispensable where it is necessary to apply non-legal solutions provided by other disciplines to legal problems.⁴⁰⁶

⁴⁰⁰ National Academy of Sciences, *Facilitating Interdisciplinary Research* (National Academies Press 2005) 2 <www.nap.edu/download/11153> accessed 28 April 2018. For the five objectives of IDR, see Julie Thompson Klein, *Interdisciplinarity: History, Theory, and Practice* (Wayne State University Press 1990) 11.

⁴⁰¹ Nada R Sanders, Brian S Fugate and Zach G Zacharia, 'Interdisciplinary Research in SCM: Through the Lens of the Behavioral Theory of the Firm' (2016) 37(2) *Journal of Business Logistics* 107, 108 <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/jbl.12129>> accessed 30 April 2018.

⁴⁰² Wendy Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 1 *Utrecht Law Review* 147, 150 <<https://dspace.library.uu.nl/handle/1874/197267>>.

⁴⁰³ *Ibid* 151.

⁴⁰⁴ *Ibid* 151–152; Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 5, 6–8 <<https://doi.org/10.1080/14760400903195090>> accessed 29 April 2018.

⁴⁰⁵ Siems (2009) 8–12.

⁴⁰⁶ Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge and Kegan Paul 1963) 88.

This study used the *advanced UIDLR* in all the four articles, based on the author's practical experience in the design and management of personal and corporate websites, as well as training in and practice of indigenous customary law.

The discussion in the articles on official legal information generic top-level domain (Chapter Three) and official networked one-stop legal information websites (Chapter Four) required sufficient expertise and experience in web design and management. The discussion of the contents of the proposed United Nations Convention on the Right of Free Access to Public Legal Information also has technical aspects, e.g. issues relating to websites that are now indispensable to every meaningful public access programme. Finally, indigenous customary law requires specialised knowledge of its system and practice that appears to be outside mainstream law.

7.2.2 Human Rights-Based Approach (HRBA)

The provision of adequate access to public legal information entails due consideration to the needs and circumstances of its diverse categories of users. Prominent among such considerations is the *human rights factor*. In today's world of ever-increasing pervasive human rights influence on every aspect of human life and the world around humankind, the human rights factor has become a necessary consideration to guide and evaluate the conduct, activities, actions, policies, programmes, and projects of States, corporate bodies, and individuals. The reason is that—despite their inadequacies, because there is no perfect system and no perfect consensus on every issue—human rights provide the only possible common sets of universal standards.⁴⁰⁷

The importance of the human rights factor gave rise to the concept of the human rights-compliant approach, popularly referred to as human rights-based approach (HRBA) that is fully discussed in the article that forms Chapter Five of this thesis.

⁴⁰⁷ Anita Jowitt, 'The Notion of Human Rights' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Australian National University E Press 2010) 185, 191 <www.jstor.org/stable/pdf/j.ctt24h3jd.18.pdf> accessed 7 August 2019.

The United Nations defines ‘human rights-based approach’ as ‘a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.’⁴⁰⁸ The United Nations Sustainable Development Group (UNSDG)⁴⁰⁹ adopted the approach in 2003 as the UN Statement of Common Understanding.⁴¹⁰ The Common Understanding is stated in the document as follows:

1. All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.

⁴⁰⁸ UN Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (HR/PUB/06/8, United Nations 2006) 15 <<https://undg.org/wp-content/uploads/2016/09/FAQen2.pdf>> accessed 1 June 2019 (UN Human Rights-Based Approach 2006). See also United Nations Children’s Fund, ‘Human Rights-Based Approach to Programming’ (*United Nations Children’s Fund*, 31 October 2011) <www.unicef.org/policyanalysis/rights/> accessed 1 June 2019; United Nations HRBA Portal, ‘What is a Human Rights-Based Approach?’ (*United Nations HRBA Portal*) <<https://hrbaportal.org/faq/what-is-a-human-rights-based-approach>> accessed 1 June 2019; André Frankovits, *The Human Rights Based Approach and the United Nations System: Desk Study* (United Nations Educational, Scientific and Cultural Organization 2006) <<https://unesdoc.unesco.org/ark:/48223/pf0000146999>> accessed 1 June 2019.

⁴⁰⁹ Also referred to as United Nations Development Group (UNDG).

⁴¹⁰ UNSDG ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ (adopted by the United Nations Sustainable Development Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019.

The Northern Ireland Human Rights Commission rightly explains the approach as follows: 'A human rights-based approach is predicated on the conviction that human rights compliant outcomes require a process that adheres to both the values which underpin human rights laws as well as their substantive content.'⁴¹¹

Examples of the human rights-compliant requirement include the following: a country's performance for purposes of its eligibility for overseas development assistance (ODA);⁴¹² a country's foreign policy,⁴¹³ including immigration policy;⁴¹⁴ diplomatic protection;⁴¹⁵ project-induced displacement and resettlement;⁴¹⁶ tax policies;⁴¹⁷ mental health management;⁴¹⁸ and policies and programmes on HIV.⁴¹⁹

⁴¹¹ Northern Ireland Public Services Ombudsman, 'Human Rights Manual' (*Northern Ireland Official Publications Archive*) 5 <<http://niopa.qub.ac.uk/bitstream/NIOPA/5583/1/NIPSO-Human-Rights-Manual.pdf>> accessed 23 June 2019.

⁴¹² Todd Landman, David Kernohan and Anita Gohdes, 'Relativizing Human Rights' 2012 11(4) *Journal of Human Rights* 460–485 <www.tandfonline.com/doi/full/10.1080/14754835.2012.730917> accessed 19 June 2019.

⁴¹³ Joe Renouard, *Human Rights in American Foreign Policy: From the 1960s to the Soviet Collapse* (University of Pennsylvania Press 2016).

⁴¹⁴ Hector A Reyes, 'The Human Rights Factor in United States Immigration Policies (2009) 4 *Hispanic Issues on Line* 150, 151–152 <https://conservancy.umn.edu/bitstream/handle/11299/182573/hiol_04_06_reyes_the_human_rights_factor.pdf> accessed 8 August 2019.

⁴¹⁵ Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008).

⁴¹⁶ Lidewij van der Ploeg and Frank Vanclay, 'A Human Rights Based Approach to Project Induced Displacement and Resettlement' (2017) 35(1) 34 *Impact Assessment and Project Appraisal* 34–52 <www.tandfonline.com/doi/abs/10.1080/14615517.2016.1271538> accessed 8 August 2019.

⁴¹⁷ Mary P Murphy, 'How Policy and Budget Proofing can Advance Human Rights and Equality in Ireland' (2017) 65(3) *Administration* 1–13 <www.degruyter.com/downloadpdf/j/admin.2017.65.issue-3/admin-2017-0021/admin-2017-0021.pdf> accessed 8 August 2019.

⁴¹⁸ Eilionóir Flynn, 'Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches' (2016) 22 *International Journal of Mental Health and Capacity Law* 75–101, <<http://journals.northumbria.ac.uk/index.php/IJMHMCL/article/view/503/997>> accessed 8 August 2019.

⁴¹⁹ Ebenezer Durojaye, 'The Role of the African Commission on Human and Peoples' Rights in Developing Norms and Standards on HIV/AIDS and Human Rights' (2017) 17(3) *Global Jurist* <www.degruyter.com/downloadpdf/j/gj.2017.17.issue-3/gj-2016-0011/gj-2016-0011.pdf> accessed 8 August 2019.

This study used HRBA as a legal research tool in developing the general concept of human rights-compliant access to public legal information and its specific application to indigenous customary law. It determined the human rights components of every access to public legal information programme, which form part of the essential contents of the UN Convention on the Right of Free Access to Public Legal Information proposed in this thesis.

International human rights conventions and instruments were researched and examined for the general principles of international human rights law relating to the general right of free access to *public information* and its component of access to public legal information. Relevant declarations, statements, and principles from reputed international, regional, and national organisations on the said issues were also researched and examined. The principles from these sources were synthesised to form the criteria for determining adequate access to public legal information projects and programmes.

A similar procedure was used to identify the specific indigenous rights relevant to the right of access to indigenous customary law (e.g. cultural rights, linguistic rights, the right to indigenous identity, the right to self-governance in indigenous local affairs, and other aspects of the omnibus right to self-determination), as indigenous customary law is a special category of public legal information.

The findings from both exercises were integrated to form a new model of public access-adequate and human rights-compliant access to indigenous customary law, acronymed *huricompatisation*⁴²⁰ for an easy one-word reference to the new method of ascertainment of indigenous customary law.⁴²¹

⁴²⁰ Section 7.1 of Chapter Five.

⁴²¹ From all the three published articles that form Chapter Two through to Chapter to Four of this thesis in which it is mentioned, as well as via social media and numerous websites, *huricompatisation* has become a new word in international human rights law and global indigenous customary-law jurisprudence, as any online search for the word can confirm.

7.2.3 New Human Rights-Advocacy Approach (NHRAA)

7.2.3.1 Definition of the New Human Rights-Advocacy Approach (NHRAA)

Although there are scholarly arguments that support the principle of the recognition of legal rights as new human rights, it appears that there is no coherent, formal approach to the issue. Such approach is pivotal to the main theme of this thesis. Therefore, to fill this gap, the author harnesses the existing arguments to formulate what may be referred to as the *new human rights-advocacy approach (NHRAA)*. I define NHRAA as

a conceptual framework for determining whether any legal right is so fundamentally interwoven with the existence, dignity, freedom, and holistic wellbeing of human beings that its violation, denial, or deprivation causes such serious injustices and consequences that its formal universal recognition as a human right (because of the inadequacy of the existing international legal framework) is the proper solution towards guaranteeing its adequate protection, promotion, and actualisation globally.

The above definition contains the broad criteria that any proposal for the formal recognition of any right as a new human right should comply with. These criteria reflect the basic nature of human rights that the new right should also possess to properly belong to the same family of exalted legal rights. They are to be integrated into the criteria from existing literature to form what may be a comprehensive set of essential criteria, although they may not be exhaustive.

The need for the formal recognition of new human rights emanates from the inability of the existing regime of human rights to adequately protect, promote, and ensure the actualisation of any legal right that should have the exalted status of a human right. The reason is that human rights enjoy the best possible global protection in the international legal system. Alston properly captured the importance of, and the wisdom behind, the practice of the formal recognition of human rights when he stated: 'Proclamation of the existence of human, natural or other forms of inalienable rights as a means by which to mobilize public support

through the invocation of high moral principles in a given cause or struggle is a time-honored and proven technique.⁴²²

7.2.3.2 *Recognition of a Legal Right as a Human Right and Rights Inflation*

There are two routes to commencing the process for the formal recognition of any right as a human right. First, through recommendations and studies that the UN General Assembly initiates for the purpose under Article 13 of the UN Charter. Two, through proposals from people or organisations under Article 7 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. The said Article 7 states: ‘Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.’ NHRAA provides the conceptual framework for such advocacy.

It is necessary to formulate a well-defined set of *onerous* criteria that should form the basis of any proposal for the universal recognition of new human rights in order to achieve transparency and the integrity of the recognition process and to prevent frivolous proposals.⁴²³ For example, Alston rightly mentioned the claim by the World Tourism Organization (UNWTO) that ‘tourism has become increasingly a basic need, a social necessity, a human right’⁴²⁴ as one of such frivolous proposals.⁴²⁵

Additionally, such stringent criteria would address genuine concerns about the proliferation of new human rights or ‘the tendency to frame any grievance as a

⁴²² Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) American Journal of International Law 607, 608 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴²³ Ibid 609, 621.

⁴²⁴ UN Doc E/1978/98. See also UN Office at Geneva Press Release ECOSOC/1977, 18 July 1978 (as cited in Alston, *ibid* 611).

⁴²⁵ Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) American Journal of International Law 607, 611 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

rights violation’,⁴²⁶ which is referred to as ‘*rights inflation*’. For instance, Alston rightly stated that ‘a proliferation of new rights would be much more likely to contribute to a serious devaluation of the human rights currency than to enrich significantly the overall coverage provided by existing rights.’⁴²⁷ It is important to clarify that the use of the term ‘rights inflation’ in reference to *proposals* for the universal recognition of a right as a human right—which is the subject of NHRAA—is totally different from its reference to *claims in court proceedings* that a right is a human right, e.g. claims before the European Court of Human Rights.⁴²⁸

According to Ramcharan, the debate on new human rights should border on ‘the criteria available in international law for determining what a human right is and whether an asserted right or category of rights meets those criteria.’⁴²⁹ He concluded with his qualitative characteristics of human rights.

7.2.3.3 Definitional Conceptions of Human Rights Containing Criteria for the Recognition of New Human Rights

Some of the definitions containing the essential criteria for the recognition of new human rights are presented in Table 2 below.

Table 2: Definitional Conceptions of Human Rights Containing Criteria for the Recognition of New Human Rights

Source	Definition / Criteria
Maurice Cranston	‘A human right by definition is a universal moral right, something which all men everywhere, at all times ought to have, something of which no

⁴²⁶ Dominique Clément, ‘Human Rights or Social Justice? The Problem of Rights Inflation’ (2018) 22(2) The International Journal of Human Rights 155, 155 <<https://doi.org/10.1080/13642987.2017.1349245>> accessed 28 May 2018.

⁴²⁷ Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) American Journal of International Law 607, 614 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴²⁸ George Letsas, ‘Public Morals, Consensus, and Rights Inflation: A Critique in George’ in George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford Scholarship Online 2009) 126–130 <DOI:10.1093/acprof:oso/9780199203437.001.0001> accessed 27 May 2018.

⁴²⁹ BG Ramcharan, ‘The Concept of Human Rights in Contemporary International Law’ (1983) Canadian Human Rights Yearbook 267, 268.

Source	Definition / Criteria
	one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human. ⁴³⁰
B. G. Ramcharan	‘Human rights are legal rights which possess one or more of certain qualitative characteristics, such as: appurtenance to the human person or group; universality; essentiality to human life, security, survival, dignity, liberty, equality; essentiality for international order; essentiality in the conscience of mankind; essentiality for the protection of vulnerable groups.’ ⁴³¹
United Nations	‘Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.’ ⁴³²
Philip Alston	‘The proposed new human right should: reflect a fundamentally important social value; be relevant, inevitably to varying degrees, throughout a world of diverse value systems; be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law; be consistent with, but not merely repetitive of, the existing body of international human rights law; be capable of achieving a very high degree of international consensus; be compatible or at least not clearly incompatible with the general practice of states; and be sufficiently precise as to give rise to identifiable rights and obligations.’ ⁴³³
The Inter-Parliamentary Union	‘Human rights are rights that every human being has by virtue of his or her human dignity.’ ⁴³⁴ ‘[C]ivil, cultural, economic, political and social

⁴³⁰ Maurice Cranston, *What are Human Rights* (Basic Books 1962) 36 <<https://archive.org/details/whatarehumanrigh00cran>> accessed 27 May 2018.

⁴³¹ BG Ramcharan, ‘The Concept of Human Rights in Contemporary International Law’ (1983) Canadian Human Rights Yearbook 267, 280.

⁴³² UN Office of the High Commissioner for Human Rights, ‘What are Human Rights?’ (*UN Office of the High Commissioner for Human Rights*) <www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 27 May 2018.

⁴³³ Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) American Journal of International Law 607, 614–615 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴³⁴ Inter-Parliamentary Union and the UN Office of the High Commissioner for Human Rights, *Human Rights* (Inter-Parliamentary Union 2016) 19

Source	Definition / Criteria
and the UN Office of the High Commissioner for Human Rights	rights are complementary and equally essential to the dignity and integrity of every person. ⁴³⁵ ‘Governments must not restrict or allow derogations from the right to personal integrity and dignity, even in times of war and in states of emergency.’ ⁴³⁶
Leesi Ebenezer Mitee	‘Human rights are the uniquely exalted category of legal rights that the international community has the collective obligation to protect, promote, and actualise, because they are so fundamentally interwoven with the existence, dignity, freedom, and holistic wellbeing of human beings that their violation, denial, or deprivation causes such grave injustices and consequences that the world cannot overlook.’ ⁴³⁷

Source: Researched and prepared by the author. Copyright © 2019 By Leesie Ebenezer Mitee

7.2.3.4 The Essential Criteria for Qualification as a Human Right and the Proposal for its Recognition

The following essential criteria that ‘a [right] must satisfy in order to qualify as a human right in terms of international law’⁴³⁸—which are by no means exhaustive—are based on Alston’s seven criteria that he presented as a list⁴³⁹ and the broad definitional conceptions of human rights by Ramcharan and Cranston. The others are the United Nations’ definition and practice, the joint definition by the Inter-Parliamentary Union and the UN Office of the High Commissioner for Human Rights that emphasises human dignity, and the author’s functional definition. They are all presented in Table 2 above. Criteria (1), (2), and (10), elucidation of Alston’s seven listed criteria, and incorporation of elements of the various definitions are the author’s contribution.

<<https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf>> accessed 22 July 2019.

⁴³⁵ Ibid 22.

⁴³⁶ Ibid 131.

⁴³⁷ The author’s functional definition of human rights (Section 5 above).

⁴³⁸ Footnote omitted.

⁴³⁹ For Alston’s list of his seven criteria, see Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) American Journal of International Law 607, 614–615 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018. Alston’s words are quoted in my discussion of these ten criteria.

The aim of this set of ten criteria is to achieve the required transparency and integrity of the process of the universal recognition of new human rights, which will thereby address the issue of human rights inflation and discourage frivolous proposals. These criteria are outlined below.

1. There should be a formal proposal for the universal recognition of any right as a human right ('the proposal') which should be a detailed, scholarly discussion that contains weighty and substantial arguments to support it, as outlined here and in criteria (2) to (10) below. Here, it should contain a detailed analysis of the existence of the right as a *legal* right based on the primary sources of law, not on the mere opinions of scholars. This first criterion is particularly important because a human right is essentially an enforceable legal right with an exalted universal status.⁴⁴⁰ This criterion is enough to invalidate many frivolous claims, e.g. the UNWTO's said claim of a human right to tourism.⁴⁴¹
2. The proposal should demonstrate how the existing legal framework is *inadequate* for the protection, promotion, and actualisation of the right; and therefore, the need for the proposed legal framework. The United Nations explained the application of this criterion thus: 'While some countries have enacted comprehensive legislation in this regard, many have not. Because of discriminatory practices, persons with disabilities tend to live in the shadows and margins of society, and as a result their rights are overlooked. A universal, legally binding standard is needed to ensure that the rights of persons with disabilities are guaranteed everywhere.'⁴⁴² Shelton posited that 'no new right need be recognized' where the 'existing norms, if fully implemented, would provide the necessary protection against the threat posed.'⁴⁴³ However,

⁴⁴⁰ BG Ramcharan, 'The Concept of Human Rights in Contemporary International Law' (1983) Canadian Human Rights Yearbook 267, 280.

⁴⁴¹ Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) American Journal of International Law 607, 611 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴⁴² United Nations, 'Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities: What About Existing Legislation? Is it not Working?' (*United Nations*) <<https://static.un.org/esa/socdev/enab/cvinfofaq.htm>> accessed 23 May 2019.

⁴⁴³ Dinah Shelton, 'Challenges to the Future of Civil and Political Rights' (1998) 55(3) Washington and Lee Law Review 669, 671 <<http://scholarlycommons.law.wlu.edu/wlulr/vol55/iss3/3>> accessed 28 May 2018.

Shelton's proposition presupposes the existence of an adequate legal framework, because an *inadequate* legal framework can never produce *adequate* implementation of any human right. For example, the United Nations stated that it was inadequate legal framework and the resultant poor implementation that necessitated the adoption of the Convention on the Rights of Persons with Disabilities.⁴⁴⁴

3. The right should be so fundamental that its violation causes manifest injustice, deprivations, or loss to human beings or it should 'reflect a fundamentally important social value.'⁴⁴⁵ It should therefore fall within the core themes of human rights protection, e.g. human dignity, fundamental freedoms, equality, and the need to remedy serious injustices. Cranston emphasises this issue of grave injustice.⁴⁴⁶ For instance, the application of the *ignorantia juris* doctrine where the law is unpublished or inaccessible, and therefore unknowable, has been known to cause untold injustice over the centuries, as discussed throughout this thesis.
4. The right should have universal relevance or at least 'be relevant, inevitably to varying degrees, throughout a world of diverse value systems.'⁴⁴⁷
5. The right should belong to the genre of the primary sources of international law, i.e. it should 'be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law.'⁴⁴⁸

⁴⁴⁴ United Nations, 'Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities: What About Existing Legislation? Is it not Working?' (*United Nations*) <<https://static.un.org/esa/socdev/enable/convinfaq.htm>> accessed 23 May 2019.

⁴⁴⁵ Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 615 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴⁴⁶ Maurice Cranston, *What are Human Rights* (Basic Books 1962) 36 <<https://archive.org/details/whatarehumanrigh00cran>> accessed 27 May 2018.

⁴⁴⁷ Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 615 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018. See also Maurice Cranston, *What are Human Rights* (Basic Books 1962) 36 <<https://archive.org/details/whatarehumanrigh00cran>> accessed 27 May 2018.

⁴⁴⁸ Philip Alston, *ibid*.

6. The right should *interrelate* with other human rights, which is one of the characteristics of human rights, as noted in the United Nations' definition.⁴⁴⁹ That means it should 'be consistent with, but not merely repetitive of, the existing body of international human rights law'.⁴⁵⁰ It should be stressed that the instrument for the proposed right could therefore be one that, like the Convention on the Rights of Persons with Disabilities, does not create any 'new rights' or 'entitlements', but it only expresses 'existing rights in a manner that addresses the needs and situation of persons [that suffer the injustice, deprivations, or loss in question]'.⁴⁵¹
7. The proposal should demonstrate that the right is 'capable of achieving a very high degree of international consensus'.⁴⁵² Only popular existing legal rights can meet this requirement.
8. The proposal should demonstrate that the right is 'compatible or at least not clearly incompatible with the general practice of states'.⁴⁵³
9. The proposal should demonstrate that the right is 'sufficiently precise as to give rise to identifiable rights and obligations'.⁴⁵⁴ For example, the UN Secretary-General reported that 'in order to clarify further the concept of the right to development and to accord it greater practical significance, *further*

⁴⁴⁹ UN Office of the High Commissioner for Human Rights, 'What are Human Rights?' (*UN Office of the High Commissioner for Human Rights*) <www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 27 May 2018.

⁴⁵⁰ Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 615 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴⁵¹ United Nations, 'Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities: Does this Convention Create New Rights?' (*United Nations*) <<https://static.un.org/esa/socdev/enab/convinfofaq.htm>> accessed 23 May 2019.

⁴⁵² Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 615 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴⁵³ *Ibid*

⁴⁵⁴ *Ibid*

analysis could be directed towards identifying and elaborating some of the specific rights and duties. . .⁴⁵⁵

10. Finally, the proposal should contain the essential contents of the anticipated instrument for the right, which should reflect its general principles. The inclusion of such contents shows a proper understanding and articulation of the nature of the proposed right and provides guidance for deliberations on the right, and for drafting the eventual instrument. As an example of the importance of this criterion, the UN Secretary-General noted the need for ‘comprehensive analysis’ of the ‘complex issues’ associated with the new right to development and that ‘the Commission on Human Rights may wish to consider undertaking a more detailed study of the relevant issues with a view to *formulating general principles and criteria which might guide future bilateral and multilateral assistance arrangements*, insofar as they seek to promote human rights in general and the human right to development in particular. . .’⁴⁵⁶

The foregoing set of ten criteria has the potential to achieve the much-needed balance between ‘the need to maintain the integrity and credibility of the human rights tradition’⁴⁵⁷ and ‘the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being’⁴⁵⁸ which necessitate the formal, universal recognition of new human rights.

All the above criteria that should form the basis for any proper proposal for the universal recognition of new human rights were applied to the analysis in this thesis under three broad categories. First, the existence of the right of free access

⁴⁵⁵ United Nations, ‘The Emergence of the Right to Development: Report of the Secretary-General’ in United Nations, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013) ch 1, 15 <https://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf> accessed 2 July 2019 (emphasis added).

⁴⁵⁶ Ibid 15 (emphasis added).

⁴⁵⁷ Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) *American Journal of International Law* 607, 609 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

⁴⁵⁸ Ibid

to public legal information as a legal right, which includes the precise definition of the right, identification of the duty-bearers and the rightsholders, and its statutory and judicial existence. Second, the reasons why the right is a human right and, additionally, why it also qualifies for its universal recognition as a substantive or stand-alone human right. Third, the formal proposal which contains fifteen essential principles and standards that should be part of the contents of the anticipated binding international human rights instrument.

7.3 Data Collection

The word ‘data’ in this discussion refers to facts, information, figures or numbers,⁴⁵⁹ and it is therefore the proper terminology in both qualitative and quantitative research, as it covers every type of information or resource that can be collected and used for any study. The complex nature of this study required different categories of data from diverse sources and the use of different data collection methods, as outlined below and presented in Table 3 in Appendix B to this Chapter.

7.3.1 Categories of Data

This study used six major categories of data for the different aspects of the discussion of the persistent global problem of inadequate access to public legal information. The categories are as follows: primary legal materials, soft law, secondary legal materials, general non-legal data, non-legal empirical data, and data from the onsite review of the official public legal information websites of the 60 countries that were selected for the discussion in Chapter Four. These categories are outlined below.

⁴⁵⁹ ‘data’ (*Oxford Advanced Learner’s Dictionary*, Oxford University Press) <www.oxfordlearnersdictionaries.com/us/definition/english/data> accessed 27 April 2019; ‘data’ (*Oxford Learner’s Dictionary of Academic English*, Oxford University Press) <www.oxfordlearnersdictionaries.com/us/definition/academic/data> accessed 27 April 2019; ‘data’ (*Cambridge Advanced Learner’s Dictionary & Thesaurus*, Cambridge University Press) <<https://dictionary.cambridge.org/dictionary/english/data>> accessed 27 April 2019.

First, primary legal materials⁴⁶⁰ are the actual texts of the law which contain legal principles that have the binding force of law. The United Nations treaties, regional treaties, national legislation (primary and secondary); and the decisions of the International Court of Justice (ICJ), regional courts, and national courts are the primary legal materials this study used.

Second, the study also used the resolutions of the United Nations and regional intergovernmental organisations⁴⁶¹ that may not have acquired the binding force of law, but contain significant legal principles that are important to the world. This category of legal materials is referred to as 'soft law', which has been defined as 'non-state rules that may be aspirational or reflect best practices but are not yet legally enforceable.'⁴⁶² A prominent example of soft law is UNDRIP that the United Nations has described as 'the most comprehensive international instrument on the rights of indigenous peoples'.⁴⁶³ Not less than 148 out of the 193 UN Member States⁴⁶⁴ have adopted UNDRIP because of its universal importance.⁴⁶⁵

⁴⁶⁰ Leslie A Street and David R Hansen, 'Who Owns the Law? Why we must Restore Public Ownership of Legal Publishing' (2019) 26(2) *Journal of Intellectual Property Law* 205, 208; Graham Greenleaf, Andrew Mowbray and Philip Chung, 'Building Sustainable Free Legal Advisory Systems: Experiences from the History of AI & Law' (2018) 34(2) *Computer Law & Security Review* 314, 322 <<https://doi.org/10.1016/j.clsr.2018.02.007>> accessed 3 August 2019.

⁴⁶¹ 'The term intergovernmental organization (IGO) refers to an entity created by treaty, involving two or more nations, to work in good faith, on issues of common interest': Harvard Law School, 'Intergovernmental Organizations (IGOs)' (*Harvard Law School*) <<https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/>> accessed 5 August 2019.

⁴⁶² Steven L Schwarcz, 'Soft Law as Governing Law' (2019) 104 *Minnesota Law Review* (forthcoming) 1, 2 <<https://dx.doi.org/10.2139/ssrn.3307418>> accessed 4 August 2019.

⁴⁶³ United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples' (*United Nations*) <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 25 May 2019. See also Brendan M Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights' (2013) 9(2) *Law, Environment and Development Journal* 142, 145 <www.lead-journal.org/content/13142.pdf> accessed 13 September 2017.

⁴⁶⁴ United Nations, 'Who are the Current Members of the United Nations?' (*United Nations*) <<http://ask.un.org/faq/14345>> accessed 5 August 2019.

⁴⁶⁵ United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples' (*UN Department of Economic and Social Affairs*)

Third, secondary legal materials⁴⁶⁶ that explain or discuss the actual texts of the law revealed current developments in international human rights law and national laws. They include scholarly legal publications (e.g. in law books, law journals, law dictionaries, and law encyclopaedia) on the different aspects of the study.

Fourth, the study used general non-legal data from diverse sources to support the discussion of the persistent global problem of inadequate access to public legal information. Those sources include dictionaries, encyclopaedia, books, journals, newspapers, magazines, websites, and professional blogs, etc. that are not law-based. Some of those sources were indispensable because of the interdisciplinary nature of this research, e.g. those on website design, findability, and search engine optimisation.

Fifth, non-legal empirical data from existing literature provided invaluable information for the analyses of the different issues on the persistent global problem of inadequate access to public legal information. The use of empirical data from non-doctrinal research has become an important aspect of legal research,⁴⁶⁷ as it helps researchers to understand real-life situations, guides the choice of solutions, and provides the basis for law-reform recommendations. Examples of the use of specific non-legal empirical data in this study include statistics in existing literature published by scholars and reputed organisations on relevant issues such as extreme poverty, the world's legal systems, Internet usage, adoption of freedom of information laws, disability, Corruption Perceptions Index, World Governance Index, languages, and the number of new gTLDs created by ICANN. The discussion of the primary cause of the problem examined in this

<<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 4 August 2019. For a list of all UN Member States, see United Nations, 'Member States' (*United Nations*) <<https://www.un.org/en/member-states/>> accessed 4 August 2019.

⁴⁶⁶ Graham Greenleaf, Andrew Mowbray and Philip Chung, 'Building Sustainable Free Legal Advisory Systems: Experiences from the History of AI & Law' (2018) 34(2) *Computer Law & Security Review* 314, 321, 322 <<https://doi.org/10.1016/j.clsr.2018.02.007>> accessed 3 August 2019.

⁴⁶⁷ Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130, 130 <<https://doi.org/10.5553/ELR.000055>> accessed 5 August 2019.

thesis⁴⁶⁸ relied on verifiable data on the costs associated with digitisation and publishing of public legal information online for national and global access.

Sixth, the study also used data from the official public legal information websites (OPLIW) of the 60 English-speaking countries that were reviewed to determine the interconnectedness of each country's OPLIW and the ease with which all of a country's OPLIW could be found. By the reality of the parallel virtual or digital world, online visits to websites to observe and conduct a real-time assessment of any subject of interest, as was done in this study, is the physical equivalent of visiting the premises of any organisation or site for a similar research objective.

7.3.2 Data Collection Methods

Data collection simply refers to 'the activity of collecting information that can be used to find out about a particular subject',⁴⁶⁹ and it is a crucial aspect of every research endeavour, including legal research. As van Gestel, Micklitz and Maduro rightly stated, 'probably nobody will deny that "data collection" is an important part of the research process in law.'⁴⁷⁰

This study used the following specific methods of data collection: doctrinal analysis, computer-aided search, literature review, and direct virtual observation. Table 3 in Appendix B to this Chapter shows the use of each of these methods.

Legal doctrinal analysis provides a means of data collection.⁴⁷¹ The first task in the use of legal doctrinal methodology is the identification and extraction or collection of legal principles from the primary sources of law. This study used doctrinal

⁴⁶⁸ Section 2.2 above.

⁴⁶⁹ 'data collection' (*Cambridge Business English Dictionary*, Cambridge University Press) <<https://dictionary.cambridge.org/us/dictionary/english/data-collection>> accessed 5 June 2019.

⁴⁷⁰ Rob van Gestel, Hans-W Micklitz and Miguel Poyares Maduro, 'Methodology in the New Legal World' (2012) European University Institute Working Paper Law 2012/13 1, <https://cadmus.eui.eu/bitstream/handle/1814/22016/LAW_2012_13_VanGestelMicklitzMaduro.pdf> accessed 5 August 2019.

⁴⁷¹ Andria Naudé Fourie, 'Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research: Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks' (2015) 3 *Erasmus Law Review* 95, 106 <<https://doi.org/10.5553/ELR.000045>> accessed 5 August 2019.

analysis to identify all the principles of international human rights law that are discussed in this thesis. They include the relevant principles in international judicial decisions and those in the Universal Declaration of Human Rights (UDHR),⁴⁷² the nine core international human rights instruments,⁴⁷³ UNDRIP, and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention 1989.⁴⁷⁴ They also include the principles in regional human rights instruments and regional judicial decisions, as well as those in national legislation and national judicial decisions.

Computer-aided search has become a crucial means of data collection in today's world of information and communications technology, especially in any research on the nature and functioning of websites,⁴⁷⁵ such as this thesis. For example, this study used Google Internet search engine, which is the world's preeminent Internet search engine,⁴⁷⁶ to find the official public legal information websites of

⁴⁷² Universal Declaration of Human Rights, UNGA Res 217 (III) (adopted 10 December 1948) (UDHR) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed 9 August 2019.

⁴⁷³ UN Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties* (United Nations 2014) <www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf> accessed 5 June 2019.

⁴⁷⁴ Indigenous and Tribal Peoples Convention 1989 (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 9 August 2019.

⁴⁷⁵ Liwen Vaughan, 'New Measurements for Search Engine Evaluation Proposed and Tested' (2004) 40(4) *Information Processing & Management* 677, 682 <[https://doi.org/10.1016/S0306-4573\(03\)00043-8](https://doi.org/10.1016/S0306-4573(03)00043-8)> accessed 5 August 2019; Nadine Schmidt-Mänz and Wolfgang Gaul, 'Web Mining and Online Visibility' in C Weihs and W Gaul (eds), *Classification — The Ubiquitous Challenge: Studies in Classification, Data Analysis, and Knowledge Organization* (Springer 2005) 418-425 <https://doi.org/10.1007/3-540-28084-7_48> accessed 5 August 2019; OB Onyancha and Dennis N Ocholla, 'A Co-Link Analysis of Institutions of Higher Learning in Eastern and Southern Africa: Preliminary Findings' (2008) 26(1) *Mousaion* 46, 51 <<http://hdl.handle.net/10500/5230>> accessed 5 August 2019.

⁴⁷⁶ For statistics on the global dominance of Google search engine, see StatCounter, 'Search Engine Market Share Worldwide: Aug 2016–Aug 2017' (*StatCounter Global Stats*) <<http://gs.statcounter.com/search-engine-market-share>> accessed 12 September 2017; 'Mobile/Tablet Search Engine Market Share' (*Netmarketshare*, August 2017)

the 60 English-speaking countries that were reviewed for their interconnectedness and comprehensiveness of their resources.⁴⁷⁷ Further, the process of collecting or extracting the legal principles in this thesis involved reading the electronic texts of the law and using computer-aided textual document search to located all the principles. One of the additional benefits of the application of that technique in this thesis is the discovery that the term ‘access to justice’ is a recent usage in international conventional human rights law, as it is found only in Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD)⁴⁷⁸ among the nine core international human rights instruments and the Universal Declaration of Human Rights. Computer-aided search facilitated the collection of all the categories of data used in this research.

Bowen rightly stated that ‘previous studies are a source of data, requiring that the researcher rely on the description and interpretation of data rather than having the raw data as a basis for analysis.’⁴⁷⁹ Literature review provided the data from relevant previous studies or works from the following categories: secondary legal materials, general non-legal data, and non-legal empirical data.

Direct observation is a data collection method⁴⁸⁰ in the physical world and in the virtual world of electronic systems. It provided real-time data on the state of the websites of the 60 English-speaking countries and territories that were selected for the study on the problem of the existence of multiple official public legal information websites that are either totally isolated or not properly interconnected.⁴⁸¹ The author used Google (the world’s dominant Internet search engine⁴⁸²) to find all the websites. Thereafter, they were all examined and

<www.netmarketshare.com/search-engine-market-share.aspx?qprid=4&qpcustomd=1> accessed 12 September 2017.

⁴⁷⁷ Discussed in Chapter Four.

⁴⁷⁸ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁴⁷⁹ Glenn A Bowen, ‘Document Analysis as a Qualitative Research Method’ (2009) 9(2) Qualitative Research Journal 27, 28 <<https://doi.org/10.3316/QRJ0902027>> accessed 1 June 2019 (2009).

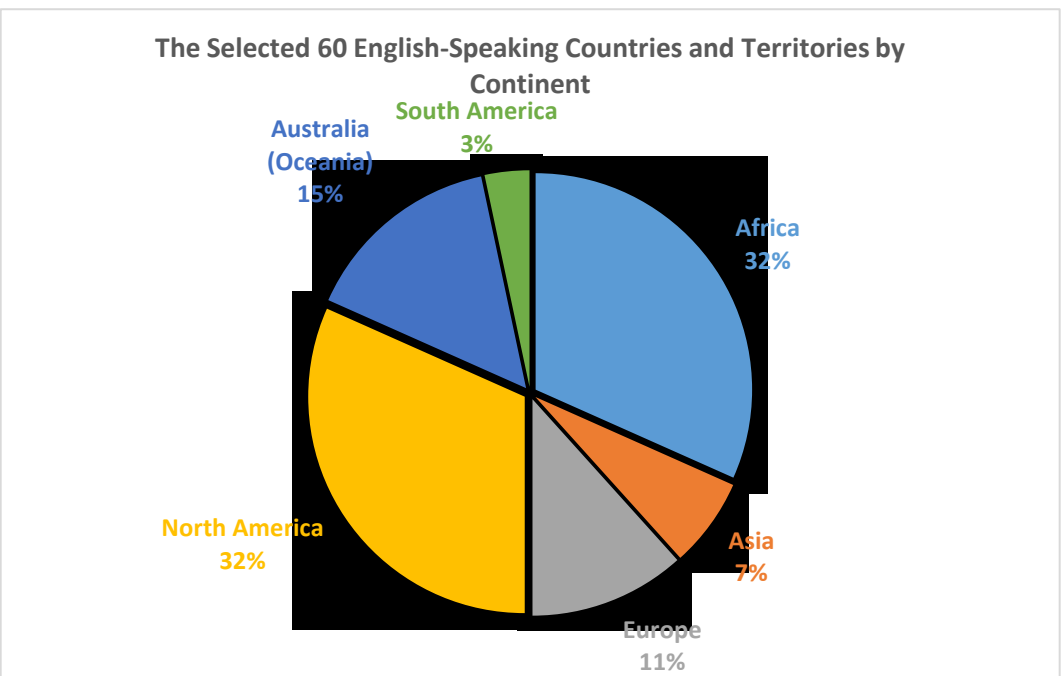
⁴⁸⁰ Emily Paradis and others, ‘Design: Selection of Data Collection Methods’ (2016) 8(2) Journal of Graduate Medical Education 263, 264 <<https://dx.doi.org/10.4300%2FJGME-D-16-00098.1>> accessed 8 August 2019.

⁴⁸¹ Section 2 of Chapter Four.

⁴⁸² For statistics on the global dominance of Google search engine, see StatCounter, ‘Search Engine Market Share Worldwide: Aug 2016–Aug 2017’ (*StatCounter Global Stats*)

evaluated for their networked one-stop access feature (NOSAF) based on the twin criteria of the comprehensiveness of their stock of all categories of the country's national public legal information and their exhaustive external links to all of the country's OPLIW⁴⁸³. Table 4 in Appendix C to this Chapter contains a list of the 121 websites and webpages that were finally selected for the review after the online search⁴⁸⁴ while the Figure below shows the distribution of all the 60 countries and territories by Continent.

Figure: The Selected 60 English-Speaking Countries and Territories by Continent



Source: Produced by the author. Copyright © 2019 By Leesi Ebenezer Mitee

<<http://gs.statcounter.com/search-engine-market-share>> accessed 12 September 2017; 'Mobile/Tablet Search Engine Market Share' (*Netmarketshare*, August 2017) <www.netmarketshare.com/search-engine-market-share.aspx?qprid=4&qpcustomd=1> accessed 12 September 2017.

⁴⁸³ The author coined this term and its abbreviation.

⁴⁸⁴ Section 2 of Chapter Four.

7.3.3 Evaluation of the Online Sources

As a library-based study on emerging issues, prominent aspects of which involved contemporary online resources and the nature and functioning of websites, it is necessary to comment on the integrity of these online resources in this discussion of data collection that includes sources of the data. Catapano rightly warned about the problem of unreliable online resources and the need for every ‘researcher [to] take even more care in evaluating the reliability of Internet sources.’⁴⁸⁵

The author made every effort to avoid unreliable online resources, which is a real global problem that the article⁴⁸⁶ which forms Chapter Three of this thesis examines. Such unreliable online resources that the author avoided during this research even included ‘quick-publication’ predatory commercial online journals of *known* publishers whose peer-review practice makes the academic integrity of their suite of journals doubtful. For example, according to Nature Index which is published by Springer, ‘[t]he University Grants Commission (UGC), which funds and oversees higher-education in India . . . removed 4,305 spurious journals from a list of some 30,000 publications used for weighing academic performance’ in 2017.⁴⁸⁷ The Commission ‘created the list of approved journals in April 2017 as a way of helping researchers distinguish between legitimate and *predatory* journals.’⁴⁸⁸

Through the application of online information literacy skills, the author also avoided unreliable websites, such as *Wikipedia* that is the world’s largest online encyclopaedia.⁴⁸⁹ For example, the URL (uniform resource locator) or web address of every website visited throughout this research was examined and the website

⁴⁸⁵ Peter Catapano, ‘Primary and Secondary Sources: A Special Core Course Guide’ (*University of California, Irvine*) <<https://eee.uci.edu/faculty/losh/research/S1.html>> accessed 7 April 2019.

⁴⁸⁶ Lees Ebezezer Mitee, ‘Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain’ (2017) 23(2) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/562/800>> accessed 14 April 2019.

⁴⁸⁷ Smriti Mallapaty, ‘India Culls 4,305 Dubious Journals from Approved List’ (*Nature Index*, 3 May 2018) <<https://www.natureindex.com/news-blog/india-culls-four-thousand-three-hundred-dubious-journals-from-approved-list>> accessed 3 August 2019.

⁴⁸⁸ *Ibid* (emphasis added).

⁴⁸⁹ Alex Bateman and Darren W Logan, ‘Time to Underpin Wikipedia Wisdom’ (2010) 468 *Nature* 765 <<https://doi.org/10.1038/468765c>> accessed 1 May 2019.

assessed to determine the integrity of its resources of interest before deciding whether or not to use any. For instance, the <.gov> gTLD (generic top-level domain) indicates that the website is an *official* government website. At least, such official websites enjoy the *presumption* of the reliability of their resources.⁴⁹⁰

Further, the author researched the background of websites, whenever necessary, using both internal (onsite) and external sources of information about the organisations or individuals behind those websites. The author's expertise in the design and management of websites and his general knowledge of popular brands and organisations also helped to determine the integrity of some websites and their resources. The categorisation of all the websites in the Bibliography of this thesis reflects the author's attempt to use authentic sources for this research.

The current trend among students, researchers, and even scholars towards citing *Wikipedia*⁴⁹¹ and similar free-for-all-to-edit resources in their works is both worrisome and dangerous because they all have doubtful integrity and lack academic value. *Wikipedia*, for example, contains mere 'user-generated knowledge'.⁴⁹² Although *Wikipedia* may also contain some reliable information, its contributors' anonymity and user-edited policies are self-defeating and make it difficult to sift the chaff from the wheat. It is significant that *Wikipedia's* policy states unequivocally:

No one 'owns' content (including articles or any page at Wikipedia). If you create or edit an article, *others can make changes, and you cannot prevent them from doing so*. In addition, you should not undo their edits without good reason. Disagreements should be calmly resolved, starting with a discussion on the article talk page.⁴⁹³

⁴⁹⁰ Section 4.3.4 above.

⁴⁹¹ Example, Teresita S Mijares and others, 'The Role of Open Educational Resources (OERS) and Web 2.0 in Transforming Pedagogy in Higher Education – Implications to Practice' (2017) 5(1) Asian Journal of Educational Research 62, 63, 75 <<http://multidisciplinaryjournals.com/ajer-vol-5-no-1-2017/>> accessed 1 June 2019.

⁴⁹² Jessica Keyes, *Enterprise 2.0: Social Networking Tools to Transform Your Organization* (Taylor & Francis 2013) xi.

⁴⁹³ 'Wikipedia: Ownership of Content' (*Wikipedia*, 3 May 2019) <https://en.wikipedia.org/wiki/Wikipedia:Ownership_of_content> accessed 1 June 2019 (emphasis added).

The above policy means not even *experts* can prevent anybody, including novices, from *wrongly* editing their writeups and articles in *Wikipedia*. It is for all these reasons that, for example, the brochure of the European University Viadrina, written by Professor Daniel Becker, rightly warns students ‘to avoid Wikipedia as a definite source to count on.’⁴⁹⁴ It has been reported that students have ‘failed their courses because the information cited from the Wikipedia turned out to be wrong.’⁴⁹⁵

Reputed academic journals, book publishers, and educational institutions at all levels have the duty to prevent the use of *Wikipedia* and similar sources in academic works, as an aspect of *quality control*. The danger of *Wikipedia* is real, as its resources dominate Internet search engine results and often rank highly among those results (in terms of being the first or among the first ten displayed search results), thereby leading to the temptation, on the part of lazy or unsuspecting researchers, to use them for academic reference.

7.4 Data Analysis

Doctrinal methodology, as adopted in this study, uses ‘interpretative tools or legal reasoning to evaluate legal rules and suggest recommendations for further development of the law.’⁴⁹⁶ The forms of legal reasoning include the use of examples or analogies in legal arguments and judicial decisions,⁴⁹⁷ which is the

⁴⁹⁴ Daniel Becker, ‘Rules, Suggestions and Tricks for Students that Write a Paper’ (*European University Viadrina*, 6 October 2016) <www.wiwi.europa.uni.de/de/lehrstuhl/fine/iwbz/downloads/lehre/lit_research/TipsTricksRules-current.pdf> accessed 1 June 2019.

⁴⁹⁵ Thomas Rune Korsgaard and Christian D Jensen, ‘Reengineering the Wikipedia for Reputation’ (2009) *Electronic Notes in Theoretical Computer Science* 244 81, 82 <<https://doi.org/10.1016/j.entcs.2009.07.040>> accessed 1 June 2019. See also Andrew Orłowski, ‘Avoid Wikipedia, Warns Wikipedia Chief: It can Seriously Damage your Grades’ *The Register* (London, 15 June 2006) <www.theregister.co.uk/2006/06/15/wikipedia_can_damage_your_grades/> accessed 1 May 2019.

⁴⁹⁶ Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 1, 4.

⁴⁹⁷ Maciej Koszowski, *Analogical Reasoning in Law* (Cambridge Scholars Publishing 2019) 1–10.

foundation of the common-law doctrine of legal precedents;⁴⁹⁸ policy arguments, deductive arguments;⁴⁹⁹ and the purpose of the law.⁵⁰⁰

One of the examples of the use of doctrinal analysis in this thesis is that of the doctrine of ignorance of the law is no excuse. The analysis of the doctrine revealed how its application, where the law is inaccessible and thereby unknowable, causes grave injustice in different scenarios.⁵⁰¹ That revelation led to the law-reform recommendation of the *defence of inaccessible law*, so that genuine ignorance of inaccessible law is an excuse.⁵⁰² Further, analysis of the implications of the application of the doctrines of *judicial precedent* and *judicial notice* in judicialization (judicial ascertainment) of indigenous customary law⁵⁰³ led to the law-reform recommendations for their abolition.⁵⁰⁴

Human rights analysis is the systematic qualitative application of the principles of human rights law to practices, policies, and programmes to determine their compliance with the required standards and to advocate their reform wherever they are defective. According to Goodhart, 'The very point of human rights analysis is to provide an integrative, intersectional analysis and critique of existing social arrangements and to call for their reform or replacement as a necessary step toward a more just society.'⁵⁰⁵ Recent application of human rights analysis include

⁴⁹⁸ Grigoris Antoniou and others, 'Legal Reasoning and Big Data: Opportunities and Challenges' (2018) 470 EasyChair Preprint 1, 4 <<https://doi.org/10.29007/tkmv>> accessed 4 August 2019.

⁴⁹⁹ David Kennedy and William W Fisher III, *The Canon of American Legal Thought* (Princeton University Press 2006) 5.

⁵⁰⁰ Phoebe C Ellsworth, 'Legal Reasoning' in Keith J Holyoak and Robert G Morrison, *The Cambridge Handbook of Thinking and Reasoning* (Cambridge University Press 2005) 685, 690, 692, 695.

⁵⁰¹ Discussed in Section 4.3.2 above and Section D.II.5 of Chapter Two.

⁵⁰² Section 4.3.2 above and Section D.III.2.15 of Chapter Two.

⁵⁰³ Section 5 of Chapter 5.

⁵⁰⁴ Section 3 of Chapter Six.

⁵⁰⁵ Michael Goodhart, 'Human Rights Cities: Making the Global Local' in Alison Brysk and Michael Stohl (eds), *Contesting Human Rights: Norms, Institutions and Practice* (Edward Elgar Publishing 2019) 142, 152.

the works of Laura Ferguson and others (medicine)⁵⁰⁶ and McGregor, Murray and Ng (information technology).⁵⁰⁷

This study used the human rights framework to examine the existing general concept of the rule-of-law duty of every government to provide free access to its public legal information and its specific aspect of public access to the oral or unwritten rules of indigenous customary law. Using the United Nations-endorsed human rights-based approach (HRBA) as its conceptual framework, the human rights analysis revealed the defects of the four existing methods of ascertainment of indigenous customary law, determined the recommendations for law reform, and helped in developing *huricompatisation* as the public access-adequate and human rights-compliant model of ascertainment.

8. Academic and Societal Relevance

The nature of this thesis, as one comprising independent but related articles that share the common theme of the right of free access to public legal information, appears to have one advantage over the traditional thesis format, in terms of the diverse nature of its contribution to knowledge in the subject of the right of free access to public legal information. The reason is that each of the four articles makes its unique set of contribution. The main or thematic contribution from each article and from Chapter One, which fills six major gaps in the literature, is outlined here. The thesis also has societal relevance globally.

First, this thesis formulates a comprehensive proposal for the formal universal recognition of the right of free access to public legal information as a stand-alone or substantive human right under the international legal framework of a proposed *United Nations Convention on the Right of Free Access to Public Legal*

⁵⁰⁶ Laura Ferguson and others, 'Human Rights and Legal Dimensions of Self Care Interventions for Sexual and Reproductive Health' (2019) 365(1941) British Medical Journal 1–4 <<https://dx.doi.org/10.1136%2Fbmj.l1941>> accessed 5 June 2019.

⁵⁰⁷ Lorna McGregor, Daragh Murray and Vivian Ng, 'International Human Rights Law as a Framework for Algorithmic Accountability' (2019) 68(2) International & Comparative Law Quarterly 309–343 <<https://doi.org/10.1017/S0020589319000046>> accessed 5 June 2019.

Information.⁵⁰⁸ The proposal is significant because the existing international legal framework for the protection, promotion, and actualisation of the right of free access to public legal information is inadequate.⁵⁰⁹ The absence of the proper international legal framework that can impose obligations on governments worldwide, and even compel them, to provide adequate access to public legal information is responsible for the neglect of their rule-of-law duty to provide the required access. The decision of the Inter-American Court of Human Rights in the Chilean case of *Claude Reyes v Chile*⁵¹⁰ and the Court's monitoring and enforcement of its orders show the indispensability of the proper international human rights legal framework to global access to public legal information, beyond the ad hoc intervention of regional human rights courts. Further, governments worldwide can adopt as policy and enact the fifteen essential principles that should form the contents of the proposed Convention into law for their immediate implementation, pending the making and adoption of the said Convention. This thesis therefore contributes to the debate on the human-right status of the right of free access to public legal information and could influence policy and law reform that could lead to substantial improvement in free access to public legal information worldwide. The thesis has already made a modest academic impact, based on the citations of the article that forms Chapter Two, in scholarly works⁵¹¹

⁵⁰⁸ Discussed in the article that forms Chapter Two: Leesi Ebenezer Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right' (2017) 18(6) German Law Journal 429–1496 (68 pages) <<https://doi.org/10.1017/S2071832200022392>> accessed 14 April 2019. Published on 1 November 2017 and available with free or open access on the Cambridge Core (Cambridge University Press) website.

⁵⁰⁹ Discussed in Sections C and D of Chapter Two.

⁵¹⁰ *Claude Reyes v Chile*, Order of the Inter-American Court of Human Rights, Judgment of 19 September 2006 (Merits, Reparations and Costs) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf> accessed 22 July 2019.

⁵¹¹ See, for example, (1) Marc van Opijnen, 'The EU Council Conclusions on the Online Publication of Court Decisions' in Ginevra Peruginelli and Sebastiano Faro (eds), *Knowledge of the Law in the Big Data Age* (IOS Press BV 2019) 81, 90 <<https://www.iospress.nl/book/knowledge-of-the-law-in-the-big-data-age/>> accessed 2 August 2019; (2) Leslie A Street and David R Hansen, 'Who Owns the Law? Why We must Restore Public Ownership of Legal Publishing' (2019) 26(2) Journal of Intellectual Property Law 205, 207 and footnote 8 <<https://doi.org/10.31228/osf.io/xnbcv>> accessed 7 May 2019 where the author states: 'At least one international scholar has argued that the public's right to free online legal information should be considered a human right, arguing that anything less than freely available online legal information does not meet the needs of citizens in

and in the 2018 Joint Submission to the UN Human Rights Council for the Third Universal Periodic Review on Access to Justice in Cambodia.⁵¹²

Second, the unregulated nature of the Web as the world's free repository for every type of information or resource—which may be merely inaccurate, inadvertently distorted, deliberately falsified, or mischievously created—poses the problem of how to identify reliable online sources, including public legal information. An example of such websites with unreliable public legal information is that of the International Centre for Nigerian Law (ICNL)⁵¹³ whose unreliable resources, surprisingly, are even among the *Guide to Law Online* resources of the world-renowned Library of Congress.⁵¹⁴ This thesis devises a possible solution to the problem via the technique of using of a strictly regulated official public legal information generic top-level domain (gTLD), herein proposed as <.officiallaws>, for identifying official public legal information websites⁵¹⁵ that enjoy the

today's world' (page 209 and footnote 18); (3) Andrew Martineau, 'Reinforcing the "Crumbling Infrastructure of Legal Research" Through Court-Authored Metadata' (2019) *Law Library Journal* (Forthcoming) 1, 40, 41 (footnotes 175 and 178) <<https://ssrn.com/abstract=3389843>> accessed 5 June 2019; (4) Sean Patrick McGinley, 'I Wanna Design for Somebody (Who Needs Me): The Intersection of Humanitarian Engineering, Choice-of-Law, and Technology Transfer in Kenya' (2018) 59(8) *Boston College Law Review* 2983, 3012 (footnotes 219 and 221, four references), 3018 (footnote 264) <<https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/18>> accessed 25 April 2019; (5) Antoine Duval, 'Publish (Tweets and Blogs) or Perish? Legal Academia in Times of Social Media' (2018) 23 *Tilburg Law Review* 91 (footnote 33) <<http://doi.org/10.5334/tlir.4>> accessed 25 April 2019; (6) Hanjo Hamann, 'The German Federal Courts Dataset 1950–2018: From Paper Archives to Linked Open Data' (2018) <<http://dx.doi.org/10.2139/ssrn.3131506>> accessed 18 May 2019. This paper was later presented at the Second Conference on Empirical Legal Studies in Europe, 31 May – 1 June 2018, University of Leuven, Belgium <www.law.kuleuven.be/pub/en/cltej/updated-conference-programme.pdf> accessed 18 May 2019.

⁵¹² Cambodian Center for Human Rights, Destination Justice and The Cambodian Human Rights and Development Association, 'Joint Submission to the Human Rights Council of the United Nations: Third Universal Periodic Review of the Kingdom of Cambodia – Access to Justice in Cambodia' (*Universal Periodic Review Info*, 12 July 2018) 9 (footnote 93) <www.upr-info.org/sites/default/files/document/cambodia/session_32_-_january_2019/js7_upr32_khm_e_main.pdf> accessed 25 April 2019.

⁵¹³ International Centre for Nigerian Law, 'The Law Library' (*Nigeria-law.org*) <<http://nigeria-law.org/LawLibrary.htm>> accessed 2 August 2019.

⁵¹⁴ Section 3.3 of Chapter Three.

⁵¹⁵ Discussed in the article that forms Chapter Three: Leesi Ebenezer Mitee, 'Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level

presumption of the reliability of information from official sources.⁵¹⁶ The <.officiallaws> gTLD will also enhance access to official public legal information websites worldwide.

Third, existing literature has rightly identified the global problem of finding the *fragments* of any country's public legal information that are located on multiple OPLIWs that are either totally isolated or poorly connected to the other OPLIWs of that country. That *findability* problem causes poor access to the stock of public legal information that is *available* online. Greenleaf and his colleagues (notable members of the Free Access to Law Movement and among the world's renowned experts in legal information systems) properly described the problem both at the global level (2005)⁵¹⁷ and at the national level, specifically in India (2011).⁵¹⁸ The 2017 study of the OPLIW of 60 countries and territories carried out for this thesis (published in 2018) confirmed the continued existence of the problem.⁵¹⁹ From the findings of this thesis, none of the 60 English-speaking countries studied in 2017 (6 developed countries and 54 developing countries and territories) has solved the problem. The reason is that there has been no effective solution to the problem. This thesis developed the concept of official networked one-stop legal information websites ('the ONOLIWs system')⁵²⁰ that provides the solution to the problem. The ONOLIWs system is designed to make it possible that, once any person lands on any of the OPLIW of any country (by any means, including direct

Domain' (2017) 23(2) European Journal of Current Legal Issues <<http://webjcli.org/article/view/562/800>> accessed 14 April 2019. Published on 12 October 2017 and available with free or open access on the *European Journal of Current Legal Issues* website.

⁵¹⁶ The presumption is discussed in Section 4.3.4 above.

⁵¹⁷ Graham Greenleaf, Philip Chung and Andrew Mowbray, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies 2002–2005' (2007) 4(4) SCRIPT-ed 319, 323 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 20 April 2019.

⁵¹⁸ Graham Greenleaf and others, 'Challenges for Free Access to Law in a Multi-Jurisdictional Developing Country: Building the Legal Information Institute of India' (2011) 8(3) SCRIPTed 292, 296 <<https://script-ed.org/wp-content/uploads/2011/12/greenleaf.pdf>> accessed 11 April 2019.

⁵¹⁹ Lees Ebezer Mitee, 'Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites' (2017) 8(3) European Journal of Law and Technology (38 pages) <<http://ejlt.org/article/view/579/768>> accessed 14 April 2019. Published on 22 January 2018 and available with free or open access on the *European Journal of Law and Technology* website.

⁵²⁰ Ibid

access and the use of Internet search engines), the person can access the whole stock of the available online public legal information of that country, by mere clicks on the internal and external links, without the need for any further search. The ONOLIWs system therefore has the potential to facilitate access to national and global public legal information, which will enhance the enjoyment of the right of free access to public legal information.

Fourth, the overriding objective of the four existing methods of ascertainment of indigenous customary law is *formal judicial recognition* of the rules of oral or unwritten indigenous customary law and the mere *transmission* of those rules into their written form, without taking the adequacy of the access they provide into consideration. The existing methods also violate the general human rights and the specific indigenous rights of indigenous communities, including their preeminent right to self-determination that include the protection of their autonomy, self-governance over their internal affairs (including their laws), and their indigenous identity. This thesis uses the concept of the right of free access to public legal information as a human right,⁵²¹ the principles that govern the provision of adequate access to public legal information in the information and communications technology-driven twenty-first century,⁵²² and the United Nations-endorsed HRBA⁵²³ as the conceptual frameworks for a new model of ascertainment of the oral or unwritten rules of indigenous customary law. It formulates the concept of human rights-compliant access to public legal information and adapts it specifically (with a set of ten essential requirements) to meet the peculiar needs of indigenous customary law. It then incorporates those ten public-access requirements into twelve relevant human rights (comprising general human rights and indigenous rights) to form the new concept of *human rights-compliant public access to indigenous customary law* (acronymed *huricompatisation*).⁵²⁴ *Huricompatisation* is expected to provide the much-needed comprehensive solution to the public-access and human-rights defects of the four

⁵²¹ Discussed extensively in Chapter Two.

⁵²² Section 1 above.

⁵²³ UNSDG 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (adopted by the United Nations Sustainable Development Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019.

⁵²⁴ Section 7.1 of Chapter Five.

existing methods of ascertainment of indigenous customary law: judicialisation, codification, restatement, and self-statement. *Huricompatisation* therefore provides the opportunity for unprecedented global access to indigenous customary law and the protection of indigenous rights worldwide.

Fifth, this thesis fills the gap in the discussion on the primary cause of the global problem of inadequate access to public legal information, which explains why the problem has persisted despite all the ancient and modern efforts to solve it. It uses practical, verifiable arguments to conclude that the lack of the political will of governments is the primary cause of the problem. The primary-cause identification guided this study to develop the comprehensive proposal for the formal universal recognition of the right of free access to public legal information as a human right as the proper solution to the problem. The simple reason is that its unequivocal and formal human right-status under its own UN Convention is the only global mechanism that can impose obligations on governments to provide the required free access to their public legal information.⁵²⁵

Sixth, as the primary cause of the global problem of inadequate access to public legal information is the lack of the political will of governments,⁵²⁶ the human rights-based approach provides the direction for its effective solution. However, the existing human rights framework for the right of free access to public legal information is inadequate—a situation that necessitates its formal recognition as a new human right. There are scholarly arguments that support the principle of the recognition of legal rights as new human rights, but there is the need to formulate them into a more robust, concise, and formal conceptual framework. This thesis fills that gap by developing the *new human rights-advocacy approach* (NHRAA), discussed in Section 7.2.3 above. NHRAA provides a well-defined set of *onerous* criteria that should form the basis of any proposal for the universal recognition of new human rights in order to achieve transparency and the integrity of the recognition process, prevent frivolous proposals,⁵²⁷ and address genuine

⁵²⁵ Section 2.2 above.

⁵²⁶ Ibid

⁵²⁷ Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) American Journal of International Law 607, 609, 621 <<https://doi.org/10.2307/2202599>> accessed 25 May 2018.

concerns about the proliferation of new human rights or ‘the tendency to frame any grievance as a rights violation’,⁵²⁸ which is referred to as ‘*rights inflation*’.

This thesis has societal relevance beyond its academic relevance. It aims to help to solve or mitigate several existing problems and injustices associated with inadequate access to public legal information, as such inadequate access denies people their inalienable right to know the law that governs their conduct and activities. These problems and injustices exist, to varying degrees, in both developed and developing countries, but are much worse in the former.

The thesis is relevant to all persons worldwide (especially those who have attained the age of legal responsibility⁵²⁹) and all organisations because they are all potential victims of the untold injustice in the application of the universal *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable. In addition to the expected improvement in global access to public legal information that will result in better knowledge of the law, the equally universal counterbalancing *defence of inaccessible law*, formulated in this thesis, can serve as the direct remedy for the said injustice.⁵³⁰

Further, this thesis will help to protect every person’s specific right to self-representation and the general right to adequate facilities for every defence and reduce the instances of unintentional disobedience to the law and needless prosecutions with its costs to the State and innocent citizens.⁵³¹ Additionally, it will reduce the instances of injustice from *per incuriam* judgments delivered in ignorance of the current position of the law;⁵³² protect the human rights to the

⁵²⁸ Dominique Clément, ‘Human Rights or Social Justice? The Problem of Rights Inflation’ (2018) 22(2) The International Journal of Human Rights 155, 155 <<https://doi.org/10.1080/13642987.2017.1349245>> accessed 28 May 2018.

⁵²⁹ The age of legal responsibility varies from one country to another. It is said to be 12 years in The Netherlands: Olivier F Colins and Thomas Grisso, ‘The Relation Between Mental Health Problems and Future Violence Among Detained Male Juveniles’ (2019) 13 Child and Adolescent Psychiatry and Mental Health <<https://doi.org/10.1186/s13034-019-0264-5>> accessed 28 July 2019.

⁵³⁰ Discussed in Section 4.3.2 above and Section D.III.2.15 of Chapter Two.

⁵³¹ Tom McMahon, ‘Improving Access to the Law in Canada with Digital Media’ (1999) 16 Government Information in Canada <<https://dx.doi.org/10.2139/ssrn.163669>> accessed 20 July 2019.

⁵³² Instances of *per incuriam* judgments in the United Kingdom, Uganda, and Ghana are mentioned in Section 2.1 above.

dignity of the human person and to personal freedom or self-determination; and enhance trust between the State and the people. It will also promote sustainable development and foreign investment,⁵³³ and enhance general research on laws and legal scholarship at both national and international levels. Furthermore, it will make indigenous customary law transparent, protect members of indigenous communities from the distortion and manipulation of their laws by their leaders and influential members, and address the problem of corruption associated with false claims as to the applicable rules, as is the case in some communities.⁵³⁴

Finally, this thesis provides law-reform and policy-relevant guidelines for implementation and advocacy by the United Nations General Assembly, United Nations Economic and Social Council, United Nations Human Rights Council, regional human rights intergovernmental organisations, human rights defenders and advocates, policymakers, web designers and developers, legal informaticists, public legal information architects, indigenous communities, legislators, the judiciary, and governments worldwide.

9. The Structure of the Thesis and How All the Articles are Interconnected

9.1 The Structure of the Thesis

This thesis includes articles. Three of the articles that form Chapter Two, Chapter Three, and Chapter Four of the thesis have been subjected to peer review, accepted, and published by the *German Law Journal*,⁵³⁵ *European Journal of*

⁵³³ Steven D Jamar, 'The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law' 2001 1(2) *Global Jurist Topics* 1, 5 <<https://doi.org/10.2202/1535-167X.1032>> accessed 15 April 2018.

⁵³⁴ AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) *The Modern Law Review* 244, 248 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1957.tb00442.x/epdf>> accessed 13 August 2017; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) *International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series* 1, 3.

⁵³⁵ Leesi Ebenezer Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right' (2017) 18(6) *German Law Journal* 1429–1496 (68 pages)

Current Legal Issues,⁵³⁶ and *European Journal of Law and Technology*,⁵³⁷ respectively. Chapter Five is an unpublished article while Chapter Six presents the conclusions of this thesis.

The three published articles are reproduced from the published version, with their original numbering of sections, footnotes, citation style, and version of the English language.⁵³⁸ As each of the three published articles retains the original numbering of its sections, which became the model for the rest of the three chapters, the numbering of the sections of the six chapters of this thesis does not include consecutive chapter numbers. It is for this reason that every cross-reference to any section of another chapter of this thesis includes that chapter number.

Chapter One: Introduction. As the first Chapter of the thesis, it provides sufficient context of the whole study to enhance understanding of this extensive research project. The Chapter starts with the background to the study which presents an overview of the development of access to public legal information. Thereafter, the statement of the problem and its primary cause are discussed. The rest of contents of this Chapter are the scope of the thesis and the definitions of the key terms, the theoretical framework, and the review of the literature on the right of free access to public legal information as a human right. The others are the aim of the study, the research questions, the methodology, the academic and societal relevance of the thesis, the structure of the thesis, and the interconnection of all the four articles.

<<https://doi.org/10.1017/S2071832200022392>> accessed 14 April 2019. Published by the *German Law Journal* on 1 November 2017 and available with free or open access on the Cambridge Core (Cambridge University Press) website.

⁵³⁶ Leesi Ebenezer Mitee, 'Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain' (2017) 23(2) *European Journal of Current Legal Issues* (HTML pages) <<http://webjcli.org/article/view/562/800>> accessed 14 April 2019. Published on 12 October 2017 and available with free or open access on the *European Journal of Current Legal Issues* website.

⁵³⁷ Leesi Ebenezer Mitee, 'Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites' (2017) 8(3) *European Journal of Law and Technology* (38 pages) <<http://ejlt.org/article/view/579/768>> accessed 14 April 2019. Published on 22 January 2018 and available with free or open access on the *European Journal of Law and Technology* website.

⁵³⁸ The article that forms Chapter Two is in the required American English.

Chapter Two: *The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right.* The first-written published article that forms this Chapter discusses the concept of the right of free access to public legal information and makes the necessary proposal for its universal recognition as a human right (the main theme of the thesis), based on the central research question and research sub-question 1.

Chapter Three: *Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain.* The published article that forms this Chapter uses research sub-question 2 to discuss the problem of the existence of third-party websites that are likely to contain unreliable public legal information. It uses the concept of the presumption of the reliability of information from official sources to explore the global solution to the problem, which will enhance enjoyment of the right of free access to public legal information.

Chapter Four: *Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites.* Using research sub-question 3, the published article that forms this Chapter identifies the difficulty in finding any country's stock of official legal information on its numerous websites because those websites either exist in total isolation or are not properly linked. The article devises an appropriate solution towards achieving the optimal findability of all such websites globally.

Chapter Five: *Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access.* The fourth article uses research sub-question 4 to seek an effective solution to the global problem of the inaccessibility of indigenous customary law. That problem is tantamount to denying indigenous communities the right of access to their laws, as indigenous customary law is a category of public legal information that equally requires adequate access, just like the other categories. The article develops *huricompatisation* as a new model that can facilitate adequate access to indigenous customary law in a manner that also complies with the relevant general human rights and the specific indigenous rights of indigenous communities worldwide.

Chapter Six: *Conclusion.* This last Chapter summarises the main findings of the study and the answers to all the four research sub-questions. These findings then

lead to an outline of the major recommendations and their implementation as the solutions to all aspects of the global problem of inadequate access to public legal information that the study identified and discussed. Thereafter, the limitations of the research and the directions for further research that could address those limitations and present further insights are highlighted. The Chapter ends with a summary of the major conclusions of the study and the answer to the central research question that is embedded in the aim of the thesis.

9.2 How All the Articles are Interconnected

From the title of the thesis, the *main theme* of the study is the concept of the right of free access to public legal information as a human right, with a specific focus on the proposal for its universal recognition as such (part of the subtitle of the thesis), which is discussed in the article that forms Chapter Two of the thesis (the first article).

The other proposals alluded to in the subtitle of the thesis are the ones that are necessary for the provision of adequate access to all categories of public legal information for the enjoyment of the right discussed in the first article. The second article (Chapter Three) provides a technical solution to the global problem of identification of official public legal information websites that are presumed to contain reliable resources. The third article (Chapter Four) devises a technical mechanism for proper management of the whole stock of the online public legal information of any country to enhance national and global access to official public legal information websites. The fourth article (Chapter Five) discusses the concept of ascertainment of oral or unwritten indigenous customary law, which is the most inaccessible category of law, and how human rights-compliant adequate public access to its rules can be achieved globally. These three articles are *subthemes* of the right of free access to public legal information. Therefore, all the four articles are interconnected, as they are all crucial aspects of the same right of free access to public legal information.

The interconnection of all the articles runs through the aim and scope of the thesis, the theoretical framework and the underlying concepts, the research questions, and the methodology because they all relate to the right of free access to public legal information.

The thematic discussion of four contemporary aspects of the right of free access to public legal information, using one central research question and four sub-questions, provides an integrated multipronged structure (IMS)⁵³⁹ that helped this thesis to achieve its aim of finding a comprehensive (but by no means exhaustive) solution to the persistent global problem of inadequate primary access to public legal information.

⁵³⁹ The author coined this phrase and its abbreviation.

Appendix A

Table 1: Political Will and the Provision of Access to Public Legal Information

S/No.	Year	Source
1	1996	Judith Bannister, 'Open Access to Legal Sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox' (1996) 3 Journal of Information Law & Technology < https://warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/ >: 'Electronic access can facilitate availability. Whether the costs of access can be kept low, and so be truly accessible, depends upon the will and co-operation of the institutions which produce the primary sources.'
2	1997	Henry H Perritt Jr and Christopher J Lhulier, 'Information Access Rights Based on International Human Rights Law' (1997) 45(3) Buffalo Law Review 899, 900 < https://digitalcommons.law.buffalo.edu/buffalolawreview/vol45/iss3/8 >: 'Unfortunately, not all governments make their information resources available for electronic access. This reluctance of some governments stems from the communist era . . .'
3	2000	David J Harvey, 'A Judicial Perspective on Public Access to Case Law on the Internet' (2000) 2 University of Technology Sydney Law Review 110, 119 < http://classic.austlii.edu.au/au/journals/UTSLawRw/2000/7.html >: 'The issue of access to New Zealand decisions on the Internet is not a high priority for the judiciary . . . In the meantime, for the online public and the worldwide Internet community, the decisions of the courts languish in electronic limbo.'
4	2005	Daniel Adler, 'Access to Legal Information in Cambodia: Initial Steps, Future Possibilities', 2005 2-3 The Journal of Information, Law and Technology < http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2-3/adler/ >: 'The failure of previous efforts to coordinate the publication of laws and judgments could give reason to doubt that the provision of public access to information is a priority of the Cambodian government.'
5	2006	Leesi Ebenezer Mitee, 'Public Access to Legislation and Its Inherent Human Rights: A Comparative Study of the United Kingdom and Nigeria' (Master of Laws dissertation, University of Huddersfield 2006): 'The political will of the state is of paramount importance for purposes of formulating appropriate policies that are conducive to implementation of public access to legislation projects.'
6	2008	G V Şerbu 'Freedom of Expression and the Right to Information' (119th Assembly of the Inter-Parliamentary Union and Related Meetings, Geneva, October 2008) 1, 7 < http://archive.ipu.org/conf-e/119/sr3.pdf >: 'Parliaments should ensure the full use of new information and communication technologies so that citizens had access to legislation, to parliamentary activity, to send petitions and to receive information online. Political will, resources and a structured approach would be necessary to achieve that end.'

S/No.	Year	Source
7	2010	Kenneth A Yates and Charles E Shapiro, 'Establishing a Sustainable Legal Information System in a Developing Country: A Practical Guide' (2010) 42(8) Electronic Journal on Information Systems in Developing Countries 1, 2 < www.researchgate.net/publication/45812253_Establishing_a_Sustainable_Legal_Information_System_in_a_Developing_Country_A_Practical_Guide >: 'Not unsurprisingly, developing countries adoption of technology is at a slower pace, primarily due to the lack of resources and in some instances, the lack of political will and capacity.'
8	2012	Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 62, 74: 'While digital online publishing has become more affordable in recent years, it still requires significant technological expertise and the support of the lawmakers themselves . . .' (62) 'Developing nations have little incentive to provide their citizens with this fundamental human right—the right to access the law.' (74)
9	2013	Brian D Anderson, 'Compiling Online Legal Information in Transitional States: Challenges and Opportunities' (Law Via the Internet Conference, Jersey, September 2013) < http://dx.doi.org/10.2139/ssrn.2437880 >: '[C]reating an online legal database from scratch [involves] issues such as staffing, funding, and obtaining the political will of governments to freely publicize laws . . .'
10	2016	Marc Masson and Ovais Tahir, 'The Legal Information Needs of Civil Society in Zambia' (2016) 4 Journal of Open Access to Law 1, 18 < https://ojs.law.cornell.edu/index.php/joal/article/view/45/61 >: '[A]ccording to the Government Printer, the agency cannot distribute soft-copies nor can the laws be published online as a measure to improve accessibility due to its limited mandate. Only an Act passed through the National Assembly and signed by the President would allow the agency to make the information available online.'

Note: All the cited sources accessed 24 April 2019.

Source: Sources researched and compiled by the author. Copyright © 2019 By Leesi Ebenezer Mitee

Appendix B

Table 3: Categories of Data, their Sources, and Methods of Collection

S/No.	Data Category	Sources of Data	Data Collection Methods
1	Primary legal materials (legal principles in United Nations treaties; treaties and international agreements entered into by United Nations Member States)	United Nations Treaty Collection (UNTC): https://treaties.un.org/	Doctrinal analysis; literature review; computer-aided search
2	Primary legal materials (legal principles in United Nations judicial decisions)	UN official website of the International Court of Justice (ICJ): www.icj-cij.org/en/decisions	Doctrinal analysis; literature review; computer-aided search
3	Soft law (legal principles in United Nations resolutions)	UN Official Document System (ODS): www.un.org/en/sections/general/documents/index.html	Doctrinal analysis; literature review; computer-aided search
4	United Nations documents	UN Official Document System (ODS): www.un.org/en/sections/general/documents/index.html	Literature review; computer-aided search
5	United Nations information on diverse legal and other relevant issues	Official websites of UN organs and specialised agencies in the UN system, e.g. www.un.org/ecosoc/en/home ; www.ohchr.org/EN/HRBodies/HRC/Pages/Home.aspx ; www.undp.org/ ; www.unicef.org/ ; www.ilo.org/ ; www.who.int/ ; www.worldbank.org/ ; https://unctad.org/	Literature review; computer-aided search
6	Primary legal materials (legal principles in regional treaties)	United Nations Treaty Collection (UNTC): https://treaties.un.org/ ; Official websites of the regional bodies, e.g.	Doctrinal analysis; computer-aided search

S/No.	Data Category	Sources of Data	Data Collection Methods
		https://europa.eu/european-union/law_en ; www.achpr.org/instruments/	
7	Primary legal materials (legal principles in regional judicial decisions)	Official websites of the regional courts and databases, e.g. https://hudoc.echr.coe.int/eng ; www.corteidh.or.cr/index.php/en	Doctrinal analysis; computer-aided search
8	Soft law (legal principles in regional resolutions)	Official websites of the regional intergovernmental organisations, e.g. https://www.achpr.org/presspublic/publication?id=3	Doctrinal analysis; literature review; computer-aided search
9	Primary legal materials (legal principles in national legislation)	Official public legal information websites (e.g. www.legislation.gov.uk/ ; www.govinfo.gov/ ; www.laws.justice.gc.ca/eng/ ; www.kenyalaw.org/kl/); websites of legal information institutes (e.g. www.bailii.org/) and other unofficial websites where unavailable on official websites	Doctrinal analysis; computer-aided search
10	Primary legal materials (legal principles in national judicial decisions)	Official public legal information websites (e.g. www.uscourts.gov/); websites of legal information institutes (e.g. www.bailii.org/) and other unofficial websites where unavailable on official websites	Doctrinal analysis; computer-aided search
11	Secondary legal materials (law books, journals, dictionaries, encyclopaedia)	Tilburg University library collections (e.g. HeinOnline, Taylor & Francis, Cambridge resources, Oxford resources, LexisNexis, WestLaw); Google Scholar (https://scholar.google.com/); Google Books (https://books.google.com/); Research repositories of academic institutions (e.g. www.repository.up.ac.za ; http://repository.law.umich.edu ; http://digitalcommons.law.uga.edu); Reputed open-access online collections and directories (https://doaj.org/)	Literature review; computer-aided search
12	General non-legal data	Specialised professional and reputed blogs, e.g. https://moz.com/ ; www.seroundtable.com ; www.highervisibility.com	Literature review; computer-aided search

S/No.	Data Category	Sources of Data	Data Collection Methods
13	Non-legal empirical data	Official and reputed websites, e.g. un.org; https://unctad.org/ ; www.icann.org ; www.worldbank.org/ ; www.netcraft.com ; www.cnn.com ; www.ethnologue.com ; www.world-governance.org ; www.oecd.org ; www.internetworldstats.com/stats.htm ; www.transparency.org/ ; www.netmarketshare.com/	Literature review; computer-aided search
14	News	Official and reputed websites, e.g. www.bbc.com ; www.telegraph.co.uk ; www.theguardian.com ; www.manilatimes.net ; https://mobile.monitor.co.ug	Computer-aided search
15	International Standards	Official websites of the responsible international organisations, e.g. www.iso.org ; www.w3.org/	Computer-aided search
16	Data on the state of the official public legal information websites of 60 English-speaking countries and territories	Official public legal information websites, e.g. http://laws.bahamas.gov.bs/cms/en/ ; www.elaws.gov.bw/ ; http://laws.gov.gd/ ; https://moj.gov.jm/laws ; www.government.pn/Laws/ ; http://crownlaw.gov.to/cms/ ; www.parlzim.gov.zw/acts ; www.sainthelena.gov.sh/laws/ ; www.assembly.gov.vc/assembly/ ; www.lrct.go.tz/laws-of-tanzania/ ;	Computer-aided search; direct virtual observation of the features of the websites through online visits

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Appendix C

Table 4: Websites and Webpages Selected after Search and Examined for the Study of 60 English-Speaking Countries and Territories

S/No.	Websites and Webpages Visited and Examined for One-Stop Websites Study
1	About Judgments < https://www.scotcourts.gov.uk/search-judgments/about-judgments >
2	About the Official Gazette: Government of the Virgin Islands < http://eservices.gov.vg/gazette/content/about-official-gazette >
3	About Us < https://www.govinfo.gov/about >
4	Achtanna an Oireachtais < http://www.acts.ie/ga.toc.decade.html >
5	Acts of Parliament < https://parliament.gov.vu/index.php/icons/members-of-10th-legislature >
6	Acts of Parliament of Vanuatu < https://parliament.gov.vu/index.php/icons/members-of-10th-legislature >
7	Acts of Parliament: The National Assembly of Lesotho < http://www.parliament.ls/assembly/index.php?option=com_docman&task=cat_view&gid=38&Itemid=89 >
8	Acts of the Oireachtas < http://www.irishstatutebook.ie/eli/acts.html >
9	Acts: South African Government < http://www.gov.za/documents/acts >
10	Anguilla Laws < http://www.anguillalaws.com/ >
11	AnguillaLaws.com < http://www.anguillalaws.com/ >
12	Antigua & Barbuda Laws < http://laws.gov.ag/new/index.php >
13	Assembly Legislation < http://www.niassembly.gov.uk/assembly-business/legislation/ >
14	Attorney General's Chambers: Government of Montserrat < http://agc.gov.ms/ >
15	Australasian Legal Information Institute < http://www.austlii.edu.au/ >
16	Bahamas Laws On-Line < http://laws.bahamas.gov.bs/cms/en/ >
17	Barbados Parliament: Bills & Resolutions < http://www.barbadosparliament.com/bills/search >
18	Bermuda Laws Online < http://www.bermudalaws.bm/SitePages/Home.aspx >
19	Bills < http://www.parliament.scot/ >
20	Bills and Legislation < http://www.parliament.gov.pg/bills-and-legislation >
21	Bills and Legislation: National Parliament of Papua New Guinea < http://www.parliament.gov.pg/bills-and-legislation >
22	Bills and Statutes < https://www.govinfo.gov/app/browse/#browse?&page=category >
23	Bills: Parliament of Malawi < http://www.parliament.gov.mw/#/bills >
24	Botswana e-Laws < http://www.elaws.gov.bw/ >
25	British and Irish Legal Information Institute < http://www.bailii.org/ >
26	British and Irish Legal Information Institute Databases < http://www.bailii.org/databases.html >

S/No.	Websites and Webpages Visited and Examined for One-Stop Websites Study
27	Browse Legislation: Northern Ireland < http://www.legislation.gov.uk/browse/ni >
28	Browse Legislation: Scotland < http://www.legislation.gov.uk/browse/scotland >
29	Browse Legislation: Wales < http://www.legislation.gov.uk/browse/wales >
30	Canadian System of Justice: Links to Resources < http://www.justice.gc.ca/eng/contact/link-lien.html >
31	CanLII Website Terms of Use < http://www.canlii.org/en/info/terms.html >
32	Cayman Islands Judicial & Legal Information Website < https://www.judicial.ky/ >
33	Commonwealth Courts Portal < https://www.comcourts.gov.au/ >
34	Court Website Links < http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links >
35	Courts of New Zealand < http://www.courtsofnz.govt.nz/from/decisions/judgments.html >
36	Decided Cases < https://www.jcpc.uk/decided-cases/index.html >
37	Decided Cases < https://www.supremecourt.uk/decided-cases/ >
38	Decisions < https://www.justice.govt.nz/courts/decisions/ >
39	Digital Legislative Library < http://laws.gov.tt/ >
40	Digital Legislative Library: The Laws of Trinidad and Tobago < http://laws.gov.tt/ >
41	Disclaimers of Liability < http://www.austlii.edu.au/austlii/disclaimers.html >
42	Disclaimers of Liability < http://www.bailii.org/bailii/disclaimers.html >
43	Disclaimers of Liability < http://www.nzlii.org/nzlii/disclaimers.html >
44	Electronic Irish Statute Book (eISB) < http://www.irishstatutebook.ie/ >
45	Electronic Irish Statute Book < http://www.irishstatutebook.ie >
46	EUR-Lex < http://eur-lex.europa.eu/homepage.html?locale=en >
47	Falkland Islands Gazette < http://www.fig.gov.fk/legal/index.php/gazettes-supplements >
48	Federal Register of Legislation: Australian Government < https://www.legislation.gov.au/ >
49	Find Us < https://www.justice.govt.nz/contact-us/find-us/ >
50	Frequently Asked Questions (FAQs): About Govinfo — When will Govinfo Replace FDsys? < https://www.govinfo.gov/help/faqs >
51	Government of Saint Vincent and the Grenadines House of Assembly < http://www.assembly.gov.vc/assembly/ >
52	Govinfo: Bills and Statutes < https://www.govinfo.gov/app/browse/category >
53	Guernsey Legal Resources < http://www.guernseylegalresources.gg/article/6325/Home >
54	Hong Kong e-Legislation < https://www.elegislation.gov.hk/ >
55	India Code: Digital Repository of All Legislations < http://indiacode.nic.in/ >
56	Jamaica Laws Online < https://moj.gov.jm/laws >
57	Jersey Legal Information Board < https://www.jerseylaw.je/Pages/default.aspx >
58	Judgments & Determinations < http://www.courts.ie/Judgments.nsf/FrmJudgmentsByCourtAll?OpenForm&l=en >
59	Judgments < http://www.parliament.uk/about/how/business/judgments/ >
60	Judgments < https://www.judiciary.gov.uk/judgments/ >

S/No.	Websites and Webpages Visited and Examined for One-Stop Websites Study
61	Judicial Decisions < https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Pages/default.aspx >
62	Judicial Decisions Online < https://forms.justice.govt.nz/jdo/Introduction.jsp >
63	Justice Laws Website < http://www.laws.justice.gc.ca/eng/ >
64	Justice Laws Website: Government of Canada < http://laws.justice.gc.ca/eng/ >
65	Kenya Law < http://kenyalaw.org/kl/ >
66	Law Reporting < http://www.judiciary.go.ug/data/smenu/25/Law%20Reporting.html >
67	Laws of Ascension: St Helena Government < http://www.sainthelena.gov.sh/laws/ >
68	Laws of Belize < http://www.belize-law.org/web/lawadmin/index2.html >
69	Laws of Dominica < http://www.dominica.gov.dm/laws-of-dominica >
70	Laws of Fiji < http://www.fiji.gov.fj/Fiji-Laws/2016.aspx >
71	Laws of Gibraltar: HM Government of Gibraltar < http://www.gibraltarlaws.gov.gi/ >
72	Laws of Grenada < http://laws.gov.gd/ >
73	Laws of Guyana < http://mola.gov.gy/information/laws-of-guyana >
74	Laws of Malta < http://www.justiceservices.gov.mt/ >
75	Laws of Mauritius < http://attorneygeneral.govmu.org/English/LawsofMauritius/Pages/default.aspx >
76	Laws of Pitcairn < http://www.government.pn/Laws/ >
77	Laws of Seychelles < http://www.attorneygeneraloffice.gov.sc/index.php/resources/print-publications/laws-of-seychelles >
78	Laws of Tanzania < http://www.lrct.go.tz/laws-of-tanzania/ >
79	Laws of Tanzania from 2002-2016 < http://www.lrct.go.tz/laws-of-tanzania/ >
80	Laws of the Cayman Islands < https://www.judicial.ky/laws >
81	Laws of Tonga < http://crownlaw.gov.to/cms/ >
82	Laws of Trinidad and Tobago < http://www.legalaffairs.gov.tt/Laws_listing.html >
83	Laws of Uganda < http://www.ulrc.go.ug/laws-of-uganda >
84	Laws of Zambia < http://www.parliament.gov.zm/acts/volumes >
85	Laws of Zimbabwe < http://www.parlzim.gov.zw/acts >
86	Laws: Parliament of Ghana < http://www.parliament.gh/docs?type=Acts&OT >
87	Laws: Turks and Caicos Islands Government < https://www.gov.tc/agc/laws/revised-laws-2014 >
88	LEGISinfo < http://www.parl.gc.ca/LEGISINFO/Home.aspx?ParliamentSession=42-1 >
89	Legislation < http://www.assembly.wales/en/bus-home/bus-legislation/Pages/bus-legislation.aspx >
90	Legislation.gov.im < https://legislation.gov.im/cms/ >
91	Legislation.gov.uk < http://www.legislation.gov.uk/ >
92	Legislation: National Parliament of Solomon Islands < http://www.parliament.gov.sb/index.php?q=node/237 >
93	Liberia Legislature < http://legislature.gov.lr/ >
94	Licences and Regulations < http://www.aucklandcouncil.govt.nz/EN/licencesregulations/Pages/home.aspx >

S/No.	Websites and Webpages Visited and Examined for One-Stop Websites Study
95	National Assembly: The Republic of Gambia < http://assembly.gov.gm/index.php/category/news/assembly-business/acts-bills/ >
96	National Parliament of Solomon Islands < http://www.parliament.gov.sb/index.php?q=node/237 >
97	Nauru's Online Legal Database < http://ronlaw.gov.nr/nauru_lpms/ >
98	New Zealand Legislation < http://www.legislation.govt.nz/ >
99	New Zealand Legislation < http://www.legislation.govt.nz/ >
100	Nigerian National Assembly: Acts, Bills & Other Legislative Documents < http://www.nassnig.org/ >
101	Opinions < https://www.supremecourt.gov/opinions/opinions.aspx >
102	Parliament of Sierra Leone < http://www.parliament.gov.sl/dnn5/ParliamentaryBusiness/Acts.aspx >
103	Parliament of the Republic of Namibia < http://www.parliament.na/ >
104	Republic Acts: Republic of the Philippines < http://www.congress.gov.ph/legisdocs/?v=ra >
105	Saint Lucia House of Assembly < http://www.govt.lc/house-of-assembly >
106	Search Documents < http://www.nassnig.org/document/acts >
107	Seychelles Legal Information Institute < http://www.seylii.org/ >
108	Singapore Statutes < http://statutes.agc.gov.sg/aol/home.w3p >
109	Site Web de la législation (Justice) < http://laws-lois.justice.gc.ca/fra/ >
110	Southern African Legal Information Institute < http://www.saflii.org/ >
111	Statutory Instruments < http://www.irishstatutebook.ie/eli/statutory.html >
112	Supreme Court Judgments < http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do >
113	Supreme Court of New Zealand < http://www.nzlii.org/nz/cases/NZSC/ >
114	Swaziland Parliament < http://www.gov.sz/index.php?option=com_content&view=category&id=73&Itemid=624 >
115	Terms of Use < https://www.law.cornell.edu/lit/terms/documentation >
116	The Official Website of St. Kitts and Nevis < https://www.gov.kn/ >
117	Treaties, Laws and Regulations < https://www.canada.ca/en/government/system/laws.html >
118	United States Court of Appeals for the Federal Circuit < http://www.cafc.uscourts.gov/ >
119	United States Courts Opinions < https://www.govinfo.gov/app/collection/uscourts >
120	Welcome to the Houses of the Oireachtas < http://www.oireachtas.ie/parliament/ >
121	What's on the Site and How It Works < http://www.legislation.govt.nz/howitworks.aspx#whatonsite >

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CHAPTER TWO

The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right*

“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.” **Jeremy Bentham** (1748–1832)**

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Article publication detail: Leesi Ebenezer Mitee, ‘The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right’ (2017) 18(6) *German Law Journal* 1429–1496 <<https://doi.org/10.1017/S2071832200022392>> (68 pages; reproduced from the published version, with its original numbering of sections, footnotes, citation style, and the Journal’s required American version of the English language). Published by the *German Law Journal* on 1 November 2017 (peer-reviewed) and available with free or open access on the Cambridge Core (Cambridge University Press) website.

** Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham*, vol 5 (William Tait 1843) 547.

Abstract

This Article examines the desirability of the universal recognition of the right of public access to legal information as a human right and therefore as part of a legal framework for improving national and global access to legal information. It discusses the right of public access to legal information as a legal right and the importance of its international human rights framework. The Article argues that every person has the right of public access to legal information, which casts a legal and moral duty on every government and every intergovernmental organization with judicial and legislative functions to provide adequate and free access to its laws and law-related publications. It argues further that every government can afford the provision of adequate public access to its legal information and that the lack of political will to do so is the preeminent factor responsible for inadequate—and in some cases extremely poor—public access. Additionally, this Article advocates the universal recognition of the right of public access to legal information as a human right and makes a proposal for a UN Convention on the Right of Public Access to Legal Information. It provides the essential contents of the proposed UN Convention which incorporate The Hague Conference Guiding Principles to be Considered in Developing a Future Instrument. These contents provide valuable input for urgent interim national and regional laws and policies on public access to legal information, pending the Convention's entry into force. The proposed UN Convention will significantly enhance global access to official legal information that will promote widespread knowledge of the law. It will also facilitate national and transnational legal research and remedy the chronic injustice from liability under inaccessible laws under the doctrine of "ignorance of the law is no excuse"—which is similar to liability under *ex post facto* and nonexistent laws—and promote the proposed doctrine of "ignorance of inaccessible law is an excuse."

Keywords: Human right of free access to public legal information; United Nations Convention on the Right of Free Access to Public Legal Information; Ignorance of inaccessible law is an excuse; Huricompatisation indigenous customary law ascertainment; New Human Rights

A. Introduction

Inadequacies in the existing system of providing public access to legal information cause difficulties in knowing the law, and these difficulties have profound adverse implications for justice, democracy, law reform, legal scholarship, sustainable development, legal practice, the rule of law, etc.¹ For instance, injustice occurs whenever the doctrine which states that “ignorance of the law is no excuse”² to avoid prosecution or culpability (hereinafter “*ignorantia juris* doctrine”) is applied on the ground that every person is presumed to know the law, even when the law is inaccessible and therefore unknowable. That is what happened in the old case of *Rex v. Bailey*,³ and more recently in *United States v. Casson*.⁴ Close to 200 years ago, Jeremy Bentham scathingly likened this injustice to that of a tyrant and slaveholders.⁵ Additionally, difficulties in knowing the law—on the part of judges and lawyers—cause injustice through wrong judicial decisions. In *Regina v. Chambers*, it was a last-minute discovery “by a fortunate accident” that prevented the England and Wales Court of Appeal from delivering yet another wrong judgment due to ignorance of inaccessible law.⁶ The discovery led the Crown Prosecution Service to review previous cases of more than 2,615

¹ See discussions *infra* Section D.II.5 (discussing the remedy for the injustice from the *ignorantia juris* doctrine); Section D.II.6 (discussing the numerous benefits from adequate public access to legal information); Section D.II.8 (discussing the global promotion of the rule of law).

² The Latin maxim is *ignorantia juris non excusat* (“ignorance of the law is no excuse”) or *ignorantia juris neminem excusat* (“ignorance of the law excuses no one”).

³ *Rex v. Bailey* (1800) 168 Eng. Rep. 651 (Eng.) (holding that a sailor at sea who had no way of knowing of a new law was guilty under it).

⁴ *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970) (holding that an amending legislation enacted just about six hours before the accused person committed a federal crime was applicable to him, even though it was obvious that people could not have known of the existence of the law and its contents within such a short period).

⁵ JEREMY BENTHAM & JOHN BOWRING, 5 THE WORKS OF JEREMY BENTHAM 547 (1843); see Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934) (discussing inaccessibility of regulations in the light of Bentham’s quote on the injustice in liability for contravening them).

⁶ *Regina v. Chambers* [2008] EWCA (Crim) 2467 [55]–[76] (UK), <http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html> (revealing that previous decisions of the England and Wales Court of Appeal over a period of seven years were based on a repealed regulation that neither the Court nor the lawyers that appeared before it knew of).

affected defendants from 2001 to 2008, some of whom successfully appealed their confiscation orders.⁷

Inadequate—and in some cases extremely poor—public access to legal information is a prevalent problem in both developed and developing countries, but it is worse in the latter.⁸ The preeminent factor responsible for this problem appears to be the lack of political will on the part of governments to provide the legal framework, policies, facilities, programs, and institutions that are necessary to enable people to know the laws that regulate their conduct and activities.⁹ Therefore, any effective solution should be able to compel governments—within the limits of international law—to provide free access to comprehensive and up-to-date legal information as a legal and moral duty. This should be part of a global mechanism for the promotion, realization, and protection of the people's right to know the law that they are bound to obey.

The existing literature on the right of public access to legal information as a human right consists of: (1) Merely stating that it is a human right without supporting the claim with arguments; (2) attempts to derive it from existing human rights and legal principles, some of which are remote; and (3) discussion of some aspects of the implications of lack of free access to legislation, which is just one category of legal information.¹⁰ There is likely no substantial discussion on *why* it should be *formally* recognized as a human right and the proper legal framework under which it can thrive as successfully as the established human rights. These gaps may explain why there appears to be no existing formal proposal for its universal recognition as a human right.

Therefore, to fill the said gaps in the existing literature, this Article aims to examine the desirability of the universal recognition of the right of public access to legal information as a human right and therefore as part of a legal framework for

⁷ See *Chambers Review: Review of Confiscation Orders in Tobacco Cases*, THE CROWN PROSECUTION SERV., http://cps.gov.uk/publications/others/chambers_review.html (last visited July 6, 2017) [hereinafter *Chambers Review*].

⁸ See discussion *infra* Part B (arguing that a lack of political will hinders public access to legal information).

⁹ See *id.*

¹⁰ See discussion *infra* Part D.I (discussing the existing literature on the right of public access to legal information as a human right).

improving national and global public access to legal information. To achieve this aim, the following specific objectives shall guide this research: (1) To determine whether the right of public access to legal information qualifies for its universal recognition as a human right, which will strengthen its current existence as a legal right to improve national and global access to legal information; and, if it does, (2) To determine the essential requirements that should be part of the contents of the resultant binding international human rights instrument.

The scope of the discussion is limited to public access to legal information for the benefit of all persons—irrespective of their profession and other circumstances¹¹—that is provided by every government and every intergovernmental organization (IGO) with legislative and judicial functions. Accordingly, I define “public access to legal information” as:

The opportunities and facilities provided by any government or intergovernmental organization (IGO) that enable people—in their different circumstances—to know the full, up-to-date texts of the whole stock of its laws and law-related publications, which guarantee the availability and free use of all formats online and in public libraries, without copyright in their texts nor in their official value-added features produced by the government or IGO either directly or under any arrangement with a third party.¹²

Commercial access to legal information is a profit-oriented service provided by private companies like LexisNexis and WestLaw. The success and prominence of the legal resources of those companies—despite any value-added features they contain—is one of the general indicators of inadequate public access to legal information, even in the developed countries.

This Article contributes to the literature on access to legal information and human rights law in several ways. First, it defines the right of public access to legal information and advances several reasons to prove its existence. Second, it argues

¹¹ For example, persons with disabilities need alternate legal information formats. See discussion *infra* Section D.III.2.11 (discussing the alternate formats for equal access by persons with disabilities).

¹² For an explanation of the elements in this definition, see discussion *infra* Part C (defining the “right of public access to legal information”) and Section 3.2 of Chapter One for its latest version.

extensively that the existing right of public access to legal information qualifies for recognition as a distinct human right, and makes a proposal for its formal universal recognition as such. Third, it goes further to advocate the making and adoption of a new UN Convention on the Right of Public Access to Legal Information and argues that the Convention will significantly improve global access to authentic¹³ and official¹⁴ legal information. It also discusses the essential contents of the proposed UN Convention as a useful guide to its drafting. Among other numerous benefits, the proposed UN Convention will promote knowledge of the law, facilitate national and transnational legal research, and remedy the chronic injustice caused by the application of the *ignorantia juris* doctrine even when the law is inaccessible and therefore unknowable. Fourth, this Article reinforces the argument that it is the duty of every government to provide and guarantee free access to its comprehensive and up-to-date legal information. It also extends this duty to every non-State organization with legislative and judicial functions. Fifth, it proposes the defense of inaccessible law to directly negate the injustice in the slavish application of the *ignorantia juris* doctrine, and devises a new remedial, counterbalancing universal doctrine that “ignorance of inaccessible law is an excuse” in the appropriate circumstances.

The rest of this Article is structured in four Parts. Part B identifies the lack of political will as the major factor responsible for inadequate public access to legal information. Part C examines the existence of the right of public access to legal information as a legal right. Part D makes a proposal for the formal universal recognition of the right of public access to legal information as a human right. It

¹³ See AM. ASS’N OF LAW LIBR., STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 2 (Mar. 2007), <https://www.aallnet.org/wp-content/uploads/2018/01/authenfinalreport.pdf> (“An authentic text is one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator”). Authentication of digital legal information is vital to its integrity. See THE IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT 14 (Richard A. Danner & Jules Winterton eds., 2016); see also *infra* Section D.III.2.3 (discussing integrity and authoritativeness of legal information). See generally Claire M. Germain, *Worldwide Access to Foreign Law: International & National Developments Toward Digital Authentication* 1–2 (University of Florida Levin College of Law Working Papers No. 1, 2012), <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1000&context=working>.

¹⁴ See AM. ASS’N OF LAW LIBR., *supra* note 13 (“An official version of regulatory materials, statutes, session laws, or court opinions is one that has been governmentally mandated or approved by statute or rule. It might be produced by the government, but does not have to be”).

examines the existing literature and views on the right of public access to legal information as a human right, reveals the gaps in the discussions, and argues that the right should be formally recognized as a human right. Further, it discusses the proposal for the UN Convention on the Right of Public Access to Legal Information and outlines its essential contents which incorporate The Hague Conference Guiding Principles to be Considered in Developing a Future Instrument. Part E, the conclusion, integrates and synthesizes the key issues on the findings and proposals discussed in this Article and highlights the significance of the research and its policy relevance.

B. Lack of Political Will Associated with Inadequate Public Access to Legal Information

I had stated in a previous study that “[t]he political will of the state is of paramount importance for purposes of formulating appropriate policies that are conducive to implementation of public access to legislation projects.”¹⁵ Every willing government can now provide adequate public access to its legal information by utilizing available and affordable information and communications technology (ICT).¹⁶ In this techno-centric age, publishing comprehensive and up-to-date legal information online with free access is indispensable and feasible.¹⁷ It is the most

¹⁵ Leesi Ebenezer Mitee, *Public Access to Legislation and Its Inherent Human Rights: A Comparative Study of the United Kingdom and Nigeria* (June 2006) (unpublished LLM dissertation, University of Huddersfield).

¹⁶ For example, Lexum provides affordable industry-standard products and services for the management and dissemination of legal information. See *Our Company*, Lexum, <https://lexum.com/en/about-us> (last visited July 6, 2017).

¹⁷ See Daniel Poulin, *Open Access to Law in Developing Countries*, 9(12) FIRST MONDAY (2004), <http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113> (stating that “electronic distribution is the least expensive means of publishing” legal information and discussing its feasibility and the use of open source software); discussions *infra* Part B (arguing that lack of political will hinders public access to legal information); Section C.III (discussing the use of advanced technologies to enhance accessibility); Section D.III.2.1 (arguing that provision of free public access to legal information online is indispensable); see also Graham Greenleaf, *Legal Information Institutes and the Free Access to Law Movement*, GLOBALEX (2008), http://www.nyulawglobal.org/globalex/Legal_Information_Institutes.html (stating that the World Wide Web provides “a low cost distribution mechanism” for free online access to legal information).

efficient and cost-effective way to enable people to access the laws that govern them, anytime and everywhere.¹⁸ In fact, there is already a movement towards digital-only legal information.¹⁹ That is why the availability of free, comprehensive, and up-to-date official online legal information resources now constitutes the foremost benchmark of the adequacy of any public access to legal information program.

All it takes to provide at least the *basic* or starting-point free access to comprehensive and up-to-date legal information is digitizing—that is, converting the traditional printed version to its electronic format—and publishing it on dedicated official government websites. It will take just a couple of years to achieve this noble public service project. New legal information can be published online on the same day it is made, using its original electronic version to avoid reproduction errors. Even the native accessibility and navigational features of this basic online access make it far superior to the traditional print version of legal information. Every responsible government—that is worthy of the status of a government—should be able to afford the cost of providing this basic public access to legal information, which is an essential public service.

Therefore, it is the lack of political will²⁰ that may explain why, for instance, some developing countries have extremely poor online access to their legal information.

¹⁸ See Durham Statement on Open Access to Legal Scholarship of 2009 (Feb. 11, 2009), <https://cyber.law.harvard.edu/publications/durhamstatement#statement> [hereinafter Durham Statement].

¹⁹ See *id.*; discussion *infra* Section C.III (discussing the use of advanced technologies to enhance accessibility).

²⁰ See Henry H. Perritt, Jr & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899, 900–01 (1997), <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol45/iss3/8> (discussing the reluctance of some governments to provide electronic access to their legal information); Judith Bannister, *Open Access to Legal Sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox*, 3 JILT (1996), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister (discussing the importance of “the will and co-operation of the institutions which produce the primary sources”); Marc Masson & Ovais Tahir, *The Legal Information Needs of Civil Society in Zambia*, 4 JOAL 18 (2016), <https://ojs.law.cornell.edu/index.php/joal/article/view/45/61> (stating that the Zambian Government Printer officially responsible for publishing legal information explained that they could not publish its electronic version online because they lacked the statutory mandate to do so).

For example, neither the federal government of Nigeria—one of Africa’s largest economies²¹—nor any of its thirty-six states has any official online legal information database. They only have insignificant fragments of primary legal resources here and there.²² A Canadian legal intern recently published an account of her frustration resulting from her inability to find Malian legal information she needed online.²³ The lack of political will may also explain why the official online legal information databases of a rich and technologically advanced country like the United Kingdom do not appear to be comprehensive and up-to-date.²⁴

Furthermore, this lack of political will also manifests in governments’ assertion of copyright in legal information, despite the unimpeachable fact that every government holds such public information in trust for the people who are its rightful owners,²⁵ and the people are entitled to know the laws that govern them. For instance, it is surprising that even in an advanced democracy like the United States, some state governments are enthusiastically asserting copyright in legal information through litigation. According to Carroll, “[s]ome states and

²¹ In 2014, Nigeria’s US\$568,508 million Gross Domestic Product was ranked twenty-second in the world and number one in Africa, followed by South Africa and Egypt. See THE WORLD BANK, GROSS DOMESTIC PRODUCT 1 2014, <http://databank.worldbank.org/data/download/GDP.pdf>.

²² For example, the website of Nigeria’s federal legislature, the National Assembly, contains only *principal* legislation made between 1999 and the present and Bills of the same period, yet Nigerian federal legislation in force spans a long period of more than 100 years (1914–2016). See FED. REPUBLIC OF NIGERIA NAT’L ASSEMBLY, <http://www.nassnig.org/document/acts> (last visited July 6, 2017). I had previously suggested that the reluctance of the Nigerian federal government to provide online access to its public information must have led to the late launch of its first website in 2005. See Mitee, *supra* note 15, at 102.

²³ See Vallery Bayly, *Legal Information and Human Rights*, MCGILL UNIV. (July 31, 2015, 11:16 AM), <http://blogs.mcgill.ca/humanrightsinterns/2015/07/31/legal-information-and-human-rights/>.

²⁴ For express statements that the UK legislation online database is neither comprehensive nor up-to-date, see *Help: Frequently Asked Questions (FAQs)*, LEGISLATION.GOV.UK, <http://www.legislation.gov.uk/help#aboutRevDate> (last visited July 6, 2017); THE NAT’L ARCHIVES, GUIDE TO REVISED LEGISLATION ON LEGISLATION.GOV.UK 6–7 (Oct. 2013), http://www.legislation.gov.uk/pdfs/GuideToRevisedLegislation_Oct_2013.pdf.

²⁵ *TISL Encouraged by Enactment of RTI in Sri Lanka*, TRANSPARENCY INT’L SRI LANKA (July 11, 2016), <http://www.tisrilanka.org/tisl-encouraged-by-enactment-of-rti-in-sri-lanka/>; 3.1 – *Information management and Access Laws for the 21st Century*, OPEN GOV’T PARTNERSHIP AUSTRALIA (Oct. 10, 2017), <https://ogpau.pmc.gov.au/commitment/31-information-management-and-access-laws-21st-century>. See discussion *infra* Section C.I (discussing the existence of the right of public access to legal information under the general right of access to public or government-held information).

municipalities in the United States assert copyright in their local legislation.”²⁶ Some claim that the version of their official legislation containing annotations—which are meant to help the people to understand the law—are copyrightable. Their claim is absurd because the annotations in question constitute public information produced with taxpayers’ money and therefore should be exempt from copyright the same way it is with any other U.S. public information.²⁷ Any government that is interested in enabling its people to know the law should provide value-added features that will facilitate people’s understanding of the law, such as annotations, summaries, indexes, and digests. Professional lawyers depend on such value-added features produced by commercial legal publishers—like LexisNexis and WestLaw—to know the law, for which they pay exorbitant periodic subscriptions. Therefore, non-lawyers—all those who have not acquired legal education that is comparable to that of lawyers—need such value-added features far more than lawyers need them.

In addition, the lack of political will extends to the policy of providing access to legal information as a revenue-generating enterprise instead of bearing the cost of doing so as an inherent cost of democracy.²⁸ For example, some U.S. government agencies charge exorbitant fees for access to public records.²⁹ Even the U.S. Public Access to Court Electronic Records (PACER) service provided by the Federal Judiciary ironically charges access fees for its so-called “public access” to

²⁶ Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 746 (2006) (discussing free access to legal information).

²⁷ See Martha Neil, *Georgia Sues Carl Malamud Group, Calls Publishing State’s Annotated Code of Laws Online Unlawful*, ABAJOURNAL.COM (July 24, 2015, 2:10 PM), http://www.abajournal.com/news/article/State_of_Georgia_sues_Carl_Malamud_says_he_published_its_annotated_code_of; Michael Hiltzik, *Georgia Claims that Publishing its State Laws for Free Online is “Terrorism,”* L.A. TIMES (July 27, 2015, 12:31 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-state-of-georgia-copyright-wall-20150727-column.html>.

²⁸ See Tom McMahon, *Improving Access to the Law in Canada with Digital Media*, 16 GOVERNMENT INFORMATION IN CANADA (Mar. 1999), <https://dx.doi.org/10.2139/ssrn.163669>. Many governments monopolize the provision of access to legal information as a means of generating revenue. See Perritt, *supra* note 20, at 900–01.

²⁹ See Nick Grube, *Many States Charge Insane Fees for Access to Public Records*, HUFFINGTON POST (Oct. 17, 2013, 8:49 PM), http://www.huffingtonpost.com/2013/10/17/fees-for-public-records_n_4119049.html.

online legal resources.³⁰ Such a situation is profoundly detrimental to public access to legal information. That is the reason for Carl Malamud's famous fight against such non-compliant public access policies in the United States, which he started since 2007 when he established his nonprofit organization, Public.Resource.Org.³¹

It is simply unjust for governments to apply the *ignorantia juris* doctrine while deliberately denying the people their right of free access to the laws that they are legally bound to obey. Every government that has the political will to enable their people to know the laws that regulate their conduct and activities can achieve it, starting with the basic free online access to comprehensive and up-to-date legal information described above. Subsequent improvements to this basic access can be made using state-of-the-art technologies like the Tasmanian EnAct System.³² Every government should be willing to provide the opportunities and facilities to promote the public's knowledge of the law so as to avoid the grave injustice in the application of the *ignorantia juris* doctrine, even when the law is inaccessible and therefore unknowable. The people have the legal right to know the laws that they are bound to obey under the rule of law,³³ which is the right of public access to legal information that I discuss in Part C below.

C. The Existence of the Right of Public Access to Legal Information as a Legal Right

Legal rights are entitlements defined, guaranteed, and protected by law. The definitive repositories of legal rights are the primary sources of law: Legislation or

³⁰ See *How Much Does PACER Cost?*, PUB. ACCESS TO COURT ELEC. RECORDS, <https://www.pacer.gov/> (last visited July 6, 2017). For a campaign against PACER's fee-charging policy, see Jason Tashea, *Carl Malamud's Crusade to Fix PACER*, TECHNICAL.LY (Apr. 20, 2015, 11:14 AM), <http://technical.ly/dc/2015/04/20/carl-malamud-pacer-dc-legal-hackers-meetup/>.

³¹ PUBLIC.RESOURCE.ORG, <https://public.resource.org/index.html> (last visited July 6, 2017).

³² See *The EnAct System*, TASMANIAN LEGIS., <https://www.legislation.tas.gov.au/about/enact> (last visited July 6, 2017); Timothy Arnold-Moore & Jane Clemes, *Connected to the Law: Tasmanian Legislation Using EnAct, JILT* (2000), https://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/arnold/. Legal information websites "may start small and simple" and progress to use "sound technology" for enhanced accessibility. See Poulin, *supra* note 17.

³³ See discussion *infra* Section D.II.8 (discussing global promotion of the rule of law).

statute law, which includes constitutions; judicial decisions; regulations; administrative orders, directives, and rules; and binding regional and international legal instruments. These sources clearly define the respective rights so that they are capable of being identified and enforced. Legal rights are also found in binding customs, such as the customary law of indigenous peoples, which may be written or unwritten. Every legal right has a beneficiary or right holder who is entitled to it, the duty bearer who has the obligation to facilitate and guarantee its enjoyment, and the possibility and mechanism of its enforcement.³⁴ I discuss all these aspects of the right of public access to legal information as a legal right in this Part. Because human rights are legal rights with an elevated status, the human rights aspect is examined in Part D below.

I define the “right of public access to legal information” as follows: The legal entitlement of all persons³⁵—in their different circumstances—to know the full, up-to-date texts of the whole stock of the laws and law-related publications³⁶ of

³⁴ See Benny Santoso, “Just Business”—Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuses by Transnational Corporations?, 18 GERMAN L.J. 533, 540–41 (2017) (“Enforcement, including compensation, builds on jurisprudence that includes enforceability in the definition of legal rights.”). For discussions of the concept of legal rights, see generally J. Raz, Legal Rights, 4 OXFORD J. LEGAL STUD. 1–21 (1984); Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L.J. 1335–72 (1986).

³⁵ This term encompasses human beings who have attained the age of legal responsibility, and who have the capacity to read and understand the texts of the law, as well as corporate organizations.

³⁶ “Laws and law-related publications” refers to primary legislation, secondary legislation, court decisions, international legal instruments, administrative memoranda, bills and other public documents directly related to the law-making function of the legislature (for example, debates and public hearings), reports on legal matters (for example, white papers and commissions of inquiry reports), and value-added publications that aid understanding and navigation of laws (for example, annotations, summaries, indexes, and digests). The oral or unwritten customary law of indigenous communities is inaccessible and unreliable. It should therefore be recorded in a written form in a manner—and through a process—that conforms to human rights and the specific rights of indigenous peoples. See discussion *infra* Section D.III.2.12 (discussing public access to the customary law of indigenous communities). For my discussion of my new concept of human rights-compliant public access to the customary law of indigenous communities, see Leesi Ebenezer Mitee, *Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access* (forthcoming 2017).

their legislative jurisdiction,³⁷ which guarantees the availability and free use of all formats online and in public libraries, without copyright in their texts nor in their official value-added features produced by any government or intergovernmental organization either directly or under any arrangement with a third party.³⁸

I believe that this definition fulfills its objective of covering all the major aspects of the right of public access to legal information, and therefore the value of its comprehensiveness far outweighs the peripheral need for its conciseness. My aim is to provide a one-sentence quotable definition of the right of public access to legal information that is comprehensive. It should be emphasized that the term “public access,” in this definition, means *free* online access on official legal information websites and *free* physical access in government-owned or public libraries. Both types of access should include all necessary alternate formats for persons with disabilities.³⁹

I. Its Existence Under the General Right of Access to Public or Government-Held Information

Government-held information is public information that is owned by the people, and the government—as representatives of the people—holds such information in trust for them, as stated in Part B above. That is the reason for President Barack Obama’s description of U.S. federal information as a “national asset” that must be open and transparent.⁴⁰ The Banjul Declaration of Principles on Freedom of Expression in Africa by the African Commission on Human and Peoples’ Rights states it aptly: “Public bodies hold information not for themselves but as

³⁷ “Legislative jurisdiction” refers to the geographical area under a particular legislature (national, state, or local). See the modified version of this definition of the right of free access to public legal information in Section 4.3 of Chapter Five of this thesis.

³⁸ See *supra* notes 26–27 and accompanying text discussing the assertion of copyright in official annotations in legislation in the United States.

³⁹ See discussion *infra* Section D.III.2.11 (discussing alternate formats for equal access by persons with disabilities).

⁴⁰ Memorandum on Transparency and Open Gov’t from President Barack Obama to the Heads of Executive Departments and Agencies (Jan. 21, 2009), <https://www.archives.gov/files/cui/documents/2009-WH-memo-on-transparency-and-open-government.pdf>.

custodians of the public good and everyone has a right to access this information . . . ”⁴¹ The Montreal Declaration on Free Access to Law (Montreal Declaration) made by the Free Access to Law Movement (FALM) also upholds this principle in relation to law by asserting that “[p]ublic legal information from all countries and international institutions is part of the common heritage of humanity.”⁴² Consequently, the people have an inherent right of public access to their information.

Laws on freedom of information are therefore based on this right of access to public information. Because legal information is an essential part of government-held or public information,⁴³ the statutory existence of the right of public access to legal information can therefore be derived from laws containing provisions on the general right of access to public information. In *Deaton v. Kidd*, the Missouri Court of Appeals adopted the trial court’s statement that “it is hard to think of a more important public record than the general laws of the state.”⁴⁴

Freedom of Information Acts (FOIAs) promote the right of access to public information. FOIAs—used here generally to refer to any substantial legislation wholly dedicated to freedom of information—provide broad access to some public documents and some private documents used by public bodies in accordance with data protection laws.⁴⁵ Article 1 of Chapter 2 of the Swedish Freedom of the Press Act 1766⁴⁶ (SFPA) is a significant contribution to the concept of free access to government-held information. The SFPA is acclaimed to be the world’s oldest

⁴¹ ACHPR/Res.62(XXXII)02, art. IV, para. 1, Banjul Declaration of Principles on Freedom of Expression in Africa (Oct. 23, 2002).

⁴² Free Access to Law Movement, Montreal Declaration on Free Access to Law of 2002, <http://www.falm.info/declaration/> [hereinafter Montreal Declaration]; see also Greenleaf (2008), *supra* note 17 (discussing historical background to legal information institutes and the Free Access to Law Movement).

⁴³ See Mitee, *supra* note 15, at 168.

⁴⁴ *Deaton v. Kidd*, 932 S.W.2d 804, 806 (Mo. Ct. App. 1996).

⁴⁵ See, e.g., Freedom of Information Act 2000, c. 36, §§ 21–44 (UK) (the numerous types of exempt information that cannot be accessed under the Act).

⁴⁶ This Act is one of the four fundamental laws that comprise the Swedish Constitution. TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] 2:1 (Swed.) (Dec. 16, 2016), <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/>.

FOIA.⁴⁷ At least 95 countries have FOIAs, according to the available statistics as of September 2013.⁴⁸

As is the case with other types of public information, FOIAs may be used to compel the appropriate government department to grant any applicant access to legal information, as in *Kidd*.⁴⁹ But that is not the main use of FOIAs;⁵⁰ their main use is reactive disclosure of other categories of public information on request and on a piecemeal basis. FOIAs also encourage proactive disclosure—the provision of comprehensive accessibility in a ready and permanent form for the whole world, devoid of procedural conditions that include requests.⁵¹ But effective proactive publication of public information requires mandatory statutory provisions that make it the default publication method. Such provisions are not likely to be found in FOIAs. Therein lies the inadequacy of FOIAs to protect the right of public access to legal information.

Adequate public access to legal information requires its publication in both physical and electronic media to make it permanently available at all times for everybody. That type of availability eliminates the need for an individual request for any document containing legal information. Individual request is the dominant practice under FOIAs. Darbishire rightly identified such proactive publication or disclosure without the need for request, as the “future” of the right of access to public information.⁵² It is significant that after more than four decades of the

⁴⁷ *Sweden: International Focus*, UNIV. COLL. LONDON, <https://www.ucl.ac.uk/constitution-unit/research/foi/countries/sweden> (last visited July 6, 2017).

⁴⁸ *Access to Information Laws: Overview and Statutory Goals*, RIGHT2INFO (Jan. 20, 2012), <http://www.right2info.org/access-to-information-laws>.

⁴⁹ *Deaton*, 932 S.W.2d. For the facts of this case, see *infra* text accompanying note 100.

⁵⁰ See McMahon, *supra* note 28 (limitations with using FOIAs to access legal information).

⁵¹ For the meaning of reactive and proactive disclosures, see Address by the Interim Information Commissioner of Canada on Proactive Disclosure Before the Standing Committee on Access to Information, Privacy and Ethics, OFFICE OF THE INFO. COMM’R OF CAN. (Apr. 29, 2010), http://www.oic-ci.gc.ca/eng/pa-ap-appearance-comparution-2010_3.aspx.

⁵² See generally Helen Darbishire, *Proactive Transparency: The Future of the Right to Information? A Review of Standards, Challenges, and Opportunities*, THE WORLD BANK (2011), <http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf>; Publish Core Information about Government on a Proactive Basis, OPEN GOV’T GUIDE 335–38 (Nov. 11, 2014), https://www.opengovpartnership.org/wp-content/uploads/2019/05/open-gov-guide_summary_all-topics1.pdf (last visited July 6, 2017).

existence of the U.S. Freedom of Information Act 1966—one of the oldest in the world—President Barack Obama issued a memorandum on the need for proactive disclosure⁵³ the day after his inauguration as President of the United States. That presidential directive reveals the defect of inadequate proactive publication under FOIAs.

Some countries have realized the limitations of the traditional FOIAs, and they have gone further to enact legislation that specifically enhances the right of access to public information. For example, Bulgaria enacted its Access to Public Information Act 2000 (BAPIA). Article 23 of the Constitution of the Republic of Albania 1998 contains an express right to information in addition to freedom of information. But even these improved statutory provisions are not sufficient to cover the specific and technical aspects of an adequate public access to legal information program, including authentication of digital legal information.⁵⁴

II. Its Existence Under the Traditional Requirement of Publication of Legal Information

The traditional requirement that laws should be published so that the people whose conduct and activities they regulate are aware of their existence has been recognized since time immemorial. That recognition has remained intact down through the millennia. It was the reason behind the inscription of ancient laws on stones and other media and displaying them in public places. For instance, the Code of Hammurabi in the 18th century B.C. consisted of 282 laws⁵⁵ written on a basalt stele measuring 2.25 meters high and 0.65 meters wide.⁵⁶

⁵³ Memorandum on the Freedom of Info. Act from President Barack Obama to the Heads of Exec. Dep'ts and Agencies (Jan. 21, 2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>.

⁵⁴ See *supra* note 13 (discussing authentication). For the specific and technical aspects of an adequate public access to legal information program, see discussion *infra* Section D.III.2 (discussing contents of the proposed UN Convention).

⁵⁵ *The Code of Hammurabi* (L. W. King trans. 2008), YALE L. SCH., <http://avalon.law.yale.edu/ancient/hamframe.asp> (last visited July 6, 2017).

⁵⁶ *Law Code of Hammurabi, King of Babylon*, THE LOUVRE MUSEUM, <http://www.louvre.fr/en/oeuvre-notices/law-code-hammurabi-king-babylon> (last visited July 6, 2017).

Section 4 of the New Zealand Acts and Regulations Publication Act 1989 (ARPA) is an example of the traditional requirement in national legislation to publish laws. It does not specify the medium for publication. From the long title of the ARPA, “to ensure that copies of Acts of Parliament and statutory regulations are available to the public” is one of its objectives. Section 5(1) of the Nigerian Acts Authentication Act 1962, a piece of federal legislation, is an example of obsolete provisions on publication of legal information. It mentions “vellum”⁵⁷ and “paper” as the only media for publication of legislation, using an outmoded printing technology. They were probably the available printing media in Nigeria at the time the legislation was enacted, more than five decades ago. The continued existence of such obsolete provisions is detrimental to public access to legal information in this information and communications technology (ICT) age when the electronic format has become not just an indispensable alternate medium, but sometimes the only one.

Article 14 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms⁵⁸ (UN Declaration on Human Rights Defenders) contains the requirement to publish legal information. It states: “The publication and widespread availability of national laws and regulations and of applicable basic international human rights instruments” is necessary for helping the people to understand “their civil, political, economic, social and cultural rights.” Although this Declaration is non-binding, like similar declarations of the United Nations, responsible governments are expected to enforce its universal democratic principles as national policies.

Bare statutory provisions, such as those mentioned above, that only stipulate that laws should be published without mentioning the effects of their non-publication are deficient. Article IV, Section 17 of the Wisconsin Constitution contains such important provision: “No law shall be in force until published.” A further improvement on this is found in Article 2 of the Civil Code of the Philippines 1949: “Laws shall take effect after fifteen days following the completion of their

⁵⁷ See discussion *infra* Section D.III.2.4 (discussing preservation of legal information).

⁵⁸ G.A. Res. 53/144, UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 9, 1998) [hereinafter UN Declaration on Human Rights Defenders].

publication in the Official Gazette, unless it is otherwise provided. This Code shall take effect one year after such publication.” The Supreme Court of the Philippines enforced this provision in *Tañada v. Tuvera*.⁵⁹

There is the need for law reform to enable every country to have provisions which expressly stipulate that laws only come into effect after their publication. It is important to emphasize that such provisions should apply to all categories of laws to avoid the situation in England and Canada where only *subsidiary legislation*—also referred to as regulations in some jurisdictions, e.g. the United States—appear to have such publication requirement.⁶⁰ Nevertheless, justice may demand that any time-sensitive benefit that any person ought to have received under an unpublished law is protected, as recommended by the Statute Law Society.⁶¹

Despite its defects, one implication of the traditional requirement to publish the law is that the duty to provide public access to legal information precedes the duty of every person to know the law. Consequently, all persons have the right to know the full contents of any legal information that applies to them, which is only possible where there is adequate public access to the sources of such legal information. It is reiterated that this right is the basis for the presumption that every person knows the law,⁶² and therefore ignorance of the law is no excuse for its contravention.⁶³

⁵⁹ *Tañada v. Tuvera*, G.R. No. L-63915, 136 SCRA 27 (Apr. 24, 1985) (Phil.). See *infra* notes 99 & 296 and accompanying text on the Court’s requirement that laws must be published before they take effect.

⁶⁰ See, e.g., Statutory Instruments Act, R.S.C. 1985, c S-22 s 11 (Can.); Statutory Instruments Act 1946, 9 & 10 Geo. 6 c. 36, § 3(2) (Eng.); Andrew Ashworth, *Ignorance of the Criminal Law, and Duties to Avoid It*, 74 MOD. L. REV. 1, 2 (2011) (discussing some recognized exceptions to the doctrine of ignorance of the law is no excuse); Mitee, *supra* note 15, at 38–39.

⁶¹ See Statute L. Soc’y, Statute Law Society Working Party on Commencement of Acts of Parliament Report, 1(1) STATUTE L. REV. 40, 51 (1980), <https://doi.org/10.1093/slr/1.1.40>.

⁶² See JEFFERSON L. INGRAM, CRIMINAL EVIDENCE § 6.13 (12th ed. 2015) (discussing the presumption of knowledge of the law). IOWA CODE § 701.6 (2016) is an example of statutory provision that “[a]ll persons are presumed to know the law.”

⁶³ See *Blackpool Corporation v. Locker* [1948] 1 KB 349, 361 (Eng.), in Bannister, *supra* note 20; DON STUART, CANADIAN CRIMINAL LAW: A TREATISE 295–98 (3rd ed., 1995), in *Corporation de l’École Polytechnique v. Canada*, 2004 FCA 127, para. 37 (CanLII).

III. Its Existence Under the Requirement of Publication of Legal Information with Advanced Technologies to Enhance Accessibility

As discussed in the immediately preceding Section C.II above, the traditional requirement for the publication of legal information cannot meet the demands of the twenty-first century that has been rightly described as the information technology or digital age.⁶⁴ Lee Loevinger pioneered the revolutionary application of technology to law in the United States in 1948⁶⁵ with his concept of *jurimetrics* in his seminal article published in 1949.⁶⁶ The U.S. federal and state laws contain provisions for the use of advanced technologies that enhance accessibility of legal information. For example, provisions of the Oregon Revised Statutes state that legal information shall be published online,⁶⁷ made available in alternate formats for diverse users,⁶⁸ and that access to it shall be free.⁶⁹ Although they are deficient in details and are not comprehensive, such improved provisions will enhance public access to legal information.

At the international level, there is a useful provision in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) with respect to variety of media for publishing public information. Although the provision is not specific, it can be interpreted to cover every form of legal information, which is a major component of public information, as stated in Section C.I above. Article 5(3) of the UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁷⁰ (Aarhus Convention) is an express provision for enhanced publication of legal information. The said Article 5(3) requires each Party

⁶⁴ See Bin Yu, *Embracing Statistical Challenges in the Information Technology Age*, 49 *TECHNOMETRICS* 237, 237–38 (2007); Claire M. Germain, *Legal Information Management in a Global and Digital Age: Revolution and Tradition* 22–23 (Cornell Legal Studies Research Paper No. 07-005, 2007), <http://ssrn.com/abstract=983197> or <http://dx.doi.org/10.2139/ssrn.983197>.

⁶⁵ See Layman E. Allen, *Festschrift: Lee Loevinger*, 40 *JURIMETRICS* 394, 394 (2000).

⁶⁶ See Lee Loevinger, *Jurimetrics: The Next Step Forward*, 33 *MINN. L. REV.* 455 (1949).

⁶⁷ See OR. REV. STAT. § 173.763(2)(a) (2015).

⁶⁸ See *id.* § 173.763(2).

⁶⁹ See *id.* § 173.763(5).

⁷⁰ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447; 38 ILM 517 (1999) [hereinafter Aarhus Convention].

to the Convention to ensure that every text of laws and appropriate policies, plans, and programs on or relating to the environment “progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks.”

The basic technology that is freely available for publishing legal information involves merely uploading an electronic version to a website. Advanced technologies are also required for managing legal information and for achieving the overall goal of providing optimum access for different categories of users. For instance, specialized assistive technology is used to produce enhanced accessibility for persons with disabilities. The Federal Register of Legislation, the official legislation website of the Government of Australia, uses BrowseAloud assistive technology to enhance accessibility through text-to-speech and screen magnification for persons with literacy problems, cognitive disabilities, and visual impairment.⁷¹ Tasmania, an Australian state, uses the innovative EnAct Legislation system—which is one of the most advanced legislation management systems in the world—for drafting and management of legislation.⁷² Among other requirements, online legal information databases should have advanced search functionality that enhances accessibility by making it easy to discover every piece of relevant information.

There is now the tendency towards digital-only legal information—born-digital⁷³ legal information without any print version—as advocated in the Durham Statement on Open Access to Legal Scholarship made by the directors of the law libraries of some U.S. universities in 2009.⁷⁴ The digital-only revolution is now so pervasive that it has already created at least one digital-only bank with no

⁷¹ *Accessibility: Assistive Technology, FED. REG. OF LEGIS.,* <https://www.legislation.gov.au/Content/Accessibility> (last visited July 6, 2017); *Listen to this Website with Browsealoud, FED. REG. OF LEGIS.,* <https://www.legislation.gov.au/content/browsealoud> (last visited July 6, 2017).

⁷² See *supra* note 32 (sources cited discussing the EnAct System).

⁷³ Born-digital information here refers to information that was created originally in electronic format, as opposed to information converted from its original print to an electronic format.

⁷⁴ Durham Statement, *supra* note 18.

branches or call centers⁷⁵ and digital-only newspapers, including a national newspaper.⁷⁶

Several organizations have made declarations and formulated principles and statements on the publication of primary legal information that contain ideas on its modern electronic format. They include the Montreal Declaration on Free Access to Law 2002,⁷⁷ The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008,⁷⁸ Law.Gov Principles and Declaration 2010,⁷⁹ and Calgary Statement on Free Access to Legal Information 2011.⁸⁰

A modern law on public access to legal information should contain all the relevant standards and technical details on the application of technology for improving accessibility. Such technical information is usually confined to schedules or annexes to legislation. This is the standard practice in legislative drafting manuals, including those of the United Kingdom⁸¹ and the European Union.⁸² I did not find any law wholly dedicated to public access to legal information during my research

⁷⁵ Jill Treanor, *Atom Becomes UK's First Digital-Only Bank*, THE GUARDIAN (Apr. 8, 2016, 6:11 PM), <http://www.theguardian.com/money/2016/apr/08/atom-first-uk-digital-only-bank>.

⁷⁶ *The Independent Becomes the First National Newspaper to Embrace a Global, Digital-Only Future*, THE INDEPENDENT (Feb. 12, 2016, 1:24 PM), <http://www.independent.co.uk/news/media/press/the-independent-becomes-the-first-national-newspaper-to-embrace-a-global-digital-only-future-a6869736.html>.

⁷⁷ Montreal Declaration, *supra* note 42.

⁷⁸ The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008, *an annexure to* ACCESS TO FOREIGN LAW IN CIVIL AND COMMERCIAL MATTERS: CONCLUSIONS AND RECOMMENDATIONS, EUR. COMM'N, https://assets.hcch.net/upload/foreignlaw_concl_e.pdf (last visited July 6, 2017) [hereinafter The Hague Conference Guiding Principles]. The Principles were developed by the experts who met on Oct. 19–21, 2008 at The Hague Conference on Private International Law.

⁷⁹ Law.Gov, Law.Gov Principles and Declaration of 2010, <https://public.resource.org/law.gov/> [hereinafter Law.Gov Principles].

⁸⁰ Council of Canadian Academic Law Library Directors, Calgary Statement on Free Access to Legal Info. of 2011, http://www.osgoode.yorku.ca/wp-content/uploads/2014/07/Calgary_Statement_2011-05-14.pdf [hereinafter Calgary Statement].

⁸¹ OFFICE OF THE PARLIAMENTARY COUNS., DRAFTING GUIDANCE 25 (June, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454628/guidancebook_August_2015.pdf.

⁸² EUR-Lex, Joint Practical Guide for Persons Involved in the Drafting of European Union Legislation 74 (2015), <http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>.

for this Article. It is only such dedicated legislation that is likely to have comprehensive provisions and schedules or annexes on technical aspects of the subject matter.

IV. The Duty-Bearers to Publish the Law Under the Existing Right of Public Access to Legal Information

The beneficiaries of the right of public access to legal information are the people, corporate organizations, and organs of the government that are entitled to know the laws that regulate their conduct and activities. They include people all over the world because of the need for global legal research, migration, travel, and other transnational activities such as online business transactions and social interactions. This is particularly important because the application of the *ignorantia juris* doctrine extends to any unlawful act committed by a foreigner in another jurisdiction, even when that same act is lawful in the foreigner's home jurisdiction.⁸³ Indeed, free access to comprehensive and up-to-date legal information from all countries and jurisdictions is essential.

Who, then, are the duty-bearers that have the responsibility to provide public access to legal information for the benefit of these beneficiaries? Whoever originates or creates legal information has the duty to provide free access to its comprehensive and up-to-date sources. Consequently, every government bears this duty,⁸⁴ as well as every IGO with legislative and judicial functions. This duty to

⁸³ *Mohammad v. State*, 1953 AIR 227, para. 19 (PB) (India) (holding that “[i]gnorance of law by a foreigner may be no legal defence but it is a matter to be taken into consideration in the matter of mitigation of punishment”); *Regina v. Barronet* (1852) 169 Eng. Rep. 633 (QB) (Eng.) (rejecting the defense that acting as seconds to their friend who died in the duel was lawful in their home country, France, and they were not aware that it was unlawful in Great Britain where they committed it); *Regina v. Esop* (1836) 173 Eng. Rep. 203 (Eng.) (rejecting the defense that buggery, anal sexual intercourse, was lawful in his home country, Iraq, and he did not know it was unlawful under English law where he committed it).

⁸⁴ See Timothy J. Arnold-Moore, *Point-In-Time Publication of Legislation (XML and Legislation): Automating Consolidation of Amendments to Legislation in Common Law and Civil Jurisdictions*, Paper presented at the 6th Law Via the Internet Conference, Paris, Nov. 3–5, 2004, http://www.frlrii.org/IMG/pdf/2004_frlrii_conference_tja.pdf (discussing the duty of the government to provide free access to legal information and the indispensability of online databases to achieving it); see also Timothy Arnold-Moore, *XML and Legislation*, *COMPLRES* 29 (2003),

publish the law precedes the duty of every person to know the law, upon which the presumption of knowledge of the law⁸⁵ is based. That presumption is the foundation of the *ignorantia juris* doctrine. The courts have maintained that the purpose of publishing legal information is to protect the people against unknowable laws that jeopardize their rights and interests—a primary obligation of every government to its citizens and residents.⁸⁶ I discuss the express judicial recognition and enforcement of this duty in Section C.V below.

To avoid the possibility of problems arising from the custodianship, copyright, and control of legal information and to reduce the cost of providing free access to it by the government, this duty should not be outsourced to commercial publishers.⁸⁷ I had stated previously that a “[g]overnment may contract aspects of the process to the private sector.”⁸⁸ But no such contract should include any third-party copyright in nor control of any database, nor any arrangement that can jeopardize the complete control of the database by the government or IGO.

Similarly, no government or IGO should depend on not-for-profit organizations to provide public access to its legal information. Unfortunately, some governments appear to do so to varying degrees. For example, the Law Reporting department of the Judiciary of Uganda publishes Ugandan legal information on the Uganda

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/CompLRes/2003/29.html>; McMahon, *supra* note 28; Mitee, *supra* note 15, at 70 (stating that “every government is under both legal and moral obligations to provide adequate access to the full-text of every legislation that is applicable in its jurisdiction”).

⁸⁵ See INGRAM, *supra* note 62.

⁸⁶ Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin., 768 N.W.2d 700, 712–13 (2009).

⁸⁷ For the accounts on how West Publishing ownership right in the JURIS database caused huge problems to the U.S. Department of Justice when it pulled out of JURIS and removed its data, see Beth Ford, *Open Wide the Gates of Legal Access*, 93 OR. L. REV. 539, 546–49 (2014); Gary Wolf, *Who Owns the Law?*, WIRED (May 1, 1994), <http://www.wired.com/1994/05/the-law/>. Resources on Sri Lanka’s official legal information website, see LAWNET, <http://www.lawnet.lk/> (last visited July 6, 2017), developed with funding from the World Bank, have been inaccessible since the outsourcing private company went out of business more than six years ago. See Graham Greenleaf, *Free Access to Legal Information, LIs, and the Free Access to Law Movement*, in IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT (Richard A. Danner & Jules Winterton eds., 2011), <http://ssrn.com/abstract=1960867>.

⁸⁸ See Mitee, *supra* note 15, at 95.

Legal Information Institute website.⁸⁹ Further, such dependence is implied in the following statement on the UK Parliament website: “The archived House of Lords judgments are the only case law that Parliament holds. For any other court decision you will need to use a legal information service such as the British and Irish Legal Information Institute (BAILII), which is free to access.”⁹⁰ Although there are official online databases of the decisions of the UK courts,⁹¹ the statement can be interpreted to mean the BAILII database may be the only online repository of some decisions. The importance of the legal resources of BAILII and those of other legal information institutes and free access providers is limited by their lack of authenticity and official status,⁹² which denies them evidentiary value. The disclaimers on their websites reveal this defect. BAILII’s disclaimer specifically states: “BAILII does not invite reliance upon, nor accept responsibility for, the information it provides.”⁹³ Yet it is such reliance that authentic legal research is based on.

Greenleaf, Mowbray, and Chung have advocated that third parties should play what appears to be a leading role in the provision of free public access to legal information. According to them,

The *obligations of the State*, in relation to all primary legal materials (‘materials’), are to provide these materials *to other parties to republish*, without fee, in the most complete, authentic and authoritative form possible, and so that materials may be republished with their authority and

⁸⁹ See *Law Reporting*, THE JUDICIARY OF UGANDA, <http://www.judiciary.go.ug/data/smenu/25/Law%20Reporting.html> (last visited July 6, 2017).

⁹⁰ See *Judgments: Other Judgments*, PARLIAMENT.UK, <http://www.parliament.uk/about/how/business/judgments/> (last visited July 6, 2017). The British and Irish Legal Information Institute (BAILII) website (<http://www.bailii.org/>) contains vast resources on the UK legal information, including legislation and judgments. It is a non-profit organization and a member of the Free Access to Law Movement (<http://www.fatlm.org/>).

⁹¹ See, e.g., *Decided Cases*, THE SUP. CT., <https://www.supremecourt.uk/decided-cases/index.html> (last visited July 6, 2017).

⁹² See *supra* note 13 (discussing the definition of authentic texts of legal information) & note 14 (discussing the definition of official texts of legal information).

⁹³ *Disclaimers of Liability*, BRIT. & IRISH LEGAL INFO. INST., <http://www.bailii.org/bailii/disclaimers.html> (last visited July 6, 2017).

integrity intact . . . *If necessary*, the State should take the role of providing free access to these materials.⁹⁴

The contribution of these distinguished scholars and experts to public access to online legal information worldwide is huge and highly commendable, but I am unable to agree with their above-quoted assertion on the obligations of the State. Their position is the same principle adopted by many free access providers, including the legal information institutes.⁹⁵ How can any government abdicate this all-important primary public duty to third parties? It is *always necessary* in every circumstance that the State must perform its legal and moral obligation to provide free and adequate public access to its legal information—not “if necessary”, as stated in the above quotation. The obligation of the State is to do so directly to the people, not exclusively “to other parties to republish”, as also stated in the above quotation. All users of legal information—including third parties who republish it—have equal access to it, directly from the same official State source.

If the duty of the State is merely to make legal information available to third parties to republish, who will the people hold accountable if the third parties fail to provide adequate public access to such information after the State had done its part? Third parties cannot be held responsible because they have no such duty. I agree completely with Arnold-Moore who stated unequivocally that “the government has a clear obligation to make the primary legal sources available to the public.”⁹⁶

Members of FALM—most of which are the legal information institutes—and other publishers of free legal information should see their invaluable contribution to free public access to online legal information as filling the gap created by the neglect

⁹⁴ Graham Greenleaf, Andrew Mowbray & Philip Chung, *The Meaning of “Free Access to Legal Information”: A Twenty Year Evolution*, 1 JOAL (2013), <https://ojs.law.cornell.edu/index.php/joal/article/view/11> (emphasis added).

⁹⁵ Legal information institutes are members of the Free Access to Law Movement (FALM), an international nonprofit association that provides and supports free access to legal information from different countries. See THE FREE ACCESS TO LAW MOVEMENT, <http://www.fatlm.org/> (last visited July 6, 2017).

⁹⁶ Arnold-Moore (2004), *supra* note 84 (discussing the duty of the government to provide free access to legal information and the indispensability of online databases to achieving it) (emphasis added); see also Arnold-Moore (2003), *supra* note 84; McMahon, *supra* note 28.

of the duty-bearers who have the legal obligation to do so. They should extend their free-access-to-law advocacy to putting pressure on the duty-bearers to perform their obligation to provide free access to their comprehensive and up-to-date legal information. In addition, third-party, free-access publishers of online legal information should provide annotations and other value-added services that will help people to understand the law. This new direction will create a more beneficial synergy in their relationship with governments and IGOs that are duty-bound to provide free and adequate public access to their legal information. I predict that someday, in any legislative jurisdiction—national, state, and local—where its government has provided free online access to its comprehensive and up-to-date legal information on its dedicated one-stop website, that jurisdiction's third-party unofficial legal information databases that do not have value-added features will begin to lose their relevance.

From the foregoing analysis, the provision of free and adequate public access to its legal information is undeniably a primary duty of every government. Every IGO with legislative and judicial functions—examples of which include the United Nations, Organization of American States, European Union, African Union, Association of Southeast Asian Nations, and the Arab League—also has this duty with respect to the legal information it creates or originates.

V. Judicial Recognition and Enforcement of the Existing Right of Public Access to Legal Information

The courts have both recognized and enforced the right of public access to legal information that goes with the duty of the government to provide the required access. I mentioned at the beginning of this Part that capability of enforcement is one of the features of a legal right. The importance of the judicial recognition of the right of public access to legal information stems from the fact that case law is one of the sources of law in common-law legal systems. Case law is an authoritative source of binding legal principles, some of which are not found in legislation nor in any other source of law. It is one of the mechanisms that helps the courts to avoid arbitrary decisions.⁹⁷ In this way, case law contributes to the

⁹⁷ See GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM: 2010–2011* 134–39, 141–42 (11th ed. 2010) (Kindle edition).

development of predictable legal principles that regulate the conduct and activities of the people, organizations, and the State. The Practice Statement of the House of Lords, the predecessor of the UK Supreme Court, encapsulates all these benefits of judicial precedent in the English legal system.⁹⁸

In *Tañada v. Tuvera*,⁹⁹ the Supreme Court of the Philippines granted a writ of *mandamus* and “order[ed] respondents to publish in the Official Gazette all unpublished presidential issuances which are of general application, and unless so published, they shall have no binding force and effect.” In addition to *mandamus*, FOIAs—also called Sunshine Laws in the United States—may be used to enforce one’s right of public access to legal information. In *Deaton v. Kidd*,¹⁰⁰ the Missouri Court of Appeals affirmed the judgment of the trial court that Ralph C. Kidd, the Director and Revisor of Statutes, purposefully violated Section 610.023 of the Revised Statutes of Missouri (Missouri Sunshine Law) by refusing to make available to Deaton a computerized copy of the Missouri Revised Statutes. The Court upheld the trial court’s decision that the electronic product was public record and emphasized the primacy of legal information among all categories of public information. The trial court had ordered Kidd to make it available to Deaton for the cost of its duplication and to pay Deaton’s litigation costs and fees. Before this action, it was made available to only private companies that entered into contracts with the Committee on Legislative Research to buy exclusive access.

The judicial recognition of every person’s right of public access to legal information is not a recent development. It is also found in old cases on copyright in public or government-held information. Those cases are relevant because the absence of copyright in public documents is one of the indicators of the right of public access to them—the right to know of their existence, read and understand their contents, and reuse their texts freely. *Wheaton v. Peters*¹⁰¹ and *Davidson v. Wheelock*¹⁰² are examples of cases in which the courts have held that there could be no copyright in legal information resources because they are public information for the whole world and every person has the right to access them to know the law. Because

⁹⁸ House of Lords Practice Statement [1966] 3 All ER 77.

⁹⁹ *Tañada*, *supra* note 59.

¹⁰⁰ *Deaton*, 932 S.W.2d.

¹⁰¹ *Wheaton v. Peters*, 33 U.S. 591 (1834).

¹⁰² *Davidson v. Wheelock*, 27 F. 61 (1886). See Ford, *supra* note 87, at 544–45.

there are still countries that have copyright in government works that include legal information,¹⁰³ there is therefore the urgent need for a global prohibition of copyright in legal information, as I advocate in the next Part of this Article.¹⁰⁴

Useful as it may seem, the enforcement of one's right of access to legal information under FOIAs is usually carried out on a piecemeal basis upon an individual's request, as I noted above.¹⁰⁵ The type of enforcement that will have a strong effect on the overall public access to legal information must involve an order of a court to publish it in a permanent form for the benefit of the whole world, as is done, for example, on a website. Also, the discretionary nature of an order of mandamus makes it an inadequate mechanism for enforcement of one's right of public access to legal information. For example, in *Victoria University of Wellington Students Association v. Shearer (Government Printer)*,¹⁰⁶ although the New Zealand Supreme Court recognized the duty of the State to provide public access to legal information, it declined to grant an order of mandamus to compel the Government Printer to produce and supply copies of the Judicature Act 1908 that the plaintiff needed. The Court reasoned that mandamus could not lie against the Government Printer who was a servant of the Crown.

The existing isolated cases of judicial enforcement of the right of public access to legal information appear to prove one salient point: Members of the public are not sufficiently aware of the fact that they may be able to invoke provisions of FOIAs and the discretionary order of mandamus to compel their governments to grant them access, albeit limited access, to their legal information. But a definitive human right of public access to legal information would give the right the advantage of global awareness of its existence. That is part of the argument that I

¹⁰³ See, e.g., Copyright Act (1988) Cap. (C28), § 4(1) (Nigeria) ("Copyright shall be conferred by this section on every work which is eligible for copyright and is made by or under the direction or control of the Government, a State authority or a prescribed International body.").

¹⁰⁴ See *infra* Section D.III.2.2 (stating that there should be no copyright in the texts of legal information and its official value-added features).

¹⁰⁵ See discussion *supra* Section C.I (discussing the existence of the right of public access to legal information under the general right of access to public or government-held information).

¹⁰⁶ *Victoria Univ. of Wellington Students Ass'n v. Shearer (Gov. Printer)* [1973] 2 NZLR 21, 23 (SC), in David Harvey, *Public Access to Legislative Information and Judicial Decisions in New Zealand: Progress and Process*, 4 UTSLAWRW 105, 108 (2002).

present in my proposal for the international human rights framework for the right of public access to legal information in Part D below.

D. A Proposal for the International Human Rights Framework for the Right of Public Access to Legal Information

I examined the existence of the right of public access to legal information strictly as a legal right in the immediately preceding Part C above. In this Part, I review existing literature on the right of public access to legal information as a human right and examine why it should be formally recognized as a human right. I also discuss my proposal for its universal recognition as such, propose a UN Convention on the Right of Public Access to Legal Information, and outline the essential contents of the Convention.

I. Existing Literature on the Right of Public Access to Legal Information as a Human Right

Existing literature and some of the views on the right of public access to legal information as a human right are examined here to provide an important aspect of the background for the proposal discussed below.

1. Previous Research and Views

Jamar has been rightly referred to as “one of few scholars trying to construe a right of access.”¹⁰⁷ He deserves credit for being one of the pioneer contributors to this debate. Jamar suggested in his 2001 paper that the existence of the right of public access to legal information as a human right could be derived explicitly from the rights “to seek [and] receive information” in the Universal Declaration of Human Rights (UDHR), ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), regional treaties, and national laws. He stated that “[t]he right of access to law is also *implicit* in other provisions of the International Covenant on Civil and Political Rights,” such as the right “not to be subjected to arbitrary arrest

¹⁰⁷ Laurens Mommers, *Access to Law in Europe*, in INNOVATING GOVERNMENT (Information Technology and Law Series 20) 383, 395 (S. van der Hof & M. M. Groothuis eds., 2010).

and detention”; “[o]ther rights such as equality before tribunals”; the right to be protected against “arbitrary and unlawful interference with [one’s] privacy, family, home or correspondence”; and the right to “nondiscrimination in employment, rights to unionize, [and] rights to social security.”¹⁰⁸

In my 2006 comparative study of public access to legislation in the United Kingdom and Nigeria,¹⁰⁹ one of the statements in its conclusion was that, “[on] the global level, public access to *legislation* may be enhanced through the recognition and implementation of the right of access to *legislation* as a new human right.”¹¹⁰ I had stated earlier in that study that public access to legislation qualified for recognition as a human right based on the “implications of lack of access to legislation highlighted above coupled with the philosophy underpinning the Montreal Declaration on Free Access to Law 2002.”¹¹¹

Mommers acknowledged Jamar’s attempt to “construe a right of access”.¹¹² In his 2010 chapter contribution, Mommers discussed what he termed “several existing rights that might be supportive in construing a right of access to legal information, or even a right of accessibility of legal information.”¹¹³ He examined the principle of legality, freedom of speech, right of access to justice, and transparency of government, which he referred to as “basic rights.” He concluded that those basic rights provided a “careful ‘yes’” answer to his research question: “Can a right of access to legal information be construed from the current legislative framework applicable to legal information?”¹¹⁴

In 2012, Danner, in his discussion primarily on open access to *legal scholarship*—that is, legal research publications that are not primary sources of law—attempted to use the free access to law principle as the possible means of making such

¹⁰⁸ See Steven D. Jamar, *The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law*, 1 GLOBAL JURIST TOPICS NO. 2 Art. 6 (Sept. 2001), <https://www.degruyter.com/downloadpdf/j/gj.2001.1.2/gj.2001.1.2.1032/gj.2001.1.2.1032.pdf> (emphasis added).

¹⁰⁹ See Mitee, *supra* note 15.

¹¹⁰ See *id.* at 187 (emphasis added).

¹¹¹ See *id.* at 175–76.

¹¹² See Mommers, *supra* note 107, at 395.

¹¹³ See *id.* at 392.

¹¹⁴ See *id.* at 395.

publications accessible freely and openly. That quest led him to examine the Montreal Declaration on Free Access to Law and two other free-access international documents.¹¹⁵ He identified the UDHR, ICESCR, and ICCPR as “the *possible sources* for a rights-based access argument,” and stated that the three free-access international documents do not “argue for a right of open access to information . . . [n]or do they discuss the [said] possible sources.”¹¹⁶

Some scholars have simply declared or inferred in their publications that the right of public access to legal information is a human right. For example, Jones & Ilako stated in their paper that discussed “US and Ugandan perspectives on legal information as a human right”: “This paper is based on the proposition that access to information is a fundamental human right.”¹¹⁷ They referred to, and appear to have adopted, the opinion of Danner mentioned above. Hellum & Taj simply declared in their 2016 work: “Equal access to law and the right to legal information is a human right that, in principle, applies to all individuals regardless of time and place.”¹¹⁸

2. Gaps in the Existing Literature

Only Mommers’ work aimed specifically to discuss the right of public access to legal information as a human right. Although he did not directly use the term “human right” in his work, human rights are also referred to as “basic rights,” which is the term he used. In addition, his reference to Jamar’s work on the human right of access to legal information and his analysis based on human rights law,

¹¹⁵ Richard A. Danner, *Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue*, 7 JICLT, 65, 66–67 (2012). The other declarations are Budapest Open Access Initiative (Feb. 14, 2002), <http://www.budapestopenaccessinitiative.org/read>; Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (Oct. 22, 2003), <https://openaccess.mpg.de/Berlin-Declaration>.

¹¹⁶ Danner, *supra* note 115, at 66 (emphasis added).

¹¹⁷ Yolanda Jones & Caroline Ilako, *Dynamic Law Libraries: Access, Development and Transformation in Africa and the United States*, IFLA (June 16, 2015), <http://library.ifla.org/1120/1/114-jones-en.pdf>.

¹¹⁸ Anne Hellum & Farhat Taj, *Taking What Law Where and To Whom? Legal Literacy as Transcultural ‘Law-Making’ in Oslo*, in FROM TRANSNATIONAL RELATIONS TO TRANSNATIONAL LAWS: NORTHERN EUROPEAN LAWS AT THE CROSSROADS (Anne Hellum, Shaheen Sardar Ali, & Anne Griffiths eds. 2016).

may be sufficient to conclude he was discussing the right of public access to legal information as a human right.

The discussions of Jamar, Mommers, and Danner do not contain arguments on why the right of public access to legal information should be recognized as a human right. They are confined to its derivative status from existing rights, which strengthen my contention in Section D.II.1 below, that its derivative existence makes the right illusory, ineffectual, and creates normative gaps. In fact, as quoted above, Mommers' conclusion contains a cautious acceptance that a right of access to legal information could be construed from the current legislative framework applicable to legal information. Danner only noted the possibility of its derivation from three international human rights instruments without discussing his claim. Jamar appears to be more optimistic about the explicit derivative existence of the right. But the rights mentioned in his implicit derivation appear to be remote. None of them proposed the proper legal framework under which the right of public access to legal information could thrive as successfully as the established human rights, neither did they discuss its applicable principles or contents.

Both arguments of my previous study relate to the consequences of lack of access and the principle of free access that I discuss below in Section D.II.5 and Section D.II.7, respectively. The scope of that study was limited to legislation—one of the many categories of legal information listed in a footnote to my definition of the "right of public access to legal information" in Part C above. I now consider limiting human right protection to legislation to be a defect in that study. All categories of legal information are entitled to equal protection under one category of human rights, as I propose below. Second, the main focus of that study was a comparative evaluation of the state of public access to legislation in the United Kingdom and Nigeria. Therefore, the absence of a detailed discussion on public access to legislation as a human right may be understandable, like the discussions of Jamar and Danner.

The gaps in these existing discussions may explain why it is likely that there is no existing formal proposal for the universal recognition of the right of public access to legal information as a human right. Their different views reveal the fundamental problem with the feeble nature of the derivative existence of the right of public access to legal information as a human right. It appears that scholars have not realized the need for its formal universal recognition as a human right, based on convincing positive arguments. Yet, it is only such formal recognition that will

make the right effectual and thereby contribute to free global public access to legal information.

This Article is my attempt to fill these gaps in the existing literature on the right of public access to legal information as a human right. It acknowledges and reinforces the existing arguments, and goes beyond them to make a positive case for the creation of the right of public access to legal information as a distinct human right based on eight reasons, as discussed in Section D.II below.

II. Why the Right of Public Access to Legal Information Should be Recognized Universally as a Human Right

Here, I argue that the right of public access to legal information should be recognized formally as a human right for several reasons, ranging from its existing human right derivative status to the need to enjoy its numerous benefits, which are only achievable under an adequate global legal framework.

1. There are Normative Gaps Associated with Its Existing Derivative Status

There is no international or regional human rights instrument that specifically created the right of public access to legal information as a human right.¹¹⁹ Nevertheless, it is not just a legal right, which I have established that it is, in Part C above; it is also a human right with a derivative status. That means it acquires its status from a parent human right, which is the right to freedom of expression and the press.¹²⁰ Although the UDHR may not have the force of a binding treaty,¹²¹ its Article 19 is the global source of the human right of freedom of expression and the

¹¹⁹ See Jamar, *supra* note 108.

¹²⁰ For opinions relating to how it may be derived or construed as a human right, see *id.* See also Mommers, *supra* note 107, at 392–97.

¹²¹ Some scholars hold the opinion that the UDHR is binding as customary international law. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995); Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EJIL 903 (2008); *What is the Universal Declaration of Human Rights?*, AUSTL. HUM. RTS. COMM'N, <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> (last visited July 6, 2017).

press. It has been replicated as an enforceable human right in the ICCPR,¹²² regional human rights instruments,¹²³ and national constitutions.¹²⁴

The first part of Article 19(2) of the ICCPR—a binding instrument that was adopted nearly twenty years after the UDHR—states: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Its equivalent provisions in other human rights instruments¹²⁵ and national constitutions¹²⁶ have several variations.

It is significant that some courts have interpreted the traditional right to receive information as the right of access to public information. For example, the Inter-American Court of Human Rights ruled in *Claude-Reyes v. Chile*¹²⁷ that Article 13 of the American Convention on Human Rights guarantees the right of access of every person to government-held information and the duty of the government to provide the required access. Although the European Court of Human Rights has over the years been reluctant to give it the same outright recognition under Article 10 of the European Convention on Human Rights, it did so implicitly in *Matky v. Czech Republic*.¹²⁸

The 2009 Report of the Special Rapporteur for Freedom of Expression on the Right of Access to Information (the Inter-American Commission on Human Rights) contains elaborate principles of the right of access to public information as “a

¹²² International Covenant on Civil and Political Rights, art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171.

¹²³ See, e.g., European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 221; African Charter on Human and Peoples’ Rights, art. 9; League of Arab States, Arab Charter on Human Rights, art. 32, May 22, 2004, *reprinted in* INTERNATIONAL HUMAN RIGHTS REPORTS 893 (2005) [hereinafter Arab Charter]. The Arab Charter expressly provides for the right of access to public information, in addition to freedom of opinion and expression.

¹²⁴ See, e.g., FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION 1999, Apr. 18, 1999, SR 101, art. 16 (Switz.); Constitution of Malta (1964), art. 41; CONSTITUTION OF NIGERIA (1999), § 39.

¹²⁵ See, e.g., Organization of American States, American Convention on Human Rights, art. 13(1), 22 Nov. 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

¹²⁶ See, e.g., CONSTITUTION OF NIGERIA (1999), § 39(1).

¹²⁷ *Claude-Reyes v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

¹²⁸ *Matky v. Czech Republic*, App. No. 19101/03 Eur. Ct. H.R. 1205 (July 10, 2006).

specific manifestation of the freedom of expression”.¹²⁹ More recently, the 2013 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression described it as “one of the central components of the right to freedom of opinion and expression.”¹³⁰ From the foregoing analysis, it is clear that because the right to freedom of expression is a human right that encompasses access to public information, and because legal information is a major component of public information,¹³¹ the right of public access to legal information is therefore also a human right.

Its derivative status as a human right is associated with normative gaps in the existing human rights instruments relating to it. For example, it is not identified or defined specifically as a human right and there is no detail on any of its various aspects. Its existence may therefore be susceptible to controversy. Because “[h]uman rights are intended to formally define the thresholds that identify situations in which human dignity is threatened or violated,”¹³² its derivative status is a defect in its existence as a human right. The solution to this defect is its formal universal recognition under a distinct international instrument. The instrument will contain express provisions on all aspects of the right and thereby eliminate the adventure to conjecture its existence or strain it from existing isolated human rights instruments.¹³³ In that way, it will remove the possibility of any judicial indifference to its outright recognition, such as the attitude of the European Court of Human Rights to Article 10 of the European Convention on Human Rights.¹³⁴

It is noteworthy that Article 14 of the UN Declaration on Human Rights Defenders persuades governments to undertake “[t]he publication and widespread

¹²⁹ ORG. OF AM. STATES, REPORT OF THE SPECIAL RAPPOREUR FOR FREEDOM OF EXPRESSION 1 (2009), http://www.oas.org/dil/access_to_information_IACHR_guidelines.pdf.

¹³⁰ Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/68/362, at 3 (Sept. 4, 2013).

¹³¹ *Deaton*, 932 S.W.2d.

¹³² HelpAge International, *International Human Rights Law and Older People: Gaps, Fragments and Loopholes*, UN DEP'T OF ECON. AND SOC. AFFAIRS (2012), <http://social.un.org/ageing-working-group/documents/GapsinprotectionofolderpeoplesrightsAugust2012.pdf>.

¹³³ See, e.g., Jamar, *supra* note 108.

¹³⁴ See *Matky case*, *supra* note 128 and the accompanying text.

availability of national laws and regulations and of applicable basic international human rights instruments.” Unfortunately, this Declaration, which has the most relevant general provisions on public access to legal information, is not a binding instrument in international human rights law, similar to other Declarations.¹³⁵ Its implementation is therefore discretionary.

2. To Provide the Human Rights Framework for its Promotion, Protection, and Actualization

To remedy the defect in its existing derivative status discussed above, the right of public access to legal information should be formally recognized as a human right in a Convention. Such formal recognition—whose importance is revealed by the United Nations’ quoted statement in Section D.II.4 below—will provide the global legal framework necessary for its promotion, protection, and actualization. The Office of the UN High Commissioner for Human Rights (OHCHR) defines human rights as the “universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.”¹³⁶ Governments are the principal duty-bearers that have human rights obligations to do, and to refrain from doing, certain things that affect the lives of people as human beings.¹³⁷ The international human rights framework is the global legal mechanism for promoting, protecting, and realizing the inalienable rights of people, irrespective of their race, culture, religion, gender, station in life, and other differences. I will examine here how this applies to global access to legal information.

First, human rights are international norms and values aimed at achieving justice necessary for the holistic wellbeing of human beings. I agree with Douglas-Scott’s claim that “human rights remain a powerful symbolic and actual force for justice

¹³⁵ See *Glossary of Terms Relating to Treaty Actions*, UN TREATY COLLECTION, https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml (last visited July 6, 2017).

¹³⁶ Office of the UN High Comm’r for H.R., *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* 1 (2006), <http://www.ohchr.org/Documents/Publications/FAQen.pdf>.

¹³⁷ *Id.*

and a better focus for its achievement.”¹³⁸ As the author rightly argues, the concept of justice is so value-laden and contested that it is easier to understand justice from the perspective of what is considered injustice.¹³⁹ The international human rights framework is the most potent global weapon against the various manifestations of injustice. That is the basis for the specific Conventions on critical aspects of injustice. For instance, the unjust deprivations suffered by persons with disabilities worldwide led to the adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD).¹⁴⁰ The injustice associated with liability under inaccessible laws—including how it is analogous to the injustice from liability under both retroactive and nonexistent legislation—is discussed below.¹⁴¹ It is therefore necessary to provide a universal remedy for this dimension of injustice through the international human rights framework for public access to legal information.

Second, the international human rights framework sets the minimum global standards that impose binding obligations, under which the duty-bearers are accountable.¹⁴² On the justification for the CRPD, the United Nations explains that “[a] universal, legally binding standard is needed to ensure that the rights of persons with disabilities are guaranteed everywhere.”¹⁴³ Elevating the right of public access to legal information to the status of a human right will therefore provide the universal standards to which the duty-bearers must conform. The obligations of the duty-bearers are expected to help them to review their laws, programs, policies, and practices to make sure that they conform to these

¹³⁸ Sionaidh Douglas-Scott, *Human Rights as a Basis for Justice in the European Union* 11–13 (WZB Discussion Paper No. SP IV 2015-804, 2015), <https://www.econstor.eu/dspace/bitstream/10419/121482/1/838036562.pdf>. The quote is from the abstract to the article.

¹³⁹ *Id.*

¹⁴⁰ The preamble to the CRPD mentions these deprivations and the need to remedy the injustice.

¹⁴¹ See discussion *infra* Section D.II.5 (discussing the remedy for the injustice from the *ignorantia juris* doctrine).

¹⁴² Office of the UN High Comm’r for H.R., *Who will be Accountable? Human Rights and the Post-2015 Development Agenda* 10 (2013), <http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf>.

¹⁴³ United Nations, *Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities*, <https://static.un.org/esa/socdev/enable/convinfofaq.htm> (last visited July 6, 2017).

standards, which is the practice in democratic countries like Australia.¹⁴⁴ It will particularly help countries with virtually no legal framework and policies on public access to legal information—such as Nigeria—to adopt such frameworks and policies.¹⁴⁵ The result promises to be a significant improvement in global access to legal information that is now indispensable due to technology-driven globalization that generates borderless interactions in virtually every area of life and is producing an ever-shrinking global space.¹⁴⁶

By setting the minimum global standards for which the duty-bearers are accountable, the human rights approach has become a universally acceptable means of making governments and non-State actors liable for violations of the inalienable rights of people worldwide. It does this through enforceable sanctions.¹⁴⁷ Article 41 of the UN Charter provides the general framework for the UN sanctions regime under international law. The Security Council determines the appropriate sanctions in any particular situation, which may include interruption of economic and communication relations and severance of diplomatic relations. Sanctions for the violation of human rights can have serious reputational, economic, and diplomatic consequences. For instance, Nigeria was suspended from the Commonwealth two days after the Nigerian military government executed Ken Saro-Wiwa and other environmental rights activists in 1995 in circumstances that amounted to gross human rights violations.¹⁴⁸ It is true that many dictatorial regimes defy sanctions imposed as punishment for human rights abuses and thereby render such coercion ineffectual or even

¹⁴⁴ ATTORNEY-GENERAL'S DEP'T, AUSTRALIA'S HUMAN RIGHTS FRAMEWORK 9 (Apr. 2010), <https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>.

¹⁴⁵ See *supra* notes 21–22 and accompanying text (discussing poor public access to legal information in Nigeria).

¹⁴⁶ See Claire M. Germain, *Worldwide Access to Foreign Law: International & National Developments Toward Digital Authentication* 1–2 (University of Florida Levin College of Law Working Papers No. 1, 2012), <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1000&context=working>.

¹⁴⁷ See *UN Sanctions: What They Are, How They Work, and Who Uses Them*, UN NEWS CENTRE (MAY 4, 2016), www.un.org/apps/news/story.asp?NewsID=53850#.V13VY1QrLIV.

¹⁴⁸ See *Nigeria Suspended from the Commonwealth*, THE COMMONWEALTH (1995), <http://thecommonwealth.org/history-of-the-commonwealth/nigeria-suspended-commonwealth>.

counterproductive.¹⁴⁹ But that is part of the general problem of enforcement of compliance with international law. Punitive sanctions may still serve as deterrents to responsible governments and organizations that value their reputation and endeavor to uphold the rule of law and the other tenets of democracy.

Third, the human rights framework is the most powerful tool that civil society uses to put pressure on governments, individuals, and organizations to do the right thing. One of the reasons for the existing poor state of public access to legal information¹⁵⁰ may be the ineffectual involvement of civil society on a global scale in the campaign. For instance, FALM has since its inception concentrated their efforts on the provision of alternative sources of legal information by third parties to the detriment of putting pressure on governments to do so as a public duty to the people. In accordance with the prevailing practice, once there is an international human rights framework for promoting, protecting, and actualizing the right of public access to legal information, civil society organizations will enter the arena to campaign for and monitor global compliance with the universal standards. This comports with the argument by Ashcroft that the human rights framework provides “long-established common language, rhetoric and institutional practice” as a platform for civil society, intergovernmental and international bodies to engage in “identifying and protecting the interests of individuals and groups worldwide.”¹⁵¹ The advocacy by civil society complements the international mechanisms of the United Nations for implementing and monitoring compliance with international human rights obligations of governments and non-State actors.¹⁵²

¹⁴⁹ See generally Dursun Peksen, *Better or Worse? The Effect of Economic Sanctions on Human Rights*, 46 JPR 59 (2009). North Korea, Iran, Cuba, and Zimbabwe are examples of dictatorial regimes that have refused to bow to the pressure from sanctions.

¹⁵⁰ See, e.g., sources cited *supra* notes 21–23 and accompanying text (discussing poor public access to legal information in Nigeria and Mali).

¹⁵¹ Richard E. Ashcroft, *Could Human Rights Supersede Bioethics?* 10 H.R.L. REV. 639, 643–44 (2010).

¹⁵² See OFFICE OF THE UN HIGH COMM’R FOR H.R., THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: FACT SHEET No. 30/REV.1 19–39 (2012), <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> (mechanisms for implementation of human rights standards).

3. It Should be Recognized as a Human Right Based on the Precedent of the Aarhus Convention

The Aarhus Convention¹⁵³ contains the right of public access to legal information relating to the environment. It defines “environmental information” in Article 2, paragraph 3(b) to include information on public agreements, policies, and legislation related to the environment. Consequently, the Convention is a formal recognition of the right of public access to a limited range of legal information specifically on environmental matters.

The Convention enhances environmental human rights¹⁵⁴ and therefore it is a precedent that it is possible, and even desirable, to have Conventions on crucial aspects of public information that are not adequately protected under the existing human rights regime. As there is hardly any aspect of public information that is more crucial than legal information that regulates the conduct and activities of every person and the State,¹⁵⁵ which every person has a duty to know and is presumed¹⁵⁶ to know, the Aarhus Convention therefore reinforces my argument for an international human rights framework for the right of public access to legal information.

4. The Right of Public Access to Legal Information has the Basic Characteristics of Human Rights

The right of public access to legal information should be recognized universally as a human right because it possesses the basic characteristics of human rights. First, human rights are *inalienable*. It is significant that the very first paragraph of the preamble to the UDHR declares the inalienability of human rights. Inalienability of

¹⁵³ Aarhus Convention, *supra* note 70.

¹⁵⁴ See generally Alan Boyle, Human Rights and the Environment: Where Next?, 23 EJIL 613–42 (2012); UN Econ. Comm’n for Europe (UNECE) Aarhus Convention Secretariat, The Role of the Aarhus Convention in Promoting Good Governance and Human Rights (Sept. 2012), http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC_COMMISSION_FOR_EUROPE.pdf; UNECE, What People are Saying about the Aarhus Convention, <http://www.unece.org/fileadmin/DAM/env/pp/documents/statements.pdf> (last visited July 6, 2017).

¹⁵⁵ *Deaton*, 932 S.W.2d.

¹⁵⁶ See INGRAM, *supra* note 62.

human rights means they are *inherent* in human beings and intertwined with their existence. The United Nations aptly states it thus:

Human rights law places an obligation on States to act in a particular way and prohibits States from engaging in specified activities. However, the law does not establish human rights. *Human rights are inherent entitlements which come to every person as a consequence of being human.* Treaties and other sources of law generally serve to protect *formally* the rights of individuals and groups against actions or abandonment of actions by Governments which interfere with the enjoyment of their human rights.¹⁵⁷

Inalienability of the right of public access to legal information is based on the general legal principle of justice that is the foundation of legal rules and regulations, humane and civilized policies, judicial decisions, and human rights. The application of the principle that every person has a duty to know, and is therefore presumed to know, the law can only be justified where the law exists in a state that everybody can access and know its full contents.¹⁵⁸ That is the only way to avoid the manifest injustice in punishing people for violating any law whose texts are unknowable, which Jeremy Bentham described as tyrannical.¹⁵⁹

The right of public access to legal information is an inalienable right because every person lives in a society that is governed by law that they are bound to know, where ignorance of the law is no excuse. Nobody can avoid its direct application because nobody is exempt from obeying the law; everybody is subject to liability for contravening it. Additionally, it is an inalienable right because it borders on an aspect of personal freedom that is inherent in human existence. Knowledge of the legal principles that regulate one's conduct and activities provides the freedom needed to make personal choices. These choices include the exercise of one's legal rights and avoidance of liability by complying with the law. A society in which people are forced to comply with inaccessible laws lacks this basic freedom.

¹⁵⁷ HUMAN RIGHTS: A BASIC HANDBOOK FOR UN STAFF, OFFICE OF THE UN HIGH COMM'R FOR H.R. 3, <http://www.ohchr.org/Documents/Publications/HRhandbooken.pdf> (last visited July 9, 2017) (emphasis added).

¹⁵⁸ See *supra* Section D.II.5 (discussing the remedy for the injustice from the *ignorantia juris* doctrine).

¹⁵⁹ BENTHAM & BOWRING, *supra* note 5.

Second, human rights are *universal* in terms of their application to the entire human race, without any kind of distinction.¹⁶⁰ According to the United Nations, “[t]he principle of universality of human rights is the cornerstone of international human rights law.”¹⁶¹ Although the debate on the correctness of the principle of universality of human rights goes on,¹⁶² there are human rights that are clearly universal, and the right of public access to legal information is one of them. It is universal because it applies to every human being who has attained the age of legal responsibility. Every person has a legal obligation to know the law and pays the price, sometimes a very high price that could even be a death sentence, for its contravention.

Third, human rights are *interdependent and interrelated*. This means they are connected to each other, intertwined, and together make a complete whole. The right of public access to legal information is interwoven with other human rights¹⁶³ and it is an empowerment right that is essential for the enjoyment of other distinct human rights, such as the right to a fair trial. The purpose of the fair trial of any person by any court or tribunal—guaranteed under Article 14 of the ICCPR and other human rights instruments—is to achieve justice in the determination of their rights and obligations and of any criminal charge against them. It includes the requirement for adequate time and facilities for the preparation of one’s defense, and the right to defend oneself by self-representation or through legal assistance of one’s own choosing. All these fair trial safeguards depend on free and adequate public access to legal information.

¹⁶⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter UDHR].

¹⁶¹ *What are Human Rights?*, OFFICE OF THE UN HIGH COMM’R FOR H.R., <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited July 6, 2017).

¹⁶² For discussions on the universality of human rights, see generally Robert Spano, *Universality or Diversity of Human Rights?* 14 H.R.L. REV. 487 (2014); Friedrich Wilhelm Graf, *The Controversial Universality of Individual Human Rights*, 26 VERBUM ET ECCLESIA 700 (2005); Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 10 (1989), <https://doi.org/10.1177/0002716289506001002> (last visited July 6, 2017); John O’Manique, *Universal and Inalienable Rights: A Search for Foundations Source*, 12 H.R.Q. 465 (Nov. 1990).

¹⁶³ See Mitee, *supra* note 15, at 76–92 (discussing the right of access to public information, right to education, right to indigenous languages, disability rights, and the right of access to public service and participation in public affairs as human rights inherent in the right of access to legislation).

*Regina v. Chambers*¹⁶⁴ illustrates the importance of access to comprehensive and up-to-date legal information to a fair trial. It was in that case that the England and Wales Court of Appeal discovered that ignorance of the current position of the law on the part of the judiciary and lawyers—due to inadequate access to legislation—had led to the delivery of wrong judgments from 2001 to 2008. The magnitude of the error led the Crown Prosecution Service to review the cases of more than 2,615 defendants. Some of the defendants successfully appealed their confiscation orders that were made in ignorance of the repealed legislation.¹⁶⁵

5. To Remedy the Injustice from the Application of the *Ignorantia Juris* Doctrine Where the Law Is Inaccessible

The *ignorantia juris* doctrine has an ancient origin. Although the exact date of its first use in common law may be unknown, one of the references to it dates back to 1530 when the Dialogue II was published.¹⁶⁶ This legal doctrine has survived several centuries of hostility and it continues to enjoy statutory sanctuary as the foundation of the criminal justice system.¹⁶⁷ It is a universal doctrine that transcends national barriers.¹⁶⁸ Therefore, any hardship or injustice associated with its application has global consequences.

John Selden stated this doctrine, more than 300 years ago, in his famous quote: “Ignorance of the Law excuses no man; not that all Men know the Law, but because ‘tis an excuse every man will plead, and no Man can tell how to confute him.”¹⁶⁹ Its application in criminal law usually depends on the distinction between

¹⁶⁴ *Regina v. Chambers* [2008] EWCA (Crim) 2467 (Eng.).

¹⁶⁵ Chambers Review, *supra* note 7. See also Mitee, *supra* note 15, at 167–68 (stating the possibility of *per incuriam* decisions due to lack of access to legislation).

¹⁶⁶ See Paul Matthews, *Ignorance of the Law is No Excuse?* 3 LEGAL STUD. 174 (1983) (listing ancient statements and references on the maxim of “ignorance of the law is no excuse”).

¹⁶⁷ See Mitee, *supra* note 15, at 37. See, e.g., MODEL PENAL CODE § 2.02(9) (U.S.); *Criminal Code Act 1995* (Cth) s 9.3(1) (Austl.); *Criminal Code Act* (1916) Cap. (C38), § 22 (Nigeria); *Crimes Act 1961*, s 25 (N.Z.); *Criminal Code*, R.S.C. 1985, c. C-46 s. 19 (Can.).

¹⁶⁸ Julia P. Sams, The Availability of the “Cultural Defense” as an Excuse for Criminal Behavior, 16 GA. J. INT’L & COMP. L. 335 (1986).

¹⁶⁹ JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 82 (London, John Russell Smith, 2nd ed. 1856), <https://archive.org/details/tabletalkofjohns00seldiala>.

ignorance, or mistake, of law and of fact.¹⁷⁰ The scope of this Article is confined to the general application of the doctrine in relation to the knowledge of the authentic and official texts¹⁷¹ of legal information that contain the legal principles that regulate the conduct and activities of people, organizations, and the State.

From Selden's statement above, it appears that the doctrine was devised as a dual weapon of convenience as well as necessity against even a genuine plea of a person's inability to know the law. Such genuine ignorance of the law may arise in two different situations. First, the volume of legal information is so large¹⁷² and the number of statutory crimes so many¹⁷³ that even lawyers and judges cannot know every law.¹⁷⁴ That means members of the public are in a much worse situation. Yet, allowing the defense of ignorance of the law on the ground of impossibility of knowing every law due to the enormous volume of legal information will enthrone a dangerous system of impunity, as it will be virtually impossible to secure any successful prosecution, especially for *mala prohibita* offenses.¹⁷⁵ This stark reality has therefore made the doctrine a necessary evil. The

¹⁷⁰ For discussions on mistake of law and mistake of fact in criminal law, see generally Mohamed Elewa Badar, *Mens Rea—Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*, 5 INT'L CRIM. L. REV. 203 (2005); Re'em Segev, *Moral Rightness and the Significance of Law: Why, How, and When Mistake of Law Matters*, 64 U.T.L.J. 36 (2014).

¹⁷¹ See *supra* note 13 (providing a definition of authentic texts of legal information). See also *supra* note 14 (providing a definition of official texts of legal information).

¹⁷² See, e.g., RICHARD CRACKNELL & ROB CLEMENTS, ACTS AND INSTRUMENTS: THE VOLUME OF UK LEGISLATION 1950 TO 2014 7 (2014), <http://researchbriefings.files.parliament.uk/documents/SN02911/SN02911.pdf>.

¹⁷³ See, e.g., Michael Anthony Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 142–44 (2015); John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>; Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, THE WALL STREET JOURNAL (July 23, 2011), <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.

¹⁷⁴ See *Montrou v. Jefferys* (1825) 2 Car. & P. 113, in 12 REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF COMMON LAW 50, 52 (Thomas Sergeant & John C. Lowber eds. 1828); Fields & Emshwiller, *supra* note 173 (quoting Ronald Gainer's statement that "[y]ou will have died and resurrected three times," and still be laboring to count the exact number of the U.S. federal crimes).

¹⁷⁵ See *infra* note 297 and accompanying text (*mala prohibita* offenses).

court stated it in *R. v. Campbell* thus: “The principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is justified because it is *necessary*, even though it will, sometimes produce an anomalous result.”¹⁷⁶

Second, ignorance of the law arises due to its inaccessibility, which is in turn due to inadequate publication. The doctrine is merely used here as a weapon of convenience. This Article focuses on two aspects of this second category—discussed below—and the solutions to them, and considers the massive volume of legal information as a factor that contributes to the problem of inaccessibility.

The first aspect is where the law has not been adequately published and is therefore inaccessible to the people affected by it. In *United States v. Casson*,¹⁷⁷ Casson was convicted of crimes he committed about six hours after President Lyndon B. Johnson had signed the amending statute in question into law on December 27, 1967. The Court of Appeals held that he was properly convicted under the statute because on the day he committed the offenses, there was no express constitutional or statutory requirement of publication of legislation before they became effective. In addition, the Court held that the widespread publication of the bill, its extensive public hearings, the report of the debates on it, and news media publicity of its provisions constituted sufficient notice to members of the public, including Casson. It is not difficult to see the Court’s error in *Casson* because the publicity of a bill in the legislative process does not amount to publication of the eventual legislation after assent. The legal framework for publication of U.S. legislation was clearly defective and it was unjust to expect every person in a populous country like the United States to know the full texts of a law within six hours of its enactment, especially because public access to information in 1967—when the law in question was made—was not as efficient as it is today.

The second aspect is where, even if the law were adequately published, the peculiar circumstances of a particular person affected by it would make it

¹⁷⁶ *R. v. Campbell* [1972] 2 All E.R. 353 (Eng.), in CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 522 (Martin L. Friedland ed., 5th ed. 1978) (emphasis added); STUART, *supra* note 63, at para. 32 (CanLII) (discussing the justification of the doctrine of ignorance of the law is no excuse).

¹⁷⁷ *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970).

inaccessible to that person. In *Rex v. Bailey*,¹⁷⁸ the Government of England had enacted legislation that criminalized a conduct that previously was not a criminal offense. Although the court found that it was impossible for the accused person—Richard Bailey, the captain of a vessel—to know of the new law because he was at sea when the statute was enacted and he was still there when he committed the prohibited act, it rejected his defense of ignorance of the new legislation and found him guilty. Cognizant of the untold injustice in its judgment, the court noted that the accused person was guilty of committing an offense whose existence was beyond his ability to know, but recommended a pardon as the appropriate remedy after his conviction.¹⁷⁹ That was one instance of slavish adherence to the *ignorantia juris* doctrine, irrespective of the magnitude of the injustice it caused.

Any conviction in circumstances similar to those in *Bailey* and *Casson* violates the victim's human right against liability under *ex post facto* legislation.¹⁸⁰ Brudner rightly stated the similarity between liability under a retroactive law and an unpublished law thus: "Liability under a retroactive law violates [the same] principles [as] liability under a regulation that was signed into law before the defendant's breach but not published so that dutiful care could discover it."¹⁸¹ He concluded correctly that "an absolute duty to know the law (where the law is not knowable to reason) is a duty to know it even if it is impossible to know, such as when it does not yet exist."¹⁸²

In both *Bailey* and *Casson*, each accused person who could not have known of the existence of the new law and its contents, was in the same position as if he was convicted under an adversely retrospective legislation. To the extent that the accused person had no means of knowing about the legislation and its provisions, the scenario was similar to a situation where the law never existed. I had, in a previous study before Brudner, stated that any law whose existence is unknown

¹⁷⁸ *Rex v. Bailey* (1800) 168 Eng. Rep. 651 (Eng.).

¹⁷⁹ *Id.* at 653; see also Matthews, *supra* note 166, at 179–85 (discussing some of the cases on the application of the doctrine of ignorance of the law is no excuse).

¹⁸⁰ See, e.g., International Covenant on Civil and Political Rights art. 15, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁸¹ See ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 186–87 (2009) (discussing the similarity between liability under retroactive and unpublished law).

¹⁸² *Id.*

because it is impossible to know—due to a complete or partial lack of access—is analogous to nonexistent law, and both types of law cause similar grave injustice.¹⁸³ Every person has the right to know the law that they have the duty to obey.

The gravity of the injustice from liability under *ex post facto* legislation led to the creation of the human right against it, and this right is enshrined in human rights instruments.¹⁸⁴ Because the magnitude of the injustice under both *ex post facto* and inaccessible laws is similar, they should also have a similar effect in terms of liability. Therefore, there should be no liability for contravention of the provision of any law that was inaccessible to the extent that the person affected could not have known of its existence and exact contents at the time of the conduct in question. The application of this principle should have led the court in the *Bailey* case to declare the accused person not guilty. Unfortunately, the court in that case upheld the *ignorantia juris* doctrine and recommended pardon as a remedy for the obvious injustice its judgment caused the accused person. The best way to remedy such injustice on a global scale is to promote, protect, and actualize this right against liability under inaccessible law as a component of the human right of public access to legal information that I advocate in this Article.¹⁸⁵

6. To Realize the Numerous Benefits Derivable from Adequate Public Access to Legal Information

Recognition of the right of public access to legal information as a human right will significantly improve global access to legal information with its attendant numerous benefits. First, adequate public access to legal information enhances sustainable development. Out of the numerous definitions of “sustainable development”, the one in the World Commission on Environment and Development Report (1987) has now been generally accepted. The Report refers to sustainable development as “[d]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own

¹⁸³ See Mitee, *supra* note 15, at 165–67.

¹⁸⁴ See *supra* text accompanying note 180 (discussing the right against *ex post facto* laws).

¹⁸⁵ See *infra* Section D.III.2.15 (discussing the proposal that there should be no liability under any inaccessible law).

needs.”¹⁸⁶ Adequate public access to legal information facilitates sustainable development by contributing to the awareness of social, economic, and development policies and regulations; promotion of trade and foreign investment;¹⁸⁷ transparency;¹⁸⁸ and protection of the rights of minorities, migrants, etc.¹⁸⁹

Second, it facilitates effective law reform. Law reform commissions have become indispensable in every democratic government that upholds the principles of justice and the rule of law. Their primary duties include identifying the existing laws in a jurisdiction or legal system that require amendment to make them relevant to the current circumstances of the society, repealing obsolete laws, and making recommendations for enactment of necessary new laws. Obviously, successful law reform programs require adequate access to all the existing laws in the jurisdiction in question.

Third, adequate public access to legal information enables effective legal research for various purposes. For example, it promotes justice by helping the judiciary to avoid decisions in ignorance of the current position of the law. The courts should not rely solely on the position of the law in the arguments of lawyers who appear before them; they have a duty to verify the authenticity of those arguments from their own independent research. In *Regina v. Chambers*,¹⁹⁰ neither the England and Wales Court of Appeal, the prosecution, nor the defense lawyer knew that a subsidiary legislation upon which the case was based had been repealed about seven years earlier. A lawyer at the Revenue and Customs Prosecutions Office who

¹⁸⁶ World Comm’n on Env’t and Dev., Rep. of the World Comm’n on Env’t and Dev.: Our Common Future (1987) adopted by G.A. Res. A/RES/42/187 (Dec. 11, 1987), <http://www.un-documents.net/our-common-future.pdf>. The Commission is also known as the *Brundtland Commission*.

¹⁸⁷ See Jamar, *supra* note 108 (“Businesses seeking to invest overseas would be better able to make investment decisions based in part on the content of the law more easily.”).

¹⁸⁸ See *id.* (“A foundational principle of the rule of law is governmental transparency, i.e., governments operating not secretly, but openly. One aspect of this transparency is ready access to the law.”).

¹⁸⁹ See UN Public Admin. Network, *Providing Access to Legal Information to Accelerate Sustainable Development*, <http://workspace.unpan.org/sites/Internet/Documents/UNPAN94768.pdf> (last visited July 6, 2017).

¹⁹⁰ *Regina v. Chambers* [2008] EWCA (Crim) 2467.

was working on an application in another case discovered the fact of the repeal and quickly alerted the prosecution because she was fortuitously aware of the draft of the judgment that was scheduled for the next day. The prosecution then disclosed it to the Court, based on which the Court allowed the appeal and quashed the confiscation order. Knowledge of the repeal led to the review of the previous cases of more than 2,615 defendants based on the mass error.¹⁹¹ Lord Justice Toulson blamed the error on inaccessible legislation.¹⁹² Adequate public access to legal information also improves justice by enhancing knowledge of the law by law enforcement agencies at all levels.

It guides the legislature in the performance of their law-making function that requires reliable legal research. The reason is that every legislature is expected to be aware of all the existing laws in force in the jurisdiction. Legal practitioners depend on adequate public access to legal information for the performance of their professional duties: To provide reliable legal opinions to their establishments and clients, and to present valid legal arguments in the court based on the current principles of law contained in up-to-date sources. As stated above, the lawyers' ignorance of a repealed subsidiary legislation in the *Chambers* case was blamed on inaccessible legislation.

Further, it is indispensable to global legal scholarship.¹⁹³ Academics, students, authors, and others interested in knowing the current position of the law on any subject cannot do without adequate access to authentic legal information. Only comprehensive, up-to-date, and free official online legal information databases of the various jurisdictions can meet the need for reliable national and transnational legal research in today's technology-driven world.¹⁹⁴ For example, a Canadian human rights intern with *Avocats sans frontières Canada*, who was frustrated with the unavailability of Malian legal information online, said:

¹⁹¹ *Chambers Review*, *supra* note 7.

¹⁹² *Regina v. Chambers* [2008] EWCA (Crim) 2467 [65]–[68].

¹⁹³ See Jamar, *supra* note 108 (“Scholars studying comparative law would find their work significantly easier to do.”). On how poor global access to legal information hampers international legal research, see Bayly, *supra* note 23 (discussing a Canadian human rights intern's frustration with the unavailability of Malian legal information online in 2015).

¹⁹⁴ See Poulin, *supra* note 17 (discussing how the Internet facilitates free dissemination of national laws thereby making them available for a global audience).

For a Canadian law student, the idea of not being able to access legal information online is unthinkable. But when I look for information about Malian law, it can be difficult—often impossible—to find even basic legal texts. Even when information is available online, it's often out of date or incomplete.¹⁹⁵

Additionally, it is necessary for effective legislative drafting that always requires knowledge of existing provisions in the relevant legislation and case law on the subject matter in question.¹⁹⁶ This is essential for ensuring harmony between legislation being drafted and existing legislation to avoid unintended consequences such as consequential or implied amendments when a provision in a new legislation conflicts with a previous legislation. Such a problem requires resolution by the court through statutory interpretation as to whether a current provision supersedes a previous one on the same issue.¹⁹⁷

Fourth, adequate public access to legal information enhances compliance with the tenets of democracy. One such tenet is public participation in the affairs of the government. Its examples include involvement in the legislative process through awareness of every piece of proposed legislation (bills) and discussion of government policies and programs.¹⁹⁸ Based on the fact that legal information is part of public information, the unhindered right of people to access it boosts accountability and transparency in governance by eliminating the culture of secrecy. Adequate public access to legal information is essential to the cause of justice and the rule of law.¹⁹⁹ Graham and Peruginelli rightly consider it to be one of the “necessary conditions for a working democracy.”²⁰⁰ In fact, legal

¹⁹⁵ See Bayly, *supra* note 23.

¹⁹⁶ HELEN XANTHAKI, *DRAFTING LEGISLATION: ART AND TECHNOLOGY OF RULES FOR REGULATION 1753–80* (2014) (Kindle edition) (“Amongst the very first considerations of the drafter is to ensure that they understand clearly and fully the current legal position on the topic of the requested legislation.”).

¹⁹⁷ Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 414–15 (2012).

¹⁹⁸ Perritt, *supra* note 20, at 899 (discussing how public participation in the decision-making process of the government promotes good governance).

¹⁹⁹ *Id.* See also Montreal Declaration, *supra* note 42 (“Maximising access to this information promotes justice and the rule of law.”).

²⁰⁰ Graham Greenleaf & Ginevra Peruginelli, *A Comprehensive Free Access Legal Information System for Europe 2* (University of New South Wales Law Research Paper No. 2012–9, 2012),

information is so important to human society that the Montreal Declaration states that “[p]ublic legal information from all countries and international institutions is part of the common heritage of humanity.”²⁰¹

Fifth, it provides authentic texts of official²⁰² legal information for reuse or republishing by all those interested in doing so—commercial publishers, authors, and not-for-profit organizations. This contributes to socio-economic development through employment and the economic activities involved. It also enhances the dissemination of vital information necessary for peace and order and operation of the rule of law.²⁰³

7. To Give Global Legal Effect to the Numerous Principles, Declarations, and Statements on Free Public Access to Legal Information

Over the years, several international and regional bodies and nongovernmental organizations have expressed their common aspirations for a new regime of public access to legal information in numerous principles, declarations, and statements. They include the Montreal Declaration on Free Access to Law 2002,²⁰⁴ The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008,²⁰⁵ Law.Gov Principles and Declaration 2010,²⁰⁶ and the Calgary Statement on Free Access to Legal Information 2011.²⁰⁷ They contain the philosophy behind—and standards for—public access to legal information. They also identify and declare the right to it. But the contribution of these principles, declarations, and statements to public access to legal information is limited because they are not binding.

<http://ssrn.com/abstract=2012956>; see also Poulin, *supra* note 17 (discussing the importance of free access to legal information to the rule of law and democracy).

²⁰¹ Montreal Declaration, *supra* note 42.

²⁰² See *supra* note 13 (providing a definition of authentic texts of legal information) & note 14 (providing a definition of official texts of legal information).

²⁰³ See Perritt, *supra* note 20, at 899; Montreal Declaration, *supra* note 42.

²⁰⁴ Montreal Declaration, *supra* note 42.

²⁰⁵ The Hague Conference Guiding Principles, *supra* note 78.

²⁰⁶ Law.Gov Principles, *supra* note 79.

²⁰⁷ Calgary Statement, *supra* note 80.

It is therefore necessary to give global legal effect to the noble aspirations and objectives contained in these principles, declarations, and statements whose formulation involved consultations, deliberations, research, and huge amounts of human and financial resources expended in organizing the international and regional fora where they were made and adopted. The best way to achieve these aspirations and objectives is to harmonize the principles, declarations, and statements as part of the contents of a binding international human rights instrument on the right of public access to legal information, as I advocate below.

8. To Promote the Rule of Law

The human society is governed by law, without which it will degenerate to the primordial state of survival of the fittest, *laissez-faire*, anarchy, and chaos that will threaten human civilization. That explains the importance of the operation of the rule of law that was made prominent by Albert Venn Dicey through his analysis in his book, *Introduction to the Study of the Law of the Constitution*.²⁰⁸ There are unresolved controversies on the exact definition of the rule of law, but its three components in Lord Bingham's definition—equality before the law, equal access to the law, and public promulgation and application of the law²⁰⁹—are settled and germane to this discussion. "Equality before the law" includes accountability to the law that includes the duty to obey the law.²¹⁰ "Equal access to the law" encompasses equal access to justice through the courts and equal access to the sources of law or legal information. "Public promulgation of law" comprises its transparent enactment process and dissemination for public knowledge through its widest possible publication and publicity. The following definition by the United Nations clearly highlights these sacred requirements:

The "rule of law" . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally

²⁰⁸ A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 171–92 (3rd ed. 1889), <https://ia802701.us.archive.org/11/items/introductiontos04dicegoog/introductiontos04dicegoog.pdf> (last visited July 9, 2017).

²⁰⁹ D. Brooke, *Q&A Jurisprudence* 2013–2014 40 (6th ed. 2013).

²¹⁰ DICEY, *supra* note 208, at 190.

enforced and independently adjudicated, and which are consistent with international human rights norms and standards²¹¹

The right to know the law— as discussed in Part C above—emanates from the duty to obey the law, both of which necessitate the duty of every government and every IGO that makes law to publicly promulgate and publish it to provide adequate access to its full texts in different formats. The right of public access to legal information is therefore rooted in the rule of law. It is therefore necessary to give this right the greatest possible protection throughout the world, as part of the promotion of the rule of law that every society needs. It is only the formal universal recognition of the right of public access to legal information as a human right that can provide such protection, as discussed in Section D.II.2 above.

III. The Proposed UN Convention on the Right of Public Access to Legal Information

In this Section, I discuss my proposal for a new UN Convention as the ultimate possible solution to the problem of inadequate access to authentic and official legal information and its attendant injustice and difficulties in national and international legal research.

1. Advocacy for a New UN Convention on the Right of Public Access to Legal Information

The UN Declaration on Human Rights Defenders provides for the right of everyone to advocate the creation of new human rights to meet any future need for the universal protection of new categories of inalienable rights whenever such protection is justified. Its Article 7 provides: “Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.”

²¹¹ U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (Aug. 23, 2004), at 4; *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2016 edn.), <https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/> (last visited July 6, 2017).

Pursuant to the said Article 7 of the UN Declaration on Human Rights Defenders, I therefore advocate the formal universal recognition of the right of public access to legal information as a distinct human right to protect all categories of legal information referred to in my definition of the “right of public access to legal information” in Part C above. The quoted statement from the United Nations in Section D.II.4 above reveals the importance of such formal recognition to the protection of human rights. This proposal is based on the eight reasons discussed in the immediately preceding Section D.II above. They are as follows: To fill the normative gaps associated with its existing derivative status; to provide the human rights framework for its promotion, protection, and actualization; it should be recognized as a human right based on the precedent of the Aarhus Convention; and it has the basic characteristics of human rights. Additionally, its formal universal recognition as a human right is necessary to remedy the injustice from the application of the *ignorantia juris* doctrine where the law is inaccessible; to realize the numerous benefits derivable from adequate public access to legal information; to give global legal effect to the numerous principles, declarations, and statements on free public access to legal information; and to promote the rule of law.

Further, I recommend the drafting, adoption, and implementation of a new *UN Convention on the Right of Public Access to Legal Information* (“the proposed UN Convention”) as the international human rights framework for its global promotion, protection, and actualization. The proposed UN Convention should protect all categories of legal information, as stated in Section D.I.2 above.

Similar to the CRPD that did not create a new right but “express[ed] existing rights in a manner that addresses the needs and situation of persons with disabilities,”²¹² the proposed UN Convention incorporates all aspects of the existing right of public access to legal information and formulates them in a comprehensive manner that will provide the requisite universal standards. This is the most potent way to strengthen the existing right of public access to legal information, as discussed in the immediately preceding Section D.II above. The contents of the proposed UN Convention are outlined below.

²¹² UNITED NATIONS, *supra* note 143, at 2.

2. The Contents of the Proposed UN Convention on the Right of Public Access to Legal Information

This is an outline of the contents of the proposed UN Convention on the Right of Public Access to Legal Information. These contents are necessary for its drafting. They incorporate recommendations in The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008²¹³ (The Hague Conference Guiding Principles). They are “[p]rinciples developed by the experts which met on 19–21 October 2008 at the invitation of the Permanent Bureau of The Hague Conference on Private International Law as part of its feasibility study on the ‘access to foreign law’ project.”²¹⁴ Although these Principles were specifically developed for global access to legal information, they contain some of the core principles for good access at all levels. The 18 Principles in the 18 paragraphs of The Hague Conference Guiding Principles are quoted in Sections D.III.2.1 to D.III.2.9 below. I have incorporated these 18 Principles into my discussion and notes that appear under them, and they clothe my suggestion of the contents with additional international legitimacy. The contents discussed in Sections D.III.2.10 to D.III.2.15 are not mentioned in The Hague Conference Guiding Principles, but they are also core principles that the proposed UN Convention should contain.

These contents reflect the essential principles that will promote, protect, and actualize the right of public access to legal information globally, but they are not exhaustive. Details of the more specialized technical standards based on the latest technology for the production, publishing, management, and application of legal information are to be determined by a consortium of the leading experts in legal informatics who are familiar with modern legal information systems.

2.1 Free Access

“1. State Parties shall ensure that their legal materials, in particular legislation, court and administrative tribunal decisions and international agreements, are

²¹³ The Hague Conference Guiding Principles, *supra* note 78. See the Appendix to this Article for a Microsoft Word version of The Hague Guiding Principles that is available online as a PDF document in the public domain.

²¹⁴ *Id.*

available for free access in an electronic form by any persons, including those in foreign jurisdictions.”

“2. State Parties are also encouraged to make available for free access relevant historical materials, including preparatory work and legislation that has been amended or repealed, as well as relevant explanatory materials.”²¹⁵

The provision of free and adequate public access to legal information for the benefit of every person, irrespective of their profession and other circumstances, is a primary legal and moral duty of every government and every organization with legislative and judicial functions. The concept of free public access to legal information derives from the right of every person to know the law. That right emanates from the legal principle that ignorance of the law is no excuse because every person has a duty to know, and is therefore presumed to know,²¹⁶ the law.²¹⁷

The State should provide free access to both physical and electronic versions of legal information through public libraries²¹⁸ and websites containing comprehensive and up-to-date legal information databases for use by the whole world.²¹⁹ I agree with McMahon that the cost of providing free access to legal information is one of the inherent costs of democracy.²²⁰ Online legal information

²¹⁵ *Id.* See Principles 1 & 2.

²¹⁶ See INGRAM, *supra* note 62.

²¹⁷ See *supra* Section C; Section D.II.5 (discussing a remedy for the injustice from the *ignorantia juris* doctrine).

²¹⁸ See Harvey, *supra* note 106, at 107–08 (discussing the New Zealand Depository Library Scheme); see generally Tammy R. Pettinato, Legal Information, the Informed Citizen, and the FDLP: The Role of Academic Law Librarians in Promoting Democracy, 99 L. LIBR. J. 695 (2007) (discussing the U.S. Federal Depository Library Program). See also Mitee, *supra* note 15, at 56–58.

²¹⁹ See Greenleaf (2008), *supra* note 17 (discussing the role played by legal information institutes in the evolution of the concept of free public access to *online* legal information). For my discussions on innovative ways of enhancing public access to available official online legal information, see Leesi Ebenezer Mitee, *Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain*, 22(2) EJCLI (2017), <http://webjcli.org/article/view/562> & <http://ejocli.org/>; Leesi Ebenezer Mitee, *Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites*, 8(2) or (3) EJLT (2017), <http://ejlt.org/> (forthcoming).

²²⁰ McMahon, *supra* note 28.

resources are now so indispensable to the provision of free public access to up-to-date primary and secondary sources of law that the Durham Statement on Open Access to Legal Scholarship “urge[d] every U.S. law school to commit to ending print publication of its journals and to making definitive versions of journals and other scholarship produced at the school immediately available upon publication in stable, open, digital formats, rather than in print.”²²¹

Adequate public access to court decisions,²²² subject to anonymization requirements for purposes of the right to privacy and data protection in appropriate cases,²²³ is essential. Access to case law appears to be the most neglected aspect of public access to legal information. This accounts for the monopolistic commercialization of law reports. It is absurd that many courts rely on commercial law reports of their own judgments. Perhaps there are millions of unreported cases worldwide, whose inaccessibility adversely affects public access to judicial decisions at all levels of the court systems in various countries.²²⁴

Every judgment of a legitimate court or tribunal, no matter its status in the judicial hierarchy, is entitled to publication. This is useful for various purposes, for example, as a permanent evidence of its existence and for research by the

²²¹ Durham Statement, *supra* note 18. On the indispensability of online legal information resources, see McMahon, *supra* note 28; Arnold-Moore (2003), *supra* note 84. For the need for authentication of digital legal information, see sources cited *supra* note 13; see *infra* Section D.III.2.3 (discussing the integrity and authoritativeness of legal information).

²²² See Org. for Security & Co-operation in Eur., Access to Court Decisions: Legal Analysis of Relevant International and National Provisions 3, 13 (Sept. 2008), http://www.right2info.org/resources/publications/publications/OSCE_AnalysisAccessToCourtDecisions17092008.pdf. As emphasized throughout this Article, online access to authentic judicial decisions is indispensable; on the need for authentication of digital legal information, see sources cited *supra* note 13 (authentication) and see *infra* Section D.III.2.3 (discussing the integrity and authoritativeness of legal information).

²²³ See generally Koen Versmissen, OSCE Mission to Skopje, Expert Report on Access to Court Decisions and Protection of Personal Data in the former Yugoslav Republic of Macedonia (Oct. 2011); Krisztina Kovács, European Commission for Democracy Through Law (Venice Commission), Report: The Anonymity Requirement in Publishing Court Decisions (July 1, 2011), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2011\)010-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2011)010-e).

²²⁴ See, e.g., *Unreported Judgments Online*, LEXISNEXIS, <http://www.lexisnexis.com.au/en-AU/Products/unreported-judgments-online.page> (last visited July 6, 2017) (claiming that LexisNexis has a database of over 237,200 Australian judicial decisions that it updates three times daily).

judiciary, legal practitioners, academics, students, law enforcement agencies, etc. Further, free access to judicial decisions ensures transparency that promotes justice because it helps every person to know the facts of a case, the judge, and the basis for the decision, from which the judge's impartiality can be ascertained.²²⁵ This is particularly necessary in common-law jurisdictions that apply the doctrine of judicial precedents. The following statement encapsulates the importance of adequate public access to court decisions: "Access to case law is of fundamental importance for the Rule of Law: it facilitates the scrutiny of justice, contributes to the transparency of the judiciary and informs the public about the continuous development of the law."²²⁶

Someone may argue that free public access to up-to-date and comprehensive legal information in public libraries and online—for the benefit of the whole world—could lead to increase in self-representation in court and the resultant decrease in the overall quality of legal representation. Even if the argument turns out to be valid—but it may not be—it cannot not be used to limit public access to legal information nor deny self-representation, because they are human rights that are inalienable.²²⁷

2.2 Reproducing and Re-use

"3. State Parties are encouraged to permit and facilitate the reproduction and re-use of legal materials, as referred to in paragraphs 1 and 2, by other bodies, in particular for the purpose of securing free public access to the materials, and to remove any impediments to such reproduction and re-use."²²⁸

There should be no copyright in the texts of legal information. Information protected by privacy laws is an exemption to the right to reproduce such content. Copyright in the texts of legal information is a barrier to its free dissemination by

²²⁵ See Poulin, *supra* note 17 (discussing how free access to legal information strengthens national judicial systems).

²²⁶ *ECLI: Background*, BLDG ON ECLI, <http://bo-ecli.eu/ecli/background> (last visited July 6, 2017).

²²⁷ See *supra* Section D.II.1 (discussing the right of public access to legal information as a human right with a derivative status). Self-representation is a human right under international and regional human rights instruments such as Article 14(3)(d) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights.

²²⁸ The Hague Conference Guiding Principles, *supra* note 78. See Principle 3.

those who wish to do so; they include authors, not-for-profit organizations, and commercial publishers. Although the provision of public access to legal information is a primary duty of every government and every organization with legislative and judicial functions, interested parties that publish it enhance its dissemination and add value to the original texts. Copyright usually subsists in any value-added unique arrangements, translations, adaptations, and annotations,²²⁹ but it should not extend those produced by any government or IGO.²³⁰

Article 2(4) of the Berne Convention for the Protection of Literary and Artistic Works²³¹ (Berne Convention) states: “It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.” Leaving the issue of copyright to the discretion of each country is an obstacle to the right of public access to legal information.²³² There is therefore the urgent need to amend the said Article 2(4) to expressly prohibit copyright protection in the texts of legal information so that there is no option for the imposition of copyright restrictions by member States.²³³

2.3 Integrity and Authoritativeness

“4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.”

²²⁹ Ford, *supra* note 87, at 550.

²³⁰ See sources cited *supra* notes 26–27 and accompanying text (discussing the assertion of copyright in official annotations in legislation in the United States).

²³¹ Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

²³² See Johan Pas & Bruno De Vuyst, Re-establishing the Balance between the Public and the Private Sector: Regulating Public Sector Information Commercialization in Europe, *JILT* (2004), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_2/pasanddevuyst/ (stating that the Berne Convention may be used by European countries that are Parties to it to impose some copyright restriction on legal information in contradistinction to the U.S. position under its copyright legislation that excludes copyright from works of the federal government).

²³³ See Mitee, *supra* note 15, at, 65–68 (stating that “the Berne Convention for the Protection of Literary and Artistic Works has contributed negatively to access to government-held information including legislation by leaving the issue of copyright in such information at the discretion of each State party”).

"5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness)." ²³⁴

The vulnerability of cyberspace to hacking and fraudulent or accidental alteration of resources has now made it necessary to preserve the integrity of digital information with authentication technologies, such as digital signatures and public key infrastructure (PKI).²³⁵ Authentication is necessary for investing a document with official status.²³⁶ Legal information with official status has evidentiary value for all legal purposes, including admissibility in courts of law. Therefore, authentication of legal information should be considered a mandatory feature to be added to existing resources on all official legal information websites and as an integral part of the process of creating new ones.²³⁷ The U.S. Govinfo website is an excellent example of the use of authentication technologies for official documents, especially the application of digital signatures to Portable Document Format (PDF) files.²³⁸ An example of such digitally authenticated legislation is the Promoting Women in Entrepreneurship Act, 42 U.S.C. 1861.²³⁹

"6. State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts."²⁴⁰

²³⁴ The Hague Conference Guiding Principles, *supra* note 78. See Principles 4 & 5.

²³⁵ *Authentication*, U.S. GOV'T PRINTING OFFICE (Oct. 13, 2005) <https://www.gpo.gov/pdfs/authentication/authenticationwhitepaperfinal.pdf>; Claire M. Germain, *Worldwide Access to Foreign Law: International and National Developments Toward Digital Authentication*, 9 COMP. L. J. PACIFIC 185 (2013), <https://ssrn.com/abstract=2676279>. See also THE IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT 14 (RICHARD A. DANNER & JULES WINTERTON eds., 2016).

²³⁶ *State-By-State Report on Authentication of Online Legal Resources: Executive Summary*, AM. ASS'N OF LAW LIBRARIES (Mar. 2007), http://www.aallnet.org/Documents/Government-Relations/authen_rprt/executivesummaryreport.pdf.

²³⁷ See *IFLA Statement on Government Provision of Public Legal Information in the Digital Age*, INT'L FED'N LIBRARY ASSOCIATIONS AND INSTITUTIONS (Dec. 15, 2016), <https://www.ifla.org/publications/node/11064>.

²³⁸ See *About Us*, GOVINFO, <https://www.govinfo.gov/about> (last visited July 6, 2017).

²³⁹ *Promoting Women in Entrepreneurship Act 2017*, GOVINFO, <https://www.govinfo.gov/content/pkg/PLAW-115publ6/pdf/PLAW-115publ6.pdf> (last visited July 6, 2017).

²⁴⁰ The Hague Conference Guiding Principles, *supra* note 78. See Principle 6.

Paragraph 6 of The Hague Conference Guiding Principles states that “State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts.” This Principle should be reviewed because it may be risky to have multiple sources of the same official legal information with evidentiary value that makes such legal information admissible in courts. The State should provide authenticated legal information on its official website for all users, but it may be prudent that no *authentic* legal information on any third-party website should also have *official status* with evidentiary value. It is usually better to err on the side of caution, especially because of the limitless technological possibilities that in the future may jeopardize the integrity of even authenticated digital information. The magnitude of such a problem will increase with multiple sources. The evidentiary presumption of the accuracy and validity of information from an official source²⁴¹ supports this suggestion.

2.4 Preservation

“7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials referred to in paragraphs 1 and 2 above.”²⁴²

Preservation of legal information—irrespective of the media in which it is published—is crucial to ensuring that it remains intact for both present and future generations. For example, the world-famous Magna Carta that was issued by King John of England on 15 June 1215—more than 800 years ago—on *vellum*,²⁴³ a durable writing material made from goatskin, is still available today.²⁴⁴ Britain started printing record copies of both public and private Acts on vellum in 1849 but the practice ended, for private Acts in 1956²⁴⁵ and public Acts in 2017, because

²⁴¹ *People v. Melchor*, 237 Cal. App. 2d 685 (1965); Greenleaf (2013), *supra* note 94, at 7.

²⁴² The Hague Conference Guiding Principles, *supra* note 78. See Principle 7.

²⁴³ See *Why is the UK Still Printing its Laws on Vellum?*, BBC (Feb. 15, 2016), <http://www.bbc.com/news/magazine-35569281>.

²⁴⁴ See Doris Mary Stenton, *Magna Carta*, ENCYCLOPÆDIA BRITANNICA (2017), <https://www.britannica.com/topic/Magna-Carta>.

²⁴⁵ *Vellum: Printing Record Copies of Public Acts*, PARLIAMENT.UK, (May 11, 2016), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7451>.

of the huge costs involved.²⁴⁶ The UK government has now decided to use high-quality, durable archival paper instead of vellum.²⁴⁷

Digital information has peculiar preservation problems that are associated with the inability of information technology systems to function properly. For example, it will be difficult or even impossible for many people to use information on floppy disks (diskettes) these days because modern computers no longer have any provision for them. Sandborn categorized these problems as functional obsolescence, such as hardware obsolescence and software obsolescence; technological obsolescence, such as termination of support, license, and maintenance; and logistical obsolescence that affects different aspects of the functioning and performance of the digital media.²⁴⁸ ISO 16363 is the recommended International Standard on best practices for determining the trustworthiness of digital repositories,²⁴⁹ including the preservation of online legal information, as practiced by the U.S. Govinfo.²⁵⁰

2.5 Open Formats, Metadata and Knowledge-Based Systems

“8. State Parties are encouraged to make their legal materials available in open and re-usable formats and with such metadata as available.”

²⁴⁶ Christopher Hope, *Anger as MPs Bow to Peers' Pressure and End 500-Year Old Tradition of Printing New Laws on Vellum*, TELEGRAPH (Mar. 21, 2017), <http://www.telegraph.co.uk/news/2017/03/21/anger-mps-bow-peers-pressure-end-500-year-old-tradition-printing/>.

²⁴⁷ Id.

²⁴⁸ Peter Sandborn, *Software Obsolescence—Complicating the Part and Technology Obsolescence Management Problem*, 30(4) IEEE TRANSACTIONS ON COMPONENTS AND PACKAGING TECHNOLOGIES 886 (2007), http://www.enme.umd.edu/ESCML/Papers/IEEE_SoftwareObs.pdf. See also Richard S. Whitt, “Through A Glass, Darkly” *Technical, Policy, and Financial Actions to Avert the Coming Digital Dark Ages*, 33 SANTA CLARA HIGH TECH. L.J. 117 (2017), <http://digitalcommons.law.scu.edu/chtlj/vol33/iss2/1>.

²⁴⁹ 16363: *Space Data and Information Transfer Systems—Audit and Certification of Trustworthy Digital Repositories*, INT’L ORGANIZATION FOR STANDARDIZATION, <https://www.iso.org/obp/ui/#iso:std:iso:16363:ed-1:v1:en> (last visited May 29, 2017).

²⁵⁰ *About Us*, GOVINFO, <https://www.govinfo.gov/about> (last visited July 6, 2017).

“9. States Parties are encouraged to cooperate in the development of common standards for metadata applicable to legal materials, particularly those intended to enable and encourage interchange.”²⁵¹

It is not enough just to make legal information available online, although doing so is indispensable to every free public access to legal information project, as discussed in Section D.III.2.1 above. It is also necessary to publish legal information in different digital formats that meet the diverse needs of its users and other requirements.²⁵² For instance, Portable Document Format (PDF) has become the default format for authenticated digital legal information that has official status with evidentiary value for all legal purposes.²⁵³ Publishing official legal information in PDF makes it possible to have identical official electronic and print versions. But PDF has its disadvantages. For example, its fixed format makes it impossible to flow and adapt to different display screen sizes. In addition, it is difficult to re-use PDF documents because their conversion to other formats usually affects the accuracy of the converted document. That is the reason legal information should, in addition to its PDF version, be published in open formats, for example, eXtensible Markup Language (XML) that is versatile and easy to re-use with its integrity intact.²⁵⁴

“10. Where State Parties provide knowledge-based systems assisting in the application or interpretation of their legal materials, they are encouraged to make such systems available for free public access, reproducing and re-use.”²⁵⁵

²⁵¹ The Hague Conference Guiding Principles, *supra* note 78. See Principles 8 & 9.

²⁵² Edward S. Dove, *Reflections on the Concept of Open Data*, 12(2) SCRIPTED 154, 157–59 (2015), <https://script-ed.org/wp-content/uploads/2015/12/Dove.pdf>.

²⁵³ *Authentication*, GOVINFO, <https://www.govinfo.gov/about/authentication> (last visited July 9, 2017).

²⁵⁴ See *Legislative XML for the Semantic Web: Principles, Models, Standards for Document Management* (Giovanni Sartor, Monica Palmirani, Enrico Francesconi, & Maria Angela Biasiotti eds., 2011); *Legislative Documents in XML at the United States House of Representatives*, U.S. House of Representatives (Sept. 2, 2016), <https://xml.house.gov/>; *Uses of XML*, IBM, https://www.ibm.com/support/knowledgecenter/ssw_i5_54/rzamj/rzamjintroues.htm (last visited July 6, 2017).

²⁵⁵ The Hague Conference Guiding Principles, *supra* note 78 (Principle 10).

There should be no copyright in annotations and other value-added features produced or owned by any government or IGO because they are meant to help the people to understand the texts of the law, and they are also public information produced with taxpayers' money.²⁵⁶

2.6 Protection of Personal Data

"11. Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymized in order to make them available for free access."²⁵⁷

Public access to court decisions should be subject to anonymization best practices for the protection of the right to privacy and data protection in appropriate cases, as discussed in Section D.III.2.1 above.

2.7 Citations

"12. State Parties are encouraged to adopt neutral methods of citation of their legal materials, including methods that are medium-neutral, provider-neutral and internationally consistent."²⁵⁸

The Neutral Citation Standard for Case Law (the neutral citation)—developed by the Canadian Citation Committee that was set up in 1998—was approved in 1999 for use in all courts through Canada.²⁵⁹ It was in response to the ever-increasing importance of electronic legal information databases, especially on websites. It is a case identifier that has the following features: It uses numbered paragraphs instead of page numbers; the court assigns its sequential numbers; and reference is made to the court that decided the case instead of a law report. For example, in

²⁵⁶ See sources cited *supra* notes 26–27 and accompanying text (discussing the assertion of copyright in official annotations in legislation in the United States).

²⁵⁷ The Hague Conference Guiding Principles, *supra* note 78. See Principle 11.

²⁵⁸ *Id.* See Principle 12.

²⁵⁹ FRÉDÉRIC PELLETIER, THE NEUTRAL CITATION STANDARD FOR CASE LAW: A SUMMARY, https://lexum.com/cccr/ccr/neutral/docs/NeutralCitation_Summary_2010.doc (last visited July 9, 2017).

the neutral-cited *Regina v. Chambers* [2008] EWCA Crim 2467 [55] that features prominently in this Article, the citation elements are as follows: names of the parties, year of decision, abbreviated name of the court, case number, and paragraph number. “EWCA Crim” means England and Wales Court of Appeal (Criminal Division).

Vidler-Smith & Prebble rightly state that the importance of neutral citation—also referred to as “medium-neutral citation”, “vendor-neutral citation”, and “provider-neutral citation”—“lies not in small stylistic variations, but in the allocation of unique sequential numbers to judgments and in the paragraph numbering of judgments.”²⁶⁰ It is usually preferable to have a uniform permanent reference system that the neutral citation guarantees. Neutral citation has good prospects of its global acceptance, although some countries, such as the United States, are still reluctant to adopt it.²⁶¹ The system may have the unique public-access advantage of spurring every court to publish its own decisions online. And that is the right thing to do.

2.8 Translations

“13. State Parties are encouraged, where possible, to provide translations of their legislation and other materials, in other languages.”

“14. Where State Parties do provide such translations, they are encouraged to allow them to be reproduced or re-used by other parties, particularly for free public access.”

“15. State Parties are encouraged to develop multi-lingual access capacities and to co-operate in the development of such capacities.”²⁶²

Translation of at least all the extant laws in a jurisdiction into all official languages of that jurisdiction is essential to the success of public access to legal

²⁶⁰ Catherine Vidler-Smith & John Prebble, *The Emergence of Neutral Citation*, 4(1) OUCIJ 121, 125 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604994.

²⁶¹ *Id.* at 125–28.

²⁶² The Hague Conference Guiding Principles, *supra* note 78. See Principles 13, 14, & 15.

information,²⁶³ as practiced by the European Union,²⁶⁴ for instance. It enables the people who use those languages to know the laws regulating their conduct and activities, to justify the operation of the doctrine of presumption of knowledge of the law.²⁶⁵ In *Lambert v. California*, the Court noted “the [great] evil . . . when the law is written in print too fine to read or in a language foreign to the community.”²⁶⁶ It is simply unjust to require people to know and obey laws written in any language they do not understand. Linguistic rights are human rights that empower people groups to use their languages,²⁶⁷ and they constitute a major component of cultural rights.²⁶⁸

2.9 Support and Co-operation

“16. State Parties and re-publishers of their legal materials are encouraged to make those legal materials more accessible through various means of interoperability and networking.”

“17. State Parties are encouraged to assist in sustaining those organisations that fulfil the above objectives and to assist other State Parties in fulfilling their obligations.”

“18. State Parties are encouraged to co-operate in fulfilling these obligations.”²⁶⁹

²⁶³ See Mitee, *supra* note 15, at 84–87.

²⁶⁴ EU laws are translated into the 24 Official EU languages, see *Translation: Official EU Languages*, EUROPEAN UNION, http://ec.europa.eu/dgs/translation/translating/officiallanguages/index_en.htm (last visited July 6, 2017) (listing all the languages and the importance of the translation of E.U. laws).

²⁶⁵ See INGRAM, *supra* note 62.

²⁶⁶ *Lambert v. California*, 225 U.S. 355 (1957), <https://supreme.justia.com/cases/federal/us/355/225/case.html>.

²⁶⁷ ICCPR, art. 27; G.A. Res. 61/295, arts. 2–3, 5, 8, 13–16, UN Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). See Universal Declaration on Linguistic Rights, art. 18 (June 9, 1996), https://culturalrights.net/descargas/drets_culturals389.pdf. This Declaration was made by institutions and non-governmental organizations in Barcelona.

²⁶⁸ See International Covenant on Economic, Social and Cultural Rights arts. 1, 3, 6 & 15, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Language as a means of communication is intricately interwoven with culture. See CLAIRE KRAMSCH, *LANGUAGE AND CULTURE* 3 (1998).

²⁶⁹ The Hague Conference Guiding Principles, *supra* note 78. See Principles 16, 17, & 18.

The achievement of free public access to legal information globally requires the support and cooperation of State parties and all those involved in all the necessary processes. The reason is that State parties and IGOs are the burden bearers that have the legal and moral duty to provide adequate and free public access to legal information, as discussed in Section C.IV above.

2.10 Drafting in Plain Language

The requirements of best practices in legal drafting ensure that every type of legal information is intelligible and thereby effective. They include the use of clear, precise, and unambiguous language in legal documents so that the documents are properly understood.²⁷⁰ The use of plain language has now become the standard practice in legal drafting.²⁷¹ Fischer rightly defines plain English as “familiar, succinct, understandable English, generally written in the active voice without legalese and unnecessary jargon or foreign phrases.”²⁷² It is no longer fashionable to use the so-called “lawyerly language”²⁷³ that is characterized by archaic legalese and long, winding sentences that the Eighth Circuit deprecated as “nefarious and nonsensical legalese”.²⁷⁴ Similarly, legal Latinisms²⁷⁵ and difficult-to-understand vocabulary are no longer fashionable.

2.11 Alternate Formats for Equal Access by Persons with Disabilities

It is necessary to produce alternate formats of legal information to meet the needs of persons with various forms of disability, whose rights are protected by the

²⁷⁰ See EUR-LEX, *supra* note 82, at 7–8; XANTHAKI, *supra* note 196, at loc. 3408–4018.

²⁷¹ For the meaning and use of plain language, see generally Anthony Watson-Brown, *Defining “Plain English” as an Aid to Legal Drafting*, 30 STATUTE L. REV. 85 (2009).

²⁷² Judith D. Fischer, *Why George Orwell’s Ideas about Language Still Matter for Lawyers*, 68 MONT. L. REV. 129, 132 (2007). See also RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* 73–74 (2015) (discussing how the use of plain English makes the law accessible and intelligible to non-lawyers, thereby facilitating their right to represent themselves in judicial proceedings).

²⁷³ See David Ball, *David Ball on Damages: The Essential Update—A Plaintiff’s Attorney’s Guide for Personal Injury and Wrongful Death Cases* 294–95 (2005).

²⁷⁴ *Jefferson Co. v. Halverson*, 276 F.3d 389, 393 (8th Cir. 2002). See also Fischer, *supra* note 272, at 142.

²⁷⁵ Fischer, *supra* note 272, at 142–43. See also Julia C. Mead, *Legal Latinisms, Dead or Alive?*, N.Y. TIMES (Jan. 26, 2003), <http://www.nytimes.com/2003/01/26/nyregion/legal-latinisms-dead-or-alive.html>.

CRPD.²⁷⁶ The use of several types of assistive technology makes it possible to provide such special access. For example, Braille helps the blind to read texts of legal information, such as the Braille publications on South African laws on domestic violence and children.²⁷⁷ Printed texts should be large enough to meet the needs of users with poor eyesight.²⁷⁸ Audio and video formats are necessary for those who need to hear the texts or see them demonstrated. For instance, the UDHR has a recorded audio version, read by Anna Eleanor Roosevelt who chaired the UN committee that drafted the Declaration.²⁷⁹ UDHR also has a video version in sign language.²⁸⁰ The Australian Government legislation website uses BrowseAloud assistive technology to enhance accessibility through text-to-speech and screen magnification for persons with literacy problems, cognitive disabilities, and visual impairment.²⁸¹

2.12 Public Access to the Customary Law of Indigenous Communities

It is essential to provide adequate public access to the customary law of indigenous communities. Customary law forms a plural legal system in many countries with indigenous communities. Most of these countries were once

²⁷⁶ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]. See Mitee, *supra* note 15, at 87–90.

²⁷⁷ See Yolisa Tswana, *Laws in Braille will Help Blind Understand their Rights*, PRESSREADER (July 19, 2012), <https://www.pressreader.com/south-africa/cape-argus/20120719/281736971571697>.

²⁷⁸ See *Lambert*, 355 U.S. at 355 (1957) (noting the evil in any law “written in print too fine to read” or in a language that members of the community do not understand).

²⁷⁹ See *Universal Declaration of Human Rights*, UDHR, https://udhr.audio/UDHR_Video.asp?lng=eng (last visited July 6, 2017) (audio version of UDHR); *Universal Declaration of Human Rights: History of the Document*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/history-document/> (last visited July 6, 2017) (stating that Anna Eleanor Roosevelt, the wife of U.S. President Franklin D. Roosevelt, chaired the committee that drafted the UDHR).

²⁸⁰ See, e.g., *UDHR in Sign Languages*, OFFICE OF THE UN HIGH COMM’R FOR HUM. RTS. (last visited July 6, 2017), <http://www.ohchr.org/EN/UDHR/Pages/UDHRinsignlanguages.aspx> (featuring videos of the Universal Declaration of Human Rights in British and Spanish sign languages); *New Zealand Sign Language Content Offers Deaf Community Better Access to Legal Information*, N.Z. L. Soc’y (May 12, 2016), <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/new-zealand-sign-language-content-offers-deaf-community-better-access-to-legal-information>.

²⁸¹ See sources cited *supra* note 71 (discussing the use of assistive technology for access to legal information by persons with disabilities).

colonized by other countries and empires. There are at least sixty-four countries that have plural legal systems which comprise a mixture of customary law and one or more other legal systems—civil law, common law, and religious law.²⁸² Liberia²⁸³ and Ethiopia,²⁸⁴ for example, were not colonized, in the strict sense of colonization, but they also have plural legal systems. Liberia has a system of common law and customary law while that of Ethiopia is civil law and customary law.²⁸⁵

Customary law in its native oral state is inaccessible because many people are not sure of what it is, in terms of definite rules and their validity. That is the reason for the judicial requirement that the existence of the unwritten rules of customary law must be proved to the satisfaction of the court. For example, section 18(1) & (2) of the Nigerian Evidence Act 2011 states:

(1) Where a custom cannot be established as one judicially noticed, it shall be proved as a fact.

(2) Where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of persons would be likely to know of its existence in accordance with section 73.

The highest quantum of proof is sometimes required to establish the existence of a custom. For instance, eleven witnesses were called to prove the existence of a rule of custom “beyond any reasonable doubt” in the South African case of *Van Breda v. Jacobs*.²⁸⁶ The unascertained and inaccessible nature of oral customary

²⁸² Customary Law Systems and Mixed Systems with a Customary Law Tradition, JURIGLOBE—WORLD LEGAL SYSTEMS, <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-coutumier.php> (last visited July 6, 2017).

²⁸³ See Walter C. Soderlund, Liberia, 1990: ECOMOG I, “Operation Liberty,” UNOMIL in HUMANITARIAN CRISES AND INTERVENTION: REASSESSING THE IMPACT OF MASS MEDIA 21 (Walter C. Soderlund et al. eds., 2008).

²⁸⁴ See Lovise Aalen, The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation Under Ethnic Federalism 87 (2011).

²⁸⁵ See JuriGlobe—World Legal Systems, *supra* note 282.

²⁸⁶ *Van Breda v. Jacobs*, 1921 (AD) 330, <https://www.coursehero.com/file/21226446/VAN-BREDA-AND-OTHERS-v-JACOBS-1921-AD-330/>. See J. C. Bekker & I. A. van der Merwe, *Proof and*

law caused such a huge waste of time and resources just to prove the existence of the custom in question. Such proof of oral customary law that depends on the memory and veracity of witnesses, the unnecessary costs and delays involved, and its susceptibility to corruption have adverse implications for justice and the rule of law, as I argue in my work, *Huricompatisation: The Concept of Human Rights-Compliant Public Access to the Customary Law of Indigenous Communities*.²⁸⁷

My above-mentioned work is a useful guide on the principles for the legal framework for adequate public access to the customary law of indigenous communities, which is significant because customary law is the most inaccessible type of law. First, access to legal information requires that the texts and effects of laws are both discoverable and ascertainable, as discussed in Part C above. Therefore, the valid and binding customs and practices that constitute customary law should be compiled by the responsible government and published in an appropriate permanent written form—but not codified—to make customary law accessible and ascertainable. Unlike codification that enacts customary as legislation, the proper ascertainment approach should be such that can preserve the adaptive nature of customary law as a living law that is always evolving and promote the human rights of the indigenous communities. Second, such published customary law should be comprehensive, translated into the language of the community, authoritative, and binding on the people to whom it is applicable. Third, apart from codification whose flaws appear to be obvious, the other methods of ascertainment of customary law—judicial ascertainment that I refer to as judicialization, restatement, and self-statement—are also flawed because they do not provide adequate public access to the customary law of indigenous communities. Fourth, none of the four existing methods of ascertainment of

Ascertainment of Customary Law, 26(1) SOUTHERN AFRICAN PUB. L. 115, 120 (2011), <https://hdl.handle.net/10520/EJC153213>.

²⁸⁷ Leesi Ebenezer Mitee, *Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access* (forthcoming 2017). For the flaws of codification as a method of ascertainment of the customary law of indigenous communities, see David Weisbrot, *Comment on the ALRC Discussion Paper: Customary Law*, 1 ABORIGINAL L. BULL. 1, 3–4 (1981-1998); Joan Vincent, *Contours of Change: Agrarian Law in Colonial Uganda, 1895-1962*, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 166 (June Starr & Jane F. Collier eds., 1989); Jelle J. P. Wouters, *Land Tax, Reservation for Women and Customary Law in Nagaland* 52 (9) ECONOMIC & POLITICAL WEEKLY 20, 23 (2017).

customary law is human rights-compliant. There is therefore the need for a new ascertainment approach that provides adequate public access to the customary law of indigenous communities and is also human rights-compliant, which is a concept that I formulate with the acronym *huricompatisation* in my said work.

2.13 Public Awareness of Legal Information

An effective legal information public awareness program (LIPAP)²⁸⁸ is essential for helping people to know the existing laws and participate in the process of making new laws. The reason is that the philosophy behind the right of public access to legal information is to acquire the best possible knowledge of the law to guide one's conduct and activities. A sustainable LIPAP must use all available means of mass communication, for example, television, radio, and official government newspapers specifically designated for LIPAP; social media, including Facebook and Twitter; and electronic messaging alert services, such as email and text messages. Real-time broadcast of all legislative businesses and other law-making activities of every government and every IGO is imperative.²⁸⁹ Indigenous communities should also use their homegrown means of information dissemination to create public awareness of laws, such as the use of town criers.²⁹⁰

2.14 Access to the Internet

State parties to the Convention shall have the obligation to formulate and implement policies and programs that will create the enabling environment for free²⁹¹ or affordable and adequate Internet connectivity in terms of speed,

²⁸⁸ The term with its abbreviation is my coinage.

²⁸⁹ See Mitee, *supra* note 15, at 56–62 (discussing legislation awareness programme).

²⁹⁰ Mary Omogor Ifukor, *Channels of Information Acquisition and Dissemination Among Rural Dwellers*, 5(10) IJLIS 306, 307 (2013), <http://www.academicjournals.org/journal/IJLIS/article-full-text-pdf/494E19F40088> (lasted visited July 8, 2017); Chimezie P. Uzuegbu & Moses M. Naga, *Information Communication to Rural Cassava Farmers in Nigeria: A Pilot Study*, 9(2) JAIST (2016), http://jaistonline.org/vol9no2_2016.html (lasted visited July 8, 2017); Henry Kam Kah, *Civil Society, Socio-Economic Development and Nation-Building In West Africa*, 7(4) AAJOSS (2016), <http://www.onlineresearchjournals.com/aajoss/art/220.pdf> (lasted visited July 8, 2017).

²⁹¹ Free Internet connectivity should be available in public depository libraries that stock government-held information which includes legal information.

reliability, and unlimited data usage.²⁹² I discussed the importance of online legal information in Section D.III.2.1 above. Even where there is an excellent legal information online database, if people are unable to access it due to the prohibitive cost of Internet access, data usage limits, and unreliable and frustratingly low-speed Internet connectivity, then the database becomes technically inaccessible.

Internet access is so indispensable to the realization of the human right of freedom of expression and the press—which encompasses the right of access to public information—and other rights, that Estonia enacted a law in 2000 to recognize it as a human right.²⁹³ Subsequently, the Constitutional Council of France (2009) and the Constitutional Court of Costa Rica (2010) also declared it a human right.²⁹⁴ In 2011, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression concluded that denying Internet access by cutting off its users amounted to a violation of Article 19, paragraph 3, of the ICCPR.²⁹⁵ This development underscores the importance of the appropriate global policy on Internet access to the right of public access to legal information.

2.15 No Liability Under Inaccessible Law

No person shall be held liable for violating the provision of any law that was not adequately published to the extent that the person, in their particular circumstances, should reasonably be expected to know the exact contents of that law. The courts have upheld this principle in some jurisdictions, including Canada and the Philippines.²⁹⁶

²⁹² See Arnold-Moore (2003), *supra* note 84.

²⁹³ Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/17/27, at para. 65 (May 16, 2011) [hereinafter Frank La Rue (2011)].

²⁹⁴ *Id.*

²⁹⁵ *Id.* at paras. 78–79. For a discussion on the human right of access to the Internet, see generally Stephen Tully, *A Human Right to Access the Internet? Problems and Prospects*, 14 HUM. RTS. L. REV. 175 (2014).

²⁹⁶ *Tañada v. Tuvera*, *supra* note 59 (“[B]efore the public is bound by its contents, especially its penal provisions, a law, regulation or circular must first be published and the people officially and

Because there is usually at least one necessary exception to every general legal principle, the proposed UN Convention should state that this defense of ignorance of the law on the ground of *inaccessibility* shall not apply to any act that a reasonable person is expected to know is illegal or unlawful even without knowing the law that specifically declared it illegal or unlawful. Examples of such acts are certain heinous, morally despicable, and dangerous offenses like murder, torture, armed robbery, rape, kidnapping, causing grievous bodily harm, and drunk driving.²⁹⁷

The provision of Article 15(2) of the ICCPR on *ex post facto* criminal law is relevant to this proposed exception. It states: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when

specially informed of said contents and its penalties.”); *Corporation de l’École Polytechnique v. Canada*, 2004 FCA 127, para. 39 (CanLII):

Invincible mistake of law, accepted by the courts and Parliament, refers to mistakes which it is impossible to avoid because it is impossible for the person charged to know the law, either because it has not been promulgated or because it was not published in a satisfactory way so that its existence and contents could be known.

(emphasis added).

“[I]gnorance of the law due to its non-publication must be a credible defence.” See CARLSON ANYANGWE, *CRIMINAL LAW: THE GENERAL PART* 207 (2015). Frans Rumpff, the Chief Justice of South Africa, delivered a revolutionary unanimous judgment in 1977 that abolished the general application of the doctrine of ignorance of the law is no excuse in relation to mens rea in criminal offenses. See *State v. De Blom* 1977 (3) SA 513 (A) at 529 H (S. Afr.).

²⁹⁷ See Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 556 (2014) (conceding that ignorance of the law should not be an excuse with regard to *mala in se* offenses); see also Cottone, *supra* note 173, at 143 (asserting the relative ease of public awareness of the unlawfulness of *mala in se* offenses in contrast to regulatory offenses: “For example, one would be hard-pressed to find a person that never heard of someone going to prison for murder or robbery—the illegality of these acts has been hammered into our collective consciousness.”). The age-old judicial distinction between *mala prohibita* (evil-because-prohibited) and *mala in se* (naturally-evil) offenses is established in criminal law. See generally Mark S. Davis, *Crimes Mala in Se: An Equity-Based Definition*, 17 CRIM. JUST. POL’Y REV. 270 (2006); *State v. Anderson*, 5 P.3d 1247, 141 Wash. 2d 357 (2000); Columbia Law Review, *The Distinction Between “Mala Prohibita” and “Mala in se” in Criminal Law* 30 Colum. L. Rev. 74 (1930), <https://www.jstor.org/stable/1114831> (lasted visited July 8, 2017). The distinction, despite its imperfection, is necessary for the attainment of justice in *special* circumstances to prevent avoidance of liability based on my proposed human-right defense of inaccessible and therefore unknowable law. The application of this distinction here is based on *accessibility* of the law, not on criminal intent—*mens rea*.

it was committed, was criminal according to the general principles of law recognized by the community of nations.” As discussed in Section D.II.5 above, an inaccessible law is analogous to an *ex post facto* law because the law is unknowable in both situations. Therefore, the said Article 15(2) justifies the proposed exception to the defense of inaccessible law. It should be emphasized that this necessary exception does not, in any manner whatsoever, diminish the legal and moral duty of any duty bearer to provide free access to comprehensive and up-to-date legal information, irrespective of its subject matter, as clearly advocated in this Article. The exception only aims to ensure that the defense is not abused by criminals.

Overall, the justice that this defense of inaccessible law strives to secure far outweighs any consequence that may emanate from its imperfection. After all, there is no perfect situation in any human institution, practice, or system. This provision for the defense of inaccessible law promises to spur all responsible governments and IGOs to provide free and adequate public access to their official and authentic legal information because they would want their laws to be enforceable and effective. This is the direct remedy to the injustice caused by the strict application of the *ignorantia juris* doctrine even when the law is inaccessible and therefore unknowable.

The proposed UN Convention will provide the human rights framework for the universal application of this essential principle that is upheld by the courts in some jurisdictions mentioned above and supported by Article 15(2) of the ICCPR. Perhaps under the new dispensation, the new counterbalancing universal doctrine may well be “ignorance of inaccessible law is an excuse.”

E. Conclusion

This Article has examined the desirability of the universal recognition of the right of public access to legal information as a human right and therefore as part of a legal framework for improving global access to legal information. Specifically, it sought to examine the existence of the right of public access to legal information as a legal right and to determine whether the right of public access to legal information qualifies for universal recognition as a human right, which will strengthen it to improve national and global access to legal information.

Objective (1): “To examine the existence of the right of public access to legal information as a legal right.” From the findings of this Article, the right of public access to legal information is a *legal right* that exists under the general right of access to public information because every government holds such information in trust for the people who are the rightful owners.²⁹⁸ Although FOIAs may be used to access legal information,²⁹⁹ as it is the case with other types of public information, it is inadequate because it mainly provides limited reactive access on a piecemeal basis in response to a specific request instead of a permanent proactive access for the whole world at all time. The use of mandamus is also limited because it is a discretionary order.³⁰⁰ The right of public access to legal information also exists under the traditional requirement in obsolete statutes that laws should be published, which did not contemplate the use of modern technology.³⁰¹ Contemporary statutory provisions have evolved in some jurisdictions to secure its modern existence, although they are still inadequate.³⁰² Furthermore, it is also a human right with a derivative status from its parent human right of freedom of expression and the press under international and regional instruments, as well as national constitutions.³⁰³ In addition, its existence enjoys *judicial recognition* in some jurisdictions.³⁰⁴

Objective (2): “To determine whether the right of public access to legal information qualifies for universal recognition as a human right, which will strengthen it to improve national and global access to legal information.” This Article has found that, although the right of public access to legal information exists, it is largely ineffectual, as discussed in Parts C and D. The reason is that its global legal framework is inadequate and therefore unable to exert sufficient

²⁹⁸ See *supra* Section C.I (discussing the existence of the right of public access to legal information under the general right of access to public or government-held information).

²⁹⁹ See *id.*

³⁰⁰ See *supra* Section C.V (discussing judicial recognition and enforcement of the existing right of public access to legal information).

³⁰¹ See *supra* Section C.II (discussing the traditional requirement of publication of legal information).

³⁰² See *supra* Section C.III (discussing the use of advanced technologies to enhance accessibility).

³⁰³ See *supra* Section D.II.1 (discussing the normative gaps associated with the existing derivative status).

³⁰⁴ See *supra* Section C.V (discussing judicial recognition and enforcement of the existing right of public access to legal information).

pressure on governments to provide free access to their comprehensive and up-to-date legal information. That is why adequate public access to legal information is not yet fully achieved even in the developed countries, and virtually nonexistent in some developing countries.³⁰⁵

The right of public access to legal information qualifies for universal recognition as a distinct human right to fill the normative gaps associated with its existing derivative status and to provide the human rights framework for its promotion, protection, and actualization. The Aarhus Convention is a precedent that it is possible, and even desirable, to have Conventions on crucial aspects of public information that are not adequately protected, chief among which is legal information. Further, it has the basic characteristics of human rights and its formal human rights status will remedy the injustice from the application of the *ignorantia juris* doctrine where the law is inaccessible. In addition, its formal universal recognition will help to realize the numerous benefits derivable from adequate public access to legal information; give global legal effect to the numerous principles, declarations, and statements on free public access to legal information; and promote the rule of law.

The formal universal recognition of the right of public access to legal information under the framework of the UN Convention on the Right of Public Access to Legal Information that I propose in this Article is the legitimate and effectual mechanism to promote, protect, and actualize it globally. The United Nations, according to its statement quoted in Section D.II.4 above, recognizes the importance and significance of such formal recognition to the protection of human rights. Douglas-Scott recently extolled the potent force of human rights for justice and its attainment³⁰⁶ which is a major goal of the proposed UN Convention. The Convention will set the minimum global standards that constitute binding obligations³⁰⁷ on governments to provide adequate public access to their legal information. The obligations also extend to all organizations with legislative and judicial functions that are non-State actors. No such global standards exist under the present dispensation. As a human right, in addition to the UN monitoring and

³⁰⁵ See *supra* notes 21–23 and accompanying text (discussing the poor public access to legal information in Nigeria and Mali).

³⁰⁶ See Douglas-Scott, *supra* note 138.

³⁰⁷ See Office of the UN High Comm’r for Hum. Rts., *supra* note 142, at 2–3.

implementation mechanisms, it will become the most powerful tool to be used by civil society to put pressure on governments and the said non-State actors to meet their international obligations under the proposed UN Convention. Ordinary legal rights do not enjoy such exalted status and global protection as human rights.³⁰⁸ Therein lies the importance of the human rights framework for strengthening the right of public access to legal information to improve global access, which is the focus of this Article.

The contents of the proposed UN Convention outlined in this Article are useful because they highlight the essential principles necessary for drafting the Convention. In addition, because of the delays usually associated with the processes that culminate in the adoption and entering into force of any UN Convention,³⁰⁹ these contents also provide a useful guide on the development and implementation of urgent interim national and regional policies and programs on the achievement of adequate public access to legal information. The best way to implement such interim policies and programs, pending the entering into force of the proposed UN Convention, is to enact them as laws on public access to legal information. In this way, there will be improvement in public access to legal information even before the proposed UN Convention enters into force to provide the definitive global legal framework for it. The provision of valuable input for policymakers is, of course, the natural use of any research that contains law reform proposals and is policy-relevant like this Article.³¹⁰

³⁰⁸ See *supra* Section D.II.2 (detailing the human rights framework for the right of public access to legal information).

³⁰⁹ For instance, with regard to the CRPD, there was a period of about seven years between the setting up of its Ad Hoc Committee by the General Assembly in 2001 and when it entered into force on May 3, 2008. See *Convention on the Rights of Persons with Disabilities: Why a Convention?*, UNITED NATIONS (Apr. 21, 2016), <http://www.un.org/disabilities/convention/questions.shtml#five> (providing the background to the Convention that was adopted on Dec. 13, 2006).

³¹⁰ See generally Tony Kingdon, *The Relevance of Research to Policy Formulation: An Australian Perspective*, 88 ADDICTION 61S (Supplement s1, Jan., 1993); Alexander C. Wagenaar, *Research Affects Public Policy: The Case of the Legal Drinking Age in the United States*, 88 ADDICTION 75S (Supplement s1, Jan., 1993); Amanda Wolf, *Research Strategies for Policy Relevance*, 23 SOC. POL'Y J.N.Z. (2004); UNCTAD Virtual Inst. on Trade and Dev., *Research-Based Policy Making: Bridging the Gap between Researchers and Policy Makers* (Recommendations for Researchers and Policy

The existing international human rights framework, declarations, constitutions, legislation, statements, principles, policies, and judicial decisions have not solved the global problem of inadequate—and in some cases extremely poor—public access to legal information.³¹¹ Yet every willing government can afford the provision of adequate access to its legal information.³¹² Therefore, only a consequential departure from the status quo, an innovative solution, should be expected to produce the positive change that is needed urgently. That is exactly the revolutionary intervention through the human rights framework that this Article advocates. The formal universal recognition of the right of public access to legal information as a human right under the framework of the proposed UN Convention, promises to improve significantly global access to legal information. Among its numerous benefits, it will promote widespread knowledge of the law and facilitate global legal research on an unprecedented scale. It will also advance the cause of justice by helping lawyers and the courts to know the current position of the law to avoid wrong decisions, as the English case of *Regina v. Chambers*³¹³ revealed; strengthen participatory democracy; and enhance the rule of law. Particularly, it will remedy the chronic injustice caused by the strict application of the *ignorantia juris* doctrine even where the law is inaccessible and therefore unknowable, in the different circumstances exemplified by *Rex v. Bailey*³¹⁴ and *United States v. Casson*.³¹⁵ In the new dispensation under the proposed UN Convention, the new counterbalancing universal doctrine may well be “ignorance of inaccessible law is an excuse.”³¹⁶

Makers Arising from the joint UNCTAD-WTO-ITC Workshop on Trade Policy Analysis, Geneva, Sept. 11–15, 2006), <https://vi.unctad.org/tda/papers/tradedata/tdarecs.PDF>.

³¹¹ See, e.g., *supra* notes 21–23 (discussing the poor public access to legal information in Nigeria and Mali).

³¹² See *supra* Part B (discussing the lack of political will hinders public access to legal information).

³¹³ *Regina v. Chambers* [2008] EWCA (Crim) 2467 (revealing that previous decisions of the England and Wales Court of Appeal over a period of seven years were based on a repealed regulation that neither the Court nor the lawyers that appeared before it knew of).

³¹⁴ *Rex v. Bailey* (1800) 168 Eng. Rep. 651 (Eng.).

³¹⁵ *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970).

³¹⁶ See *supra* Section D.III.2.15 (discussing the proposal that there should be no liability under any inaccessible law).

Appendix

Guiding Principles to be Considered in Developing a Future Instrument¹

Free access

1. State Parties shall ensure that their legal materials, in particular legislation, court and administrative tribunal decisions and international agreements, are available for free access in an electronic form by any persons, including those in foreign jurisdictions.
2. State Parties are also encouraged to make available for free access relevant historical materials, including preparatory work and legislation that has been amended or repealed, as well as relevant explanatory materials.

Reproducing and re-use

3. State Parties are encouraged to permit and facilitate the reproduction and re-use of legal materials, as referred to in paragraphs 1 and 2, by other bodies, in particular for the purpose of securing free public access to the materials, and to remove any impediments to such reproduction and re-use.

Integrity and authoritativeness

4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.
5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).

¹ The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008, *an annexure to* ACCESS TO FOREIGN LAW IN CIVIL AND COMMERCIAL MATTERS: CONCLUSIONS AND RECOMMENDATIONS, EUR. COMM'N, https://assets.hcch.net/upload/foreignlaw_concl_e.pdf (last visited July 6, 2017). These are principles developed by the experts which met on Oct. 19-21, 2008 at the invitation of the Permanent Bureau of the Hague Conference on Private International Law as part of its feasibility study on the "access to foreign law" project.

6. State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts.

Preservation

7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials referred to in paragraphs 1 and 2 above.

Open formats, metadata and knowledge-based systems

8. State Parties are encouraged to make their legal materials available in open and re-usable formats and with such metadata as available.

9. States Parties are encouraged to cooperate in the development of common standards for metadata applicable to legal materials, particularly those intended to enable and encourage interchange.

10. Where State Parties provide knowledge-based systems assisting in the application or interpretation of their legal materials, they are encouraged to make such systems available for free public access, reproducing and re-use.

Protection of personal data

11. Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymized in order to make them available for free access.

Citations

12. State Parties are encouraged to adopt neutral methods of citation of their legal materials, including methods that are medium-neutral, provider-neutral and internationally consistent.

Translations

13. State Parties are encouraged, where possible, to provide translations of their legislation and other materials, in other languages.

14. Where State Parties do provide such translations, they are encouraged to allow them to be reproduced or re-used by other parties, particularly for free public access.

15. State Parties are encouraged to develop multi-lingual access capacities and to co-operate in the development of such capacities.

Support and co-operation

16. State Parties and re-publishers of their legal materials are encouraged to make those legal materials more accessible through various means of interoperability and networking.

17. State Parties are encouraged to assist in sustaining those organizations that fulfill the above objectives and to assist other State Parties in fulfilling their obligations.

18. State Parties are encouraged to cooperate in fulfilling these obligations.

CHAPTER THREE

Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain¹

*“The goal of introducing new gTLDs [generic top-level domains] into the Internet is to enhance competition, innovation and consumer choice.” Internet Corporation for Assigned Names and Numbers (2015)**

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Article publication detail: Leesi Ebenezer Mitee, ‘Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain’ (2017) 23(2) European Journal of Current Legal Issues <<http://webjcli.org/article/view/562/800>> (unnumbered HTML webpages; reproduced from the published version, with its original numbering of sections, footnotes, and citation style). Published on 12 October 2017 (peer-reviewed) and available with free or open access on the *European Journal of Current Legal Issues* website.

* Internet Corporation for Assigned Names and Numbers, ‘New gTLD Fast Facts’ (*Internet Corporation for Assigned Names and Numbers*) <<http://newgtlds.icann.org/en/about/program/materials/fast-facts-26jan15-en.pdf>> accessed 17 April 2017.

Abstract

This article examines the use of a new legal information generic top-level domain as a viable tool for easy identification of official legal information websites and enhancing global public access to their resources. This intervention is necessary because of the existence of unofficial legal information websites with issues of reliability and the overdependence on Internet search engines (despite their limitations) as the only means of finding and accessing official legal information websites. The existing findability difficulties create technical unavailability of available online legal information. This article proffers a workable solution to these problems through its proposal for the creation of <.officiallaws> regulated official legal information generic top-level domain by ICANN. It develops a Legal Information Domain Name System exclusively for the official legal information websites of governments and intergovernmental organisations based on the proposed generic top-level domain. The Legal Information Domain Name System extends the ramification of Internet governance within the ICANN framework in respect of official legal information as a universal public brand. The article argues that the generic top-level domain will facilitate easy identification of official sources of online legal information to avoid the risk of relying on unreliable legal resources, enable direct access to official legal information websites without the laborious use of Internet search engines, and enhance their findability even when the search option is used. It concludes that the resultant improved access to the available official online legal information will promote the people's right of free public access to legal information globally. This will help people to know the laws they are bound to obey (ignorance of which is no excuse), enhance justice under the right to a fair trial, and facilitate national and transnational legal research. It will also promote transparency and accountability in governance and engender the holistic actualisation of the environmental, economic, and social components of sustainable development, among other benefits.

Keywords: Right of public access to legal information; Official legal information generic top-level domain gTLD; Legal information domain name system LIDNS; United Nations World Legal Information Organization UNWLIO; Legal informatics; Internet Corporation for Assigned Names and Numbers ICANN; Internet governance; Free access to law movement; Legal information institutes

1. Introduction

The World Wide Web ('the Web'), as indispensable as it is in the twenty-first century information age, is also a massive junkyard of unregulated, unreliable and dangerous information. Such information is either merely inaccurate, inadvertently distorted, deliberately falsified, or mischievously created. Yet, the Web has unparalleled advantages for the global dissemination of every type of information. For instance, publishing legal information online is indispensable to the provision of free, adequate, comprehensive, and up-to-date public access to legal information that meets the need of its different users.² Such access is necessary for sustainable development and has profound human rights implications for justice and the rule of law.³ The dilemma that the indispensability of the Web and the everyday danger that it poses to its billions of users worldwide⁴ creates, has necessitated the quest for mechanisms that can help people identify genuine and reliable sources of online information. One of such interventions is the unprecedented creation of more than 1,000 new generic top-level domains (gTLDs) by the Internet Corporation for Assigned Names and Numbers (ICANN)—a revolution that began with the current exercise which started in 2012.⁵ Despite the proven importance of these new restricted gTLDs (e.g. <.health>, <.organic>, <.edu>, and <.ac>),⁶ there is no such gTLD to help people identify the reliable and official sources of online legal information. The proliferation of third-party

² Section 2.4 below.

³ Ibid. See *Regina v Chambers* [2008] EWCA Crim 2467, para 55–76 (UK) <www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html> accessed 12 September 2017; 'Chambers Review: Review of Confiscation Orders in Tobacco Cases' (*The Crown Prosecution Service*) <http://cps.gov.uk/publications/others/chambers_review.html> accessed 12 September 2017; 'Montreal Declaration on Free Access to Law' (*Free Access to Law Movement*, 2002) <www.falm.info/declaration/> accessed 12 September 2017; Brian D Anderson, 'Meaningful Access to Information as a Critical Element of the Rule of Law: How Law Libraries and Public Libraries Can Work Together to Promote Access' (IFLA World Library and Information Congress, Columbus, Ohio, United States, August 2016) <<http://library.ifla.org/1376/1/179-anderson-en.pdf>> 12 September 2017.

⁴ 'World Internet Usage and Population Statistics June 30, 2017 – Update' (*Internet World Stats*, 12 September 2017) <www.internetworldstats.com/stats.htm>.

⁵ Section 2.3 below.

⁶ Section 3.3 below.

unofficial websites that publish legal information has exacerbated this problem. In addition, the volume of online legal information is so large, and its sources are so many and diverse,⁷ that people waste many precious man-hours and energy searching for and researching items of interest, many times fruitlessly. This situation creates *technical unavailability* of the available online legal information. The solution to this problem lies in the development of a technical mechanism that will facilitate optimum *findability* of available online legal information resources and provide the eventual access to them. Findability of online information simply refers to the ease with which people can find or discover it.⁸

This article therefore aims to examine the use of a new regulated legal information gTLD as a viable tool for easy identification of official legal information websites (OLIWs) and enhancing national and transnational public access to official legal information. The discussion focuses on the OLIWs of governments and intergovernmental organisations (IGOs) that create legal information, and therefore have the legal and moral duty to provide free access to it.⁹ Such access should be adequate for its different users, comprehensive, and up-to-date. Non-governmental organisations (NGOs) and other third parties that provide free access to legal information have no such duty; they deserve commendation for their noble voluntary service. Accordingly, the term '*legal information*' in this article refers to the laws and law-related resources made by governments and the said IGOs, which has been aptly defined as follows:

Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on

⁷ Richard A Danner and Jules Winterton (eds), *The IALL International Handbook of Legal Information Management* (Routledge 2016) 71.

⁸ Peter Morville, *Ambient Findability: What We Find Changes Who We Become* (O'Reilly 2005) 4.

⁹ Section 2.4 below. Every government has the legal and moral duty to provide free and adequate access to *all categories* of its legal information, including customary law. For my discussion on the right of public access to the customary law of indigenous communities, see Leesi Ebenezer Mitee, 'Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access' (forthcoming peer-reviewed article).

preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.¹⁰

Any description of legal information as '*official*' in this article is a reference to its *source* which may be the website of a government or an IGO. It is not a reference to the status of any legal information, unless it is expressly stated otherwise. Such legal information still benefits from the *presumption of reliability of only information from an official source*,¹¹ even without digital authentication. '*Unofficial*' legal information is that which is published by any third party, i.e. neither a government nor an IGO.

This article builds upon the existing Domain Name System (DNS) operated by ICANN, that is used by nearly two billion websites worldwide,¹² including all OLIWs. The aspect of accessibility that is the focus of this article is the easy identification and location or discovery of *OLIWs* that are the official repositories of *documents* containing the stock of online legal information. This may be described as *primary online access*. It is not concerned with the format, architecture, and management of the said documents and their data, which provide *another level of access* to legal information. Several Semantic Web technologies and standards have been developed for such systems and processes, which include URN:LEX (Uniform Resource Name Namespace for Sources of Law) and Akoma Ntoso (Architecture for Knowledge-Oriented Management of African Normative Texts using Open Standards and Ontologies).¹³ They are different matters than the subject of this article.

¹⁰ 'Montreal Declaration on Free Access to Law' (*Free Access to Law Movement*, 2002) <www.falm.info/declaration/> accessed 12 September 2017).

¹¹ *People v Melchor*, Crim. No. 5023. First Dist., Div. One. 26 October 1965 (US) <<http://law.justia.com/cases/california/court-of-appeal/2d/237/685.html>> accessed 12 September 2017; Graham Greenleaf, Andrew Mowbray and Philip Chung, 'The Meaning of "Free Access to Legal Information": A Twenty Year Evolution' (2013) 1 *Journal of Open Access to Law* <<https://ojs.law.cornell.edu/index.php/joal/article/view/11>> accessed 12 September 2017.

¹² 'September 2017 Web Server Survey' (*Netcraft*, 11 September 2017) <<https://news.netcraft.com/archives/category/web-server-survey/>> accessed 12 September 2017.

¹³ Enrico Francesconi, 'Semantic Model for Legal Resources: Annotation and Reasoning over Normative Provisions' (2016) 7 *Semantic Web* 255

This article contributes to the existing literature in the following major ways. First, it develops a *Legal Information Domain Name System* (LIDNS)¹⁴ for the OLIWs of governments and IGOs based on the proposed <.officiallaws> regulated generic top-level domain (gTLD) to be created by ICANN. This extends the ramification of Internet governance within the ICANN framework in respect of *official* legal information as a universal public brand. LIDNS will facilitate easy identification of reliable official sources of online legal information worldwide. Further, unlike the existing system, the LIDNS will make it possible for people to access OLIWs *directly* with their easy-to-remember and easy-to-guess domain names. This direct-access option introduces a new dimension to findability and accessibility of official legal information websites. This option will minimise the current *overdependence* on Internet search engines that is associated with the rigours of doing numerous searches which may not always be successful. The reasons include the fact that the proper use of search engines requires skills that many people may not have.¹⁵ Even when the usual Internet search option is used, the proposed regulated legal information gTLD will still facilitate findability of OLIWs through its said identification feature.¹⁶ It will thereby enhance public access to official online legal information globally.

Second, it articulates the need for the global promotion, regulation, and monitoring of public access to *official* legal information. This is because, although public access to legal information is not just a legal and constitutional right but also a human right,¹⁷ many governments have neglected their legal and moral duty to provide the required free and adequate access.¹⁸ This article therefore argues for the establishment of a new United Nations World Legal Information

<<http://content.iospress.com/articles/semantic-web/sw150>> accessed 12 September 2017; Pompeu Casanovas and others, 'Semantic Web for the Legal Domain: The Next Step' (2016) 7 Semantic Web 213 <<http://content.iospress.com/articles/semantic-web/sw224>> accessed 12 September 2017; Guido Boella and others, 'D2.2 Legal XML-Schema (XSD)' (*EUCases*, 23 June 2014) <www.eucases.eu/fileadmin/EUCases/documents/D2%20Legal%20XML-scheme.pdf> accessed 12 September 2017.

¹⁴ The term 'Legal Information Domain Name System' with its abbreviation 'LIDNS' is my coinage.

¹⁵ Section 3.3 below.

¹⁶ *Ibid*

¹⁷ Section 2.4 below.

¹⁸ Section 3.4 below.

Organization (UNWLIO)¹⁹ that will become the UN agency of intergovernmental character responsible for promoting, regulating, and monitoring public access to legal information worldwide. It will become the *proper* organisation to apply for the proposed <.officiallaws> official legal information gTLD and manage it for the public benefit of the whole world.²⁰ The article proposes a change to ICANN's current defective policy under which it delegated <.health> gTLD to DotHealth LLC, a private US company²¹ that will use it for purely commercial reasons, instead of the World Health Organization (WHO) that is responsible for global health matters and standards.²² The article contends that the existence of the United Nations World Tourism Organization (UNWTO) for *tourism* that does not directly affect the life of *every* human being, justifies the establishment of the proposed UNWLIO because public access to legal information does.²³

Third, this article reinforces the argument that the provision of public access to legal information is the legal and moral duty of every tier of government and every IGO that creates legal information.²⁴ It uses the historical records of the publishing of laws by kings (e.g. King Hammurabi of Babylon and King Henry VII of England), judicial decisions, statutes, constitutions, and international legal instruments to support this claim and *the right of public access to legal information*.²⁵ It argues that this duty should not be abdicated to third parties and that every government should manage and control its legal information databases without outsourcing it to any third-party whatsoever.²⁶

The rest of this article comprises three Sections. Section 2 discusses the background to the evolution of the Web, the process of creating new gTLDs by ICANN, and the recent revolution in creating new gTLDs. It examines the duty of every government and every IGO to provide free and adequate public access to its

¹⁹ The name 'United Nations World Legal Information Organization' with its abbreviation 'UNWLIO' is my coinage.

²⁰ Section 3.4 below.

²¹ 'Delegation Report for .Health' (*Internet Assigned Numbers Authority*, 21 January 2016) <www.iana.org/reports/c.2.9.2.d/20160121-health> accessed 12 September 2017.

²² Section 3.4 below.

²³ Ibid

²⁴ Section 2.4 below.

²⁵ Ibid

²⁶ Ibid

legal information, how the right of public access to legal information is not just a legal and constitutional right but also a human right, and the importance of publishing legal information on websites. Section 3 makes a proposal for a new <.officiallaws> official legal information gTLD, and discusses its exclusive use, advantages, and implementation. Section 4 concludes that the proposal for the new <.officiallaws> official legal information gTLD will significantly improve public access to legal information and promote the *right of public access to legal information* globally, which will help to realise the numerous benefits of free online public access to legal information.

2. The World Wide Web and Public Access to Legal Information

This Section discusses the background to the evolution of the Web whose functionality is tied to domains, the process of creating new gTLDs by ICANN, and the recent revolution in creating new gTLDs. It examines the duty of governments and IGOs to provide free public access to their legal information and the right of public access to legal information. It concludes with the indispensability of publishing legal information on websites in this ICT age.

2.1 The World Wide Web and Top-Level Domains

Sir Timothy Berners-Lee invented the World Wide Web in March 1989.²⁷ That happened about two decades after the launch of the Internet in 1969 in the form that evolved to become what it is today.²⁸ The Web was launched as a resource on the Internet in the summer of 1991.²⁹ The World Wide Web Consortium defines

²⁷ Michael L Rustad, *Global Internet Law* (2nd edn, West Academic 2016) 5; Dan Connolly, 'A Little History of the World Wide Web' (*World Wide Web Consortium*, 29 August 2016) <www.w3.org/History.html> accessed 12 September 2017.

²⁸ Barry M Leiner and others, 'Brief History of the Internet' (*Internet Society*, 1997) <<https://www.internetsociety.org/internet/history-internet/brief-history-internet/>> accessed 12 September 2017. See also Barry M Leiner and others, 'A Brief History of the Internet' (2009) 39(5) *Computer Communication Review* 22-31 <www.cs.ucsb.edu/~almeroth/classes/F10.176A/papers/internet-history-09.pdf> accessed 12 September 2017.

²⁹ W Theobald and H Dunsmore, *Internet Resources for Leisure and Tourism* (Butterworth-Heinemann 2000) 59.

the Web as follows: 'The World Wide Web (WWW, or simply Web) is an information space in which the items of interest, referred to as resources, are identified by global identifiers called Uniform Resource Identifiers (URI).'³⁰ *Hyperlinks* are the navigational tools for accessing both internal and external resources on the Web.

Paul Mockapetris invented the Domain Name System (DNS) in 1983³¹ as a convenient mechanism that resolves easy-to-remember names (e.g. google) to their unique string of numbers called Internet Protocol (IP) addresses (e.g. 139.130.4.5).³² IP addresses are like phone numbers that can be dialled from a saved contact name.³³ Before his invention, web addresses were the all-numeric IP addresses only,³⁴ which were difficult to remember. DNS is part of the critical Internet infrastructure that facilitates global access to online resources. The proposals in this article are based on DNS, the basic aspects of which are highlighted here.

A *domain name* is part of the Uniform Resource Locator (URL) commonly referred to as the web address, e.g. <http://publiclegalinformation.com/>. The domain name in this URL is <publiclegalinformation.com>. The 'string of letters following the last dot' in a domain name is the *top-level domain* (TLD).³⁵ There are two main types of TLDs. TLDs based on the universal two-letter alpha-2 country code (ISO 3166) developed by the International Organization for Standardization (ISO)³⁶ are

³⁰ 'Architecture of the World Wide Web, Volume One' (*World Wide Web Consortium*, 15 December 2004) <www.w3.org/TR/webarch/> accessed 12 September 2017.

³¹ David C Hay, *UML and Data Modeling: A Reconciliation* (Technics Publications 2011) 181.

³² 'What Does ICANN Do?' (*ICANN*, 25 February 2012) <www.icann.org/resources/pages/what-2012-02-25-en> accessed 12 September 2017.

³³ 'Glossary' (*Internet Corporation for Assigned Names and Numbers*, 3 February 2014) <www.icann.org/resources/pages/glossary-2014-02-03-en#d> accessed 12 September 2017.

³⁴ Rolf H Weber and Ulrike I Heinrich, 'IP Address Allocation Through the Lenses of Public Goods and Scarce Resources Theories' (2011) 8(1) *SCRIPTed* 69 <<https://script-ed.org/article/ip-address-allocation-lenses-public-goods-scarce-resources-theories/>> accessed 12 September 2017.

³⁵ 'Program Implementation Review' (*Internet Corporation for Assigned Names and Numbers*, 29 January 2016) 213 <www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> accessed 12 September 2017.

³⁶ 'Country Codes – ISO 3166' (*International Organization for Standardization*) <www.iso.org/iso-3166-country-codes.html> accessed 12 September 2017.

referred to as *country-code TLDs* (ccTLDs), e.g. <.us> (United States).³⁷ TLDs with more than two characters that do not correspond to any country code are called *generic TLDs* (gTLDs), e.g. <.com>, <.org>, <.net>, and <.info>.³⁸ ICANN maintains an exhaustive database of TLDs.³⁹ A *subdomain* is a child domain that is attached to its parent domain which can be used to create a different website,⁴⁰ e.g. <<http://search.publiclegalinformation.com>>.

2.2 The Process of Creating New Generic Top-Level Domains

The DNS within the ICANN framework is a crucial aspect of Internet governance.⁴¹ The ICANN structure consists of several organisations responsible for executing different aspects of its functions, one of which is the formulation of policies on new gTLDs.⁴² Creating new gTLDs based on sound policies has been crucial to the work of ICANN since its inception.⁴³ ICANN explains the goal of its revolutionary New gTLD Program thus:

The Internet Corporation for Assigned Names and Numbers' (ICANN) New gTLD Program is responsible for introducing new generic Top-Level Domains (gTLDs) into the Internet, which will result in the largest-ever

³⁷ 'Top-Level Domains (gTLDs)' (*Internet Corporation for Assigned Names and Numbers*) <<https://archive.icann.org/en/tlds/>> accessed 12 September 2017.

³⁸ *Ibid*

³⁹ 'Root Zone Database' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root/db> accessed 12 September 2017.

⁴⁰ Jeffrey R Shapiro, *Windows Server 2008 Bible* (Wiley Publishing 2008) 207–208.

⁴¹ Steven Malcic, 'Proteus Online: Digital Identity and the Internet Governance Industry' (2016) *Convergence: The International Journal of Research into New Media Technologies* 1, 6 <<http://journals.sagepub.com/doi/pdf/10.1177/1354856516664035>> accessed 12 September 2017; Mira Burri, 'Global Cultural Law and Policy and the Internet: A Tale of Parallel Worlds' (2016) 1(1) *Arts and International Relations* 148, 158 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748050> accessed 12 September 2017.

⁴² 'What Does ICANN Do?' (*Internet Corporation for Assigned Names and Numbers*, 25 February 2012) <www.icann.org/resources/pages/what-2012-02-25-en> accessed 12 September 2017.

⁴³ 'gTLD Applicant Guidebook, Version 2012-06-04' (*Internet Corporation for Assigned Names and Numbers*, 4 June 2012) <<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>> accessed 12 September 2017 (AGB).

expansion of the Domain Name System (DNS). The goal of this expansion is to enhance competition, innovation and consumer choice.⁴⁴

Details of the process for creating and introducing new gTLDs into the Internet are contained in ICANN Bylaws, policy documents, fact sheets, and the latest edition of the *gTLD Applicant Guidebook* (AGB) that regulated the last exercise which took place in 2012. First, ICANN publishes the version of AGB that contains all the required details for the upcoming application exercise and announces an upcoming application period, specifying the opening and closing dates.⁴⁵ Second, interested applicants submit their applications to ICANN with the evaluation fee to cover the costs associated with the new gTLD programme which was \$185,000.00 (USD) for the 2012 exercise.⁴⁶

Third, ICANN evaluates all the applications that were validly submitted within the application window based on the criteria in the applicable AGB, which include initial evaluation (gTLD string reviews and applicant reviews⁴⁷) and background screening.⁴⁸ Resolution of disputes is an intermediate stage of the process between evaluation of an application and execution of the registry agreement regarding any application involving disputes.⁴⁹

Fourth, ICANN notifies all successful applicants after the evaluation exercise to enter into a registry agreement with it.⁵⁰ Fifth, after execution of the registry agreement and a successful pre-delegation test, ICANN delegates the new gTLDs to each registry operator.⁵¹ Thereafter, a successful applicant is entitled to commence the process required for the delegation of the new gTLD into the DNS

⁴⁴ 'New gTLD: Fast Facts' (*Internet Corporation for Assigned Names and Numbers*) <<http://newgtlds.icann.org/en/about/program/materials/fast-facts-26jan15-en.pdf>> accessed 12 September 2017.

⁴⁵ AGB, s 1.1.

⁴⁶ AGB, s 1.5.1.

⁴⁷ AGB, s 1.1.2.5.

⁴⁸ AGB, s 2.1.

⁴⁹ AGB, s 3.2; Kevin McGillivray, 'Anticipating Conflict-An Evaluation of the New gTLD Dispute Resolution System' (2012) 9(2) SCRIPTed 195 <<http://script-ed.org/?p=474>> accessed 12 September 2017.

⁵⁰ AGB, s 5.1.

⁵¹ AGB, s 5.3.

root zone database managed by the Internet Assigned Numbers Authority (IANA). IANA is the arm of ICANN charged with the responsibility for assigning the registry operators of TLDs (gTLDs and ccTLDs) and maintaining their administrative and technical details.⁵²

2.3 The Recent Revolution in Creating New Generic Top-Level Domains

Before the establishment of ICANN in 1998,⁵³ the eight gTLDs that were in existence were <.com>, <.edu>, <.gov>, <.int>, <.mil>, <.net>, <.org>, and <.arpa>.⁵⁴ ICANN carried out its first round of application for seven new gTLDs in 2000 and the second round of seven gTLDs in 2004.⁵⁵ It launched four new gTLDs (<.cat>, <.jobs>, <.mobi>, and <.travel>) in 2005-2006.⁵⁶ The 2012 application round (the latest exercise) ushered in what has now become a *revolution* in creating new gTLDs in terms of number and diversity,⁵⁷ under which ICANN had introduced 1,227 new gTLDs into the Internet as of 31 August 2017.⁵⁸ General law-related new gTLDs introduced between 31 May 2014 and 26 June 2015 are <.attorney>, <.lawyer>, <.legal>, and <.law>.⁵⁹ According to the 2012 application round Program Implementation Review by ICANN, actions on all the new gTLDs

⁵² 'Root Zone Management' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root> accessed 12 September 2017.

⁵³ 'What Does ICANN Do?' (*Internet Corporation for Assigned Names and Numbers*, 25 February 2012) <www.icann.org/resources/pages/what-2012-02-25-en> accessed 12 September 2017.

⁵⁴ 'New Generic Top-Level Domains: About the Program' (*Internet Corporation for Assigned Names and Numbers*) <<https://newgtlds.icann.org/en/about/program>> accessed 12 September 2017.

⁵⁵ 'New Generic Top-Level Domains Fact Sheet' (*Internet Corporation for Assigned Names and Numbers*, 14 April 2011) 1 <<https://archive.icann.org/en/topics/new-gtlds/factsheet-new-gtld-program-14apr11-en.pdf>> accessed 12 September 2017.

⁵⁶ 'ICANN' (*Internet Corporation for Assigned Names and Numbers*) <<http://archive.icann.org/tr/english.html>> accessed 12 September 2017.

⁵⁷ Tobias Mahler, 'A gTLD Right? Conceptual Challenges in the Expanding Internet Domain Namespace' (2014) 22 *International Journal of Law and Information Technology* 27, 28 <<https://academic.oup.com/ijlit/article/22/1/27/697805/A-gTLD-right-Conceptual-challenges-in-the>> accessed 12 September 2017.

⁵⁸ 'Current Statistics (Updated Monthly)' (*Internet Corporation for Assigned Names and Numbers*, 31 August 2017) <<https://newgtlds.icann.org/en/program-status/statistics>> accessed 12 September 2017.

⁵⁹ 'Delegated Strings' (*Internet Corporation for Assigned Names and Numbers*) <<https://newgtlds.icann.org/en/program-status/delegated-strings>> accessed 12 September 2017.

applications are expected to be completed by the end of 2017, by which time those that were still pending, as of 31 December 2015, will have been concluded.⁶⁰

In this dispensation of new gTLDs revolution, the name of almost anything can now be a gTLD, examples of which include the controversial <.sucks>⁶¹ and <.monster>. However, according to ICANN, the *goal* of new gTLDs includes easy identification of online brands so that people can make informed choices of the websites they should *trust*.⁶² The global need for easy identification of websites that provide reliable information that users can trust, render proper services, or sell genuine products is because there is no system of vetting contents *before* any information is published on the Web. This *freedom to publish* anything online has been grossly abused to the extent that the Web has become a dangerous environment for all categories of its users. That accounts for the unprecedented demand for brand-identifying new gTLDs as a *positive* response to ICANN's intervention that now empowers online users to choose websites they can trust, based on their domain names. For example, attempts have now been made to help people to identify reliable health information websites with <.health> and <.organic> gTLDs. There is no such attempt in the case of legal information to help it benefit from ICANN's specialised-gTLD intervention. There is therefore the need to address this situation because the provision of public access to legal information via websites is indispensable.

2.4 Public Access to Legal Information and its Provision Via Websites

Governments at all levels (federal, state, and local) that make laws have the legal and moral duty to provide free adequate access to their legal information; no third

⁶⁰ 'Program Implementation Review' (*Internet Corporation for Assigned Names and Numbers*, 29 January 2016) 10 <www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> accessed 12 September 2017.

⁶¹ Chris Burt, 'FTC to ICANN: We Told You .Sucks was a Bad Idea' (*The Whir*, 2 June 2015) <www.thewhir.com/web-hosting-news/ftc-to-icann-we-told-you-sucks-was-a-bad-idea> accessed 12 September 2017; Chris Burt, 'Canada Responds to ICANN on Controversial .Sucks New gTLD' (*The Whir*, 17 June 2015) <www.thewhir.com/web-hosting-news/canada-responds-to-icann-on-controversial-sucks-new-gtld> accessed 12 September 2017.

⁶² 'New gTLD Fast Facts' (*Internet Corporation for Assigned Names and Numbers*) <<http://newgtlds.icann.org/en/about/program/materials/fast-facts-26jan15-en.pdf>> accessed 17 April 2017.

party has that duty. IGOs that have law-making functions (e.g. United Nations, European Union, Organization of American States, and African Union) and thereby produce legal information also have this duty. McMahon rightly refers to the duty as ‘a positive obligation on governments and courts’.⁶³

The courts have recognised this duty in several cases, including *Tañada v Tuvera*⁶⁴ and *Victoria University of Wellington Students Association v Shearer (Government Printer)*.⁶⁵ Article IV, section 17 of the Constitution of the US State of Wisconsin authoritatively states that ‘No law shall be in force until published.’ Arnold-Moore rightly argues that this duty belongs to the government: ‘In a modern Western democracy regardless of the legal tradition, common law or civil, the government has a clear obligation to make the primary legal sources available to the public.’⁶⁶ It is not the duty of non-governmental or any other third-party providers of free access to legal information.

This duty of every government and every IGO to provide public access to their legal information, in turn, creates the *right of public access to legal information* that enables every person, organisation, and the State itself to know the legal principles that govern their conduct and activities. Mommers examines how the right is

⁶³ Ibid. For my discussion of the duty of every government and every law-making intergovernmental organisation to provide adequate and free public access to its legal information, see Leesi Ebenezer Mitee, ‘The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right’ (2017) 18(6) German Law Journal <www.germanlawjournal.com/> (forthcoming peer-reviewed article scheduled for publication).

⁶⁴ 220 Phil 422 (1985), GR No. L-63915 24 April 1985 <www.lawphil.net/judjuris/juri1985/apr1985/gr_l63915_1985.html> accessed 13 September 2017. See the discussion in Mitee (n 63).

⁶⁵ [1973] 2 NZLR 21, 23 (SC) in David Harvey, ‘Public Access to Legislative Information and Judicial Decisions in New Zealand: Progress and Process’ (2002) 4 *University of Technology Sydney Law Review* 105, 108 <www.austlii.edu.au/au/journals/UTSLawRw/2002/7.html> accessed 12 September 2017. See the discussion in Mitee (n 63).

⁶⁶ Timothy J Arnold-Moore, ‘Point-In-Time Publication of Legislation (XML and Legislation): Automating Consolidation of Amendments to Legislation in Common Law and Civil Jurisdictions’ (6th Law Via the Internet Conference, Paris, November 2004) <www.frlii.org/IMG/pdf/2004_frlii_conference_tja.pdf> accessed 12 September 2017. See also Tim Arnold-Moore, ‘XML and Legislation’ (2003) 29 *Computerisation of Law Resources* <www.austlii.edu.au/cgi-bin/sinodisp/au/other/CompLRes/2003/29.html> accessed 12 September 2017. See the discussion in Mitee (n 63).

related to or derived from the principle of legality, freedom of speech, right of access to justice, and transparency of government.⁶⁷ Therefore, it is not just an ordinary *legal right*. The US Supreme Court recognised the right in *Bounds v Smith*⁶⁸ and *Lewis v Casey*⁶⁹ as necessary for the preparation of a prisoner's case in self-representation which is part of the *constitutional right* of access to courts, although they differed in the *level* of access.⁷⁰ It is also a *human right*, although it may not be so expressly stated in any international or regional human rights instrument.⁷¹ It is a human right that is derived from its parent human right – the *right to freedom of expression and the press*⁷² – that was first universally recognised in Article 19 of the Universal Declaration of Human Rights⁷³ (1948). The same right exists at the international level in Article 19 of the International

⁶⁷ Laurens Mommers, 'Access to Law in Europe' in Simone van der Hof and Marga M Groothuis (eds), *Innovating Government: Normative, Policy and Technological Dimensions of Modern Government* (TMC Asser Press 2011) 383, 389, 392-397 <<https://link.springer.com/book/10.1007/978-90-6704-731-9>> accessed 12 September 2017. See the discussion in Mitee (n 63).

⁶⁸ 430 US 817 (1977) <<https://supreme.justia.com/cases/federal/us/430/817/case.html>> accessed 13 September 2017.

⁶⁹ 518 US 343 (1996) <<https://supreme.justia.com/cases/federal/us/518/343/case.html>> accessed 13 September 2017.

⁷⁰ Jessica Feierman, 'Creative Prison Lawyering: From Silence to Democracy' (2004) 11(2) Georgetown Journal on Poverty Law & Policy 249, 264-269; Jessica Feierman, '"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement' (2006) 41 Harvard Civil Rights-Civil Liberties Law Review 369, 375-377.

⁷¹ Steven D Jamar, 'The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law' (2001) 1 Global Jurist Topics Number 2 Article 6 <www.degruyter.com/downloadpdf/j/gj.2001.1.2/gj.2001.1.2.1032/gj.2001.1.2.1032.pdf> accessed 12 September 2017. For my argument that the right of public access to legal information is a human right, and my proposal for its universal recognition as a human right, see Mitee (n 63). I also discuss the contents of my proposal for the United Nations Convention on the Right of Public Access to Legal Information in that article.

⁷² Jamar (n 71). See also Laurens Mommers, 'Access to Law in Europe' in Simone van der Hof and Marga M. Groothuis (eds), *Innovating Government: Normative, Policy and Technological Dimensions of Modern Government* (TMC Asser Press 2011) 383, 395. See the discussion in Mitee (n 63).

⁷³ Universal Declaration of Human Rights, UNGA Res 217 (III) (adopted 10 December 1948) (UDHR) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed 12 September 2017.

Covenant on Civil and Political Rights⁷⁴ (1966), in several regional human rights instruments,⁷⁵ and in the constitutions of many countries.⁷⁶ The general right to freedom of expression and the press encompasses the right of access to public or government-held information,⁷⁷ a component of which is legal information.⁷⁸ Undeniably, legal information is a unique, all-important component of government-held information,⁷⁹ and the right of public access to it is therefore also a human right, just like its parent human right. In my article titled 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right', I argue that the right is a human right, advocate that it should be recognised universally as such, make a proposal for a new *United Nations Convention on the Right of Public Access to Legal Information*, and discuss the contents of the Convention to aid its drafting.⁸⁰

From the Code of Hammurabi the King of Babylon (1792-1750 BCE⁸¹) which was inscribed on a basalt stele and kept in a conspicuous public place⁸² to the fifteen-

⁷⁴ Example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 9.

⁷⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights, as amended) (ECHR) art 3.

⁷⁶ Example, Constitution of the Federal Republic of Nigeria 1999, s 39.

⁷⁷ *Claude-Reyes v Chile*, Inter-Am. Ct. H.R. (ser. C) No. 151 (19 September 2006) <<https://iachr.ils.edu/cases/claude-reyes-et-al-v-chile>> accessed 13 September 2017; United Nations Human Rights Council 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2013) UN Doc A/68/362.

⁷⁸ Laurens Mommers, 'Access to Law in Europe' in Simone van der Hof and Marga M Groothuis (eds), *Innovating Government: Normative, Policy and Technological Dimensions of Modern Government* (TMC Asser Press 2011) 383, 384. See the discussion in Mitee (n 63).

⁷⁹ *Deaton v Kidd*, 932 S.W.2d 804 (Mo. Ct. App. 1996) <<https://casetext.com/case/deaton-v-kidd>> accessed 13 September 2017. See the discussion in Mitee (n 63).

⁸⁰ Leesi Ebenezer Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right' (2017) 18(6) German Law Journal <www.germanlawjournal.com/> (forthcoming peer-reviewed article scheduled for publication).

⁸¹ 'Code of Hammurabi', *Encyclopædia Britannica* (2017) <www.britannica.com/topic/Code-of-Hammurabi> accessed 12 September 2017.

⁸² 'Law Code of Hammurabi, King of Babylon' (*The Louvre Museum*) <www.louvre.fr/en/oeuvre-notices/law-code-hammurabi-king-babylon> accessed 12 September 2017.

century London statute book⁸³ that was printed (with the possibility of mass production, following Johannes Gutenberg's invention of the movable-type printing press), there was always the quest for the best method of publishing laws for the benefit of citizens.⁸⁴ This trend continued, and ground-breaking developments in technology in the twentieth century took printing and publishing of laws to a whole new level. It enhanced mass production and easier distribution of all types of print publications, including those that contained legal information.

The invention of the electronic media and the Internet led to digitisation of print legal information by both governments⁸⁵ and private publishers.⁸⁶ Thereafter, the invention of the World Wide in 1989⁸⁷ revolutionised global dissemination of all types of information. It led to the development of the first generation of legal information websites that provided *free public access* on a large scale. Its pioneers were Thomas R. Bruce and Peter W. Martin, both of Cornell University Law School (United States), who founded the Legal Information Institute in 1992.⁸⁸ Today, Legal Information Institutes (LIIs) constitute an overwhelming majority of the

⁸³ London had a statute book around 1470 that contained legislation from 1327. See PR Cavill, *The English Parliaments of Henry VII 1485-1504* (Oxford University Press 2009) s 6.1.

⁸⁴ Hammurabi placed his Code in a public place (the temple of Babylon's national god) for people to see, read, and know. See 'Code of Hammurabi', *Encyclopædia Britannica* (2017) <www.britannica.com/topic/Code-of-Hammurabi> accessed 12 September 2017. Henry VII, King of England, was interested in the widest publication of laws to enable the people, not only lawyers, to know them. See PR Cavill, *The English Parliaments of Henry VII 1485-1504* (Oxford University Press 2009) s 6.1.

⁸⁵ Tom McMahon, 'Improving Access to the Law in Canada With Digital Media' (1999) Government Information in Canada No 16 <<https://dx.doi.org/10.2139/ssrn.163669>> accessed 12 September 2017.

⁸⁶ Xiaohua Zhu, 'Access to Digital Case Law in the United States: A Historical Perspective' (IFLA World Library and Information Congress, Helsinki, Finland, August 2012) <www.ifla.org/past-wlic/2012/193-zhu-en.pdf> accessed 12 September 2017. See also 'The LexisNexis Timeline: Celebrating Innovation . . . and 30 Years of Online Legal Research' (LexisNexis, 2003) <www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf> accessed 12 September 2017.

⁸⁷ Section 2.1 above.

⁸⁸ Ginevra Peruginelli, 'Law Belongs to the People: Access to Law and Justice' (2016) 16 *Legal Information Management* 107, 108.

current members of FALM.⁸⁹ The contribution of these and other non-governmental providers of free access to online legal information worldwide for more than two decades now is immense.

The existence and importance of LIIs and other third-party free access providers should be seen in the proper context: their *voluntary* response to the *neglect* by governments to provide free adequate public access to their legal information. An extreme example of this neglect is that of the government of Vanuatu. Vanuatu has no legislation on its Parliament website. The website merely directs visitors to the Pacific Islands Legal Information Institute (PACLI) for its legislation.⁹⁰ It is reiterated that every government owes its people the *legal* and *moral duty* to publish its legal information with free and adequate access that is comprehensive and up-to-date, and no government should abdicate this duty to any third-party whatsoever.

It is out of place and risky for any government to publish its official legal information on any website or database that is under the control of a third party, whether not-for-profit or commercial publishers. For example, Ugandan legal information is published by the Law Reporting Department of the Judiciary of Uganda on the Uganda Legal Information Institute (ULII) website.⁹¹ Outsourcing official legal information to commercial publishers is fraught with legal and technical dangers relating to its ownership, copyright, management, and control. Examples of such situations include the ill-fated JURIS database of the US Department of Justice when West Publishing went away with its data in the

⁸⁹ 'Members of the Free Access to Law Movement' (*Free Access to Law Movement*) <www.falm.info/members/current/> accessed 12 September 2017.

⁹⁰ 'Acts of Parliament' (*Republic of Vanuatu*) <<https://parliament.gov.vu/index.php/icons/members-of-10th-legislature>> accessed 12 September 2017. For my discussion of the situation in Vanuatu and other countries, see Leesi Ebenezer Mitee, 'Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites' (2017) (forthcoming peer-reviewed article). This present article and the said forthcoming article are complementary.

⁹¹ 'Law Reporting' (*The Judiciary of the Republic of Uganda*) <www.judiciary.go.ug/data/smenu/25/Law%20Reporting.html> accessed 12 September 2017. See Mitee (n 90).

database⁹² and Sri Lanka's loss of access to its official online databases on LawNet website⁹³ when the hosting company it outsourced the databases to, went out of business.⁹⁴ Therefore, every government and every IGO that creates legal information should publish its legal information databases on its own website over which it has absolute ownership and control.

Publishing legal information on websites is indispensable to the provision of free and adequate public access to every category of information in this twenty-first-century ICT age. The right of public access to legal information (discussed above in this Subsection) can only be meaningful when access is *free* for every person, which is impossible without publishing legal information on websites. It is absurd that the government of Anguilla, for example, merely sells CD-ROM packages of its laws (already in electronic format) on its website instead of publishing them online with free access.⁹⁵ It thereby denies its citizens (and the whole world) their right of public access to their *own* laws because citizens are the rightful owners of laws.⁹⁶

⁹² Beth Ford, 'Open Wide the Gates of Legal Access' (2014) 93 Oregon Law Review 539, 546-549 <<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/18816/Ford.pdf>> accessed 12 September 2017. See also Gary Wolf, 'Who Owns the Law?' (*Wired*, 1 May 1994) <www.wired.com/1994/05/the-law/> accessed 12 September 2017. See the discussion in Mitee (n 63).

⁹³ LawNet <www.lawnet.lk/> accessed 12 September 2017. See the discussion in Mitee (n 63).

⁹⁴ Graham Greenleaf, 'Free Access to Legal Information, LIIs, and the Free Access to Law Movement' in Richard A. Danner and Jules Winterton (eds), *The IALL International Handbook of Legal Information Management* (Ashgate Publishing 2011) 201, 215. See the discussion in Mitee (n 63).

⁹⁵ AnguillaLaws.com <www.anguillalaws.com/> accessed 12 September 2017.

⁹⁶ African Commission on Human and Peoples' Rights (ACHPR) 'Banjul Declaration of Principles on Freedom of Expression in Africa' ACHPR/Res.62(XXXII)02 (23 October 2002) <<https://www.achpr.org/presspublic/publication?id=3>> accessed 12 September 2017.

Undeniably, the use of websites is the most cost-effective means of disseminating legal information⁹⁷ and it is the only medium in which the law can be up-to-date.⁹⁸ It guarantees global reach, has the best navigational features and search functionality, and provides the best accessibility features for persons with disabilities.⁹⁹

Websites use domain names as online addresses. Therefore, any improvement in the use of domain names, especially relevant gTLDs, to facilitate their discovery will enhance access to their resources and help people to know the websites they can trust. Online users of legal information resources will benefit immensely from such improvement, as discussed in the next Section.

3. Proposal for a New Official Legal Information Generic Top-Level Domain

This Section discusses the proposal for a new official legal information gTLD, its exclusive use, and unique advantages. It argues that the proposed regulated gTLD has good prospects and will be viable, and suggests its implementation.

⁹⁷ Tom McMahon, 'Improving Access to the Law in Canada With Digital Media' (1999) Government Information in Canada No 16 <<https://dx.doi.org/10.2139/ssrn.163669>> accessed 12 September 2017; Daniel Poulin, 'Open Access to Law in Developing Countries' (2004) 9(12) First Monday <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 12 September 2017; Graham Greenleaf, 'The Global Development of Free Access to Legal Information' 2010 1(1) European Journal of Law and Technology <<http://ejlt.org/article/view/17/39>> accessed 12 September 2017. See also Harvard University, 'Durham Statement on Open Access to Legal Scholarship' (2009) <<https://cyber.law.harvard.edu/publications/durhamstatement#statement>> accessed 12 September 2017.

⁹⁸ John Bahrij and Irene Shieh, 'Hong Kong Moves Towards Open Access to Authenticated Legal Information' (IFLA World Library and Information Congress, Singapore, August 2013) 1–9 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1007.5773&rep=rep1&type=pdf>> accessed 12 September 2017.

⁹⁹ 'Accessibility: Assistive Technology' (*Federal Register of Legislation*) <www.legislation.gov.au/Content/Accessibility> accessed 12 September 2017; 'Listen to this Website with BrowseAloud' (*Federal Register of Legislation*) <www.legislation.gov.au/content/browsealoud> accessed 12 September 2017.

3.1 The Proposal for the <.officiallaws> Official Legal Information gTLD

ICANN's exhaustive database of TLDs¹⁰⁰ shows that there is no existing gTLD *specifically* for *legal information* websites. The existing law-related gTLDs (mentioned in Section 2.3 above) are for general legal purposes. I therefore advocate that <.officiallaws> be created by ICANN as a new strictly regulated *official* legal information gTLD to help online users to identify *official sources* of legal information easily from their domain names and enhance public access to them.

It should be emphasised that ICANN should not create any other version of <.officiallaws> gTLD as a competing gTLD, e.g. <.officiallaw>. ICANN should discontinue its defective policy of creating new gTLDs that are likely to confuse people. This includes offering a word or phrase and its abbreviation as separate gTLDs, for example, <.edu> (a regulated gTLD created in the 1980s¹⁰¹) and <.education> (a non-regulated gTLD created in 2013¹⁰²). This policy creates *identification confusion* and contradicts ICANN's own goal of the new regulated gTLD regarding consumer choice.¹⁰³

A possible new official legal information gTLD could have been <.laws>, but the existence of <.law> that ICANN had created and delegated to Minds + Machines Group Limited on 24 June 2015¹⁰⁴ will affect its uniqueness and cause identification confusion. In addition, both gTLDs are so strikingly similar that it may not pass the gTLD string similarity review during the initial evaluation.¹⁰⁵ Even if it

¹⁰⁰ 'Root Zone Database' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root/db> accessed 12 September 2017.

¹⁰¹ 'Top-Level Domains (gTLDs)' (*Internet Corporation for Assigned Names and Numbers*) <<https://archive.icann.org/en/tlds/>> accessed 12 September 2017.

¹⁰² '.Education Registry Agreement' (*Internet Corporation for Assigned Names and Numbers*, 7 November 2013) <www.icann.org/resources/agreement/education-2013-11-07-en> accessed 12 September 2017.

¹⁰³ 'New gTLD Fast Facts' (*Internet Corporation for Assigned Names and Numbers*) <<http://newgtlds.icann.org/en/about/program/materials/fast-facts-26jan15-en.pdf>> accessed 12 September 2017.

¹⁰⁴ 'Delegation Record for .Law' (*Internet Assigned Numbers Authority*, 26 May 2017) <www.iana.org/domains/root/db/law.html> accessed 12 September 2017.

¹⁰⁵ AGB, § 2.2.

passes the review, it is likely to result in a dispute in the application process, the resolution of which may be both timewasting and expensive.¹⁰⁶ Another possible choice is <.legalinfo> (the short form of <.legalinformation>). However, <.laws> and <.legalinfo> have the deficiency of neither being unique nor explicit for the purpose of helping people to identify *official* legal information from their domain names. The proposed <.officiallaws> gTLD satisfies both identification requirements because it is not similar to any existing gTLD and it contains the phrase 'official laws' that is evident to every person who sees it. It is therefore expected to serve its purpose of identification of *official* sources of legal information excellently.

This proposal is based on the practical importance and viability of the new legal information <.officiallaws> gTLD. It has nothing to do with any excitement that may be associated with the mere existence of new distinct gTLDs in the legal profession as a response to the new gTLDs revolution discussed in Section 2.3 above.

3.2 Exclusive Use of the Proposed Official Legal Information gTLD

The proposed <.officiallaws> gTLD is to be used *exclusively* by governments (federal, state, and local) and IGOs that create legal information (e.g. United Nations, European Union, Organization of American States, and African Union) for their OLIWs. All that is required is the proper public organisation (discussed in Section 3.4 below) to apply for the <.officiallaws> gTLD in the next new gTLDs application round. ICANN has categorically stated that it will undertake more application rounds: 'ICANN plans to hold additional application rounds in the future. The exact dates for these future rounds are not yet available.'¹⁰⁷ Like the latest 2012 application round, which is expected to be completed by the end of

¹⁰⁶ AGB, s 3.4.7.

¹⁰⁷ "New Generic Top-Level Domains Fact Sheet" (*Internet Corporation for Assigned Names and Numbers*, 14 April 2011) 2 <<https://archive.icann.org/en/topics/new-gtlds/factsheet-new-gtld-program-14apr11-en.pdf>> accessed 12 September 2017.

2017,¹⁰⁸ ICANN will commence the exercise with publication of a new version of its *gTLD Applicant Guidebook* to regulate the whole process.

The *default* domain name to be associated with the new gTLD for each *national official legal information website* (NOLIW)¹⁰⁹ is the *short name* of a country,¹¹⁰ e.g. <www.unitedstates.officiallaws>, <www.Japan.officiallaws>, <www.unitedkingdom.officiallaws>, <www.netherlands.officiallaws>, <www.nigeria.officiallaws>, <www.brazil.officiallaws>, <www.italy.officiallaws>, and <www.canada.officiallaws>. One advantage of using a country's short name is the presence of relevant keywords in the domain name that evidently identify its OLIWs, as discussed in Section 3.3 below.

Every country should also buy *a second domain name* that uses its universal two-letter alpha-2 country code (ISO 3166).¹¹¹ The code is used for several purposes, e.g. to identify international postal mail (parcels), to determine the nationality of machine-readable passport holders, for money transfers by banks, and to define the TLDs of countries (ccTLDs).¹¹² ICANN maintains an exhaustive database of ccTLDs.¹¹³ The second domain names of the countries mentioned above would be <www.us.officiallaws>, <www.jp.officiallaws>, <www.uk.officiallaws>, <www.nl.officiallaws>, <www.ng.officiallaws>, <www.br.officiallaws>, <www.it.officiallaws>, and <www.ca.officiallaws>.

¹⁰⁸ 'Program Implementation Review' (*Internet Corporation for Assigned Names and Numbers*, 29 January 2016) 10 <www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> accessed 12 September 2017.

¹⁰⁹ The term 'national official legal information website' with its abbreviation 'NOLIW' is my coinage.

¹¹⁰ Examples: 'Netherlands' instead of 'Kingdom of the Netherlands', 'United States' instead of 'United States of America', 'United Kingdom' instead of 'United Kingdom of Great Britain and Northern Ireland'.

¹¹¹ 'Country Codes — ISO 3166' (*International Organization for Standardization*) <www.iso.org/iso-3166-country-codes.html> accessed 12 September 2017.

¹¹² *Ibid*

¹¹³ 'Root Zone Database' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root/db> accessed 12 September 2017.

Domain names are cheap (details below in this Sub-subsection). Therefore, buying both versions will be no problem at all. It should be noted that the OLIWs of the countries with globally popular ccTLDs, e.g. United States (<www.us.officiallaws>) and United Kingdom (<www.uk.officiallaws>) will be more identifiable worldwide than those of other countries whose ccTLDs are largely unknown to foreigners. For instance, in the case of South Africa, <www.za.officiallaws> will not be as self-evident as <www.southafrica.officiallaws> to most people. This supports the preference for use of a country's short name, instead of its ccTLD, for its OLIW. It is a golden principle of effective communication, especially in legal communication, that clarity should never be sacrificed for brevity.¹¹⁴ This is one instance when that principle should be applied to achieve the said identification goal.

Where a country uses the domain name containing its short name for the actual development of its OLIW, the second domain containing its ccTLD should be *delegated* to *automatically* redirect its visitors to the OLIW. It is a prudent and standard web design practice to buy different versions of a domain name and delegate them for maximum access to the website in use, to stop others from buying it, and to direct traffic to the one in use. For example, www.microsoft.net, www.microsoft.org, and www.microsoft.info (all of them owned by Microsoft) have been delegated to redirect their visitors automatically to www.microsoft.com. However, to benefit from both worlds, the domain name that is not used to develop the OLIW may be used to create a one-page website (webpage) that contains sufficient relevant information and a *conspicuous link* to the main website (the OLIW). But the danger here is that, unless this is expertly done, Internet search engines (especially the preeminent Google¹¹⁵) will consider

¹¹⁴ Michele M Asprey, *Plain Language for Lawyers* (3rd edn, Federation Press 2003) 306-307.

¹¹⁵ For recent statistics on the global dominance of Google search engine, see StatCounter, 'Search Engine Market Share Worldwide: Aug 2016–Aug 2017' (*StatCounter Global Stats*) <<http://gs.statcounter.com/search-engine-market-share>> accessed 12 September 2017; 'Mobile/Tablet Search Engine Market Share' (*Netmarketshare*, August 2017) www.netmarketshare.com/search-engine-market-share.aspx?qprid=4&qpcustomd=1 accessed 12 September 2017.

it to be a mere *doorway* webpage¹¹⁶ and penalise it.¹¹⁷ That penalty may also adversely affect the ranking of the main OLIW in search engine results.

Like those of countries, the domain name of the OLIW of an administrative division within a country or that of an IGO would be its short name or universally known abbreviation (if any) sufficient to identify it easily, e.g. <www.texas.officiallaws> (the US State of Texas), <www.eu.officiallaws> (European Union), and <www.un.officiallaws> (United Nations). It should be noted that the domain name of a country's administrative division is an *independent* domain name that is not associated with that of the country itself, e.g. <www.texas.officiallaws> instead of <www.texas.us.officiallaws> which makes it a *subdomain* (mentioned in Section 2.1 above). This is necessary to avoid management problems associated with attaching a subdomain-OLIW owned by a state or local government to the parent domain owned by the federal government. Each level of government should own its domain name. Sharing domain will also create problems associated with using a *subdomain* name that will then require *sub-subdomain names* for all the different categories of legal information.

When the proposed <.officiallaws> official legal information gTLD becomes functional, governments and IGOs will be able to migrate their existing legal information websites to their new <.officiallaws> domain names over time. All that will be required immediately will be to buy the <.officiallaws> domain name and *delegate* it accordingly so that it will automatically redirect visitors who access it to the existing website during the transition. Countries without existing legal information websites will simply develop them from scratch, using their <.officiallaws> domain names. This will be quite easy to achieve because domain names are not expensive, as mentioned in Section 3.4 below.

The existence of the proposed <.officiallaws> gTLD in *English language* has the advantage of being in a language that provides a common universal standard for the common good of the whole world. This is because English has evolved as the

¹¹⁶ 'Doorway Pages' (Google) <<https://support.google.com/webmasters/answer/2721311?hl=en>> accessed 12 September 2017.

¹¹⁷ 'Webmaster Guidelines' (Google) <<https://support.google.com/webmasters/answer/35769>> accessed 12 September 2017.

global language. Crystal rightly stated this fact in his classic book, *English as a Global Language*:

‘English is now the language most widely taught as a foreign language - in over 100 countries, such as China, Russia, Germany, Spain, Egypt and Brazil - and in most of these countries it is emerging as the chief foreign language to be encountered in schools, often displacing another language in the process. In 1996, for example, English replaced French as the chief foreign language in schools in Algeria (a former French colony).’¹¹⁸

English has also been rightly referred to as ‘the *de facto* language of international communication today’¹¹⁹ and ‘the language of the Internet.’¹²⁰ Available statistics reveal that English is an established language that is more widely spoken in more countries (106) than any other language,¹²¹ with its 1.5 billion speakers.¹²²

It should be emphasised that the adoption of <.officiallaws> as the universal gTLD for official legal information websites globally has nothing to do with the superiority of any language and does not derogate from the linguistic aspect of the sovereignty of any country in any manner whatsoever. It should be properly viewed as the solution to the need for a common universal standard for purposes of enhancing global access to legal information from all countries. And English just happens to be that language.

¹¹⁸ David Crystal, *English as a Global Language* (2nd edn, Cambridge University Press 2012) 5.

¹¹⁹ Yukio Tsuda, ‘The Hegemony of English and Strategies for Linguistic Pluralism: Proposing the Ecology of Language Paradigm’ in Molefi Kete Asante, Yoshitaka Miike and Jing Yin (eds), *The Global Intercultural Communication Reader* (Routledge 2014) 445.

¹²⁰ Slađana Živković and Nadežda Stojković, ‘Cyberspace - Addiction or Not: A Limited Case Study of the Internet Addiction Among Student Population’ (2013) 2 (11) *Academic Journal of Interdisciplinary Studies* <www.mcser.org/journal/index.php/ajis/article/view/1474> accessed 12 September 2017.

¹²¹ Gary F Simons and Charles D Fennig (eds), *Ethnologue: Languages of the World* (20th edn, SIL International 2017) <www.ethnologue.com/statistics/size> accessed 12 September 2017.

¹²² ‘Most Widely Spoken Languages in the World’ (*Worldatlas*, 2017) <www.worldatlas.com/articles/the-most-widely-spoken-languages-in-the-world.html> accessed 12 September 2017.

Any country that may be hesitant initially to migrate its OLIWs to <.officiallaws> can still benefit from the proposed official legal information gTLD by simply buying its <.officiallaws> domain names and *delegating* them to automatically redirect visitors to its OLIWs, as explained earlier in this Sub-subsection. Countries that may prefer to use their *Internationalized Domain Names (IDNs)* can do the same. IDNs are domain names that are in the character sets of languages (e.g. Arabic, Chinese, Greek, and Korean) other than the English-based American Standard Code for Information Interchange (ASCII) in which domain names originally existed and have continued to exist.¹²³ All that will be required to achieve this, is to buy the <.officiallaws> domain name as the second domain name and delegate it accordingly.

World Wide Web Consortium, the ‘international community that develops open standards to ensure the long-term growth of the Web,’ authoritatively supports this dual-domain name solution. It states thus: ‘In practice, it makes sense to register two names for your domain. One in your native script, and one using just regular ASCII characters. The latter will be more memorable and easier to type for people who do not read and write your language.’¹²⁴ That is the reasoning behind the multiple versions of the ccTLDs of South Korea (<.kr> and <.한국>) and China

¹²³ ‘Internationalized Domain Names’ (*Internet Corporation for Assigned Names and Numbers*, 25 February 2012) <www.icann.org/resources/pages/idn-2012-02-25-en> accessed 12 September 2017; Samantha Bradshaw and Laura DeNardis, ‘The Politicization of the Internet’s Domain Name System: Implications for Internet Security, Universality, and Freedom’ (2016) *New Media & Society* 1, 13 <<http://journals.sagepub.com/doi/pdf/10.1177/1461444816662932>> accessed 12 September 2017; Jay Jordan and Justin G Whitney, ‘The Internet in “Their” Language: South Korea and the Internationalizing Web’ (2016) 42 *Computers and Composition* <www.sciencedirect.com/science/article/pii/S8755461515300086> accessed 12 September 2017; Irmgarda Kasinskaite-Buddeberg, ‘A Decade of Promoting Multilingualism in Cyberspace Through the International Normative Instrument: UNESCO’s Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace (2003)’ in Anastasia Parshakova (ed), *Multilingualism in Cyberspace: Proceedings of the Ugra Global Expert Meeting (Khanty-Mansiysk, Russian Federation, 4-9 July, 2015)* (Interregional Library Cooperation Centre 2016) 34, 41 <www.ifapcom.ru/files/2016/UGRA_ENGL_BLOK_WEB.pdf> accessed 12 September 2017.

¹²⁴ ‘An Introduction to Multilingual Web Addresses’ (*World Wide Web Consortium*, 9 May 2008) <www.w3.org/International/articles/idn-and-iri/> accessed 12 September 2017.

<.cn>, <.中國> and <.中国>), for example.¹²⁵ In this way, the OLIWs of every country worldwide can use the proposed <.officiallaws> seamlessly.

3.3 Advantages of the Proposed Official Legal Information gTLD

The proposed <.officiallaws> gTLD has major unique advantages. First, it will guarantee *direct access* to OLIWs without conducting any online search. The two methods of finding online resources are through *direct access* and *Internet search engines*. Kopackova, Michalek, and Cejna rightly state this as follows: 'To find something on the Internet, someone must either know the *exact URL address*, which is sometimes too complicated, or the right keywords for *searching*.'¹²⁶ Direct access will be possible because any person can remember or guess correctly the URL of the NOLIW of any country by simply entering its name with the <.officiallaws> gTLD in the address (or location) bar of a web browser, e.g. <www.netherlands.officiallaws>.

Based on the recommendation (in Section 3.2 above) that every country should buy both versions of its domain name, anybody who knows any country's said universal two-letter alpha-2 country code (also used for its ccTLD) can also access its NOLIW directly, e.g. <www.nl.officiallaws> (Netherlands). The two formulas for remembering the URLs of any NOLIW of any country are simply: *NOLIW = country name + .officiallaws* and *NOLIW = ccTLD + .officiallaws*. With time, people will be aware of the <.officiallaws> gTLD and find it quite easy to access NOLIWs *directly*. It will not be difficult to create such awareness through all the available social media, online informational publications, conferences, libraries, universities, and other research institutions. This concept applies to the OLIW of any administrative

¹²⁵ 'Root Zone Database' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root/db> accessed 12 September 2017.

¹²⁶ Hana Kopackova, Karel Michalek and Karel Cejna, 'Accessibility and Findability of Local e-Government Websites in the Czech Republic' (2010) 9:1 *Universal Access in the Information Society* 51, 53 <<http://link.springer.com/article/10.1007/s10209-009-0159-y>> accessed 12 September 2017 (emphasis added). For my discussion on how the proposed <.officiallaws> legal information gTLD can be used to develop one-stop legal information websites to provide optimal findability, see Leesi Ebenezer Mitee, 'Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites' (2017) (forthcoming peer-reviewed article). This present article and the said forthcoming article are complementary.

division of any country (states and local governments), e.g. <www.virginia.officiallaws> (the US State of Virginia) and <www.croydon.officiallaws> (London Borough of Croydon, United Kingdom). It also applies to IGOs, e.g. <www.unitednations.officiallaws> and <www.un.officiallaws> for the United Nations.

Direct access was originally the *default* method of accessing websites, which ICANN states as follows: ‘To reach another person on the Internet you have to type an *address* into your computer — a name or a number.’¹²⁷ It is not even necessary to enter ‘www’ for domain names whose DNS records have been properly so configured. It is significant that renowned *Internet security companies* recommend direct access to websites that require sensitive information (e.g. banks) as one of the measures for preventing online phishing scams (fraud).¹²⁸

Directly accessing websites with easy-to-remember domain names is easier, much faster, and more reliable than using Internet search engines. The reasons are: (1) Conducting reliable Internet search requires skills¹²⁹ and attitudes that most Internet users may not have. These include the right order of search terms and using the right keywords and phrases;¹³⁰ when to use quotation marks (“ ”), plus sign (+), minus sign (-), and asterisks (*);¹³¹ how to recognise authentic information; the patience to examine several search results pages; and searching by time frame. (2) There is no guarantee that the search engine results will show every item of interest because search results depend on several factors, including

¹²⁷ ‘What Does ICANN Do?’ (*Internet Corporation for Assigned Names and Numbers*, 25 February 2012) <www.icann.org/resources/pages/what-2012-02-25-en> accessed 12 September 2017 (emphasis added).

¹²⁸ ‘10 Tips to Prevent Phishing Attacks’ (*Panda Security*, 21 February 2016) <www.pandasecurity.com/mediacenter/security/10-tips-prevent-phishing-attacks/> accessed 12 September 2017.

¹²⁹ Eileen Wood and others, ‘Exploration of the Relative Contributions of Domain Knowledge and Search Expertise for Conducting Internet Searches’ (2016) 57 *The Reference Librarian* 182-204.

¹³⁰ Eric Popkoff, ‘Methods of Effective Internet Research’ (*Brooklyn College*) <http://depthome.brooklyn.cuny.edu/economics/internetresearch.htm> accessed 12 September 2017.

¹³¹ ‘Research Tools’ (*University of South Florida Center for Instructional Technology*, 2009) <https://fcit.usf.edu/internet/chap5/chap5.htm> accessed 12 September 2017.

the indexed status of the relevant URL,¹³² different search engines (e.g. Google, Bing, Yahoo)¹³³ and their geographic variants (e.g. Google United States, Google United Kingdom, Google Australia),¹³⁴ search engine platforms (desktop/laptop versus mobile devices),¹³⁵ and search ranking of the relevant webpages usually determined by proper search engine optimisation (SEO).¹³⁶ Search engines evolved to *complement*, not supplant, the default method of directly accessing websites via their URLs as their location addresses.¹³⁷ Search engines are indispensable only when the exact URL is unknown or difficult to use, and to find information from unknown sources.

Second, even when the search-engine option is used instead of direct access, the proposed <.officiallaws> gTLD will still facilitate findability of OLIWs. The reason is that the use of the keywords 'official' and 'laws' plus the name of a country in the domain URL of its OLIWs (e.g. www.australia.officiallaws) is beneficial. For example, a search engine (including Google) will recognise the said www.australia.officiallaws as 'Australia official laws' which will *contribute* (among other SEO factors) to the website appearing higher up in search results for such relevant search terms as 'official laws of Australia', 'laws of Australia', or just

¹³² 'Index Status Report' (Google) <<https://support.google.com/webmasters/answer/2642366?hl=en>> accessed 12 September 2017.

¹³³ Dogpile.com (in Collaboration with Researchers from Queensland University of Technology and the Pennsylvania State University), 'Different Engines, Different Results: Web Searchers not Always Finding What They're Looking for Online' (*Dogpile*, April 2007) <<https://cdn1.inspsearchapi.com/dogpile/10.10.0.392/content/downloads/overlap-differentenginesdifferentresults.pdf>> accessed 12 September 2017.

¹³⁴ Ricky, 'Why Do I Get Different Google Results in Different Locations?' (*LCN*, 19 September 2014) <www.lcn.com/blog/get-different-results-google-vs-location-users/> accessed 12 September 2017.

¹³⁵ Erik Newton, 'Smartphone and Desktop Search Results Diverge Further' (*BrightEdge*, 5 December 2016) <www.brightedge.com/blog/smartphone-desktop-search-results/> accessed 12 September 2017.

¹³⁶ Sachin Kumar and Pratishtha Gupta, 'A Survey of Techniques and Applications for Search Engine Optimization' (2016) 8(2) *Research Journal of Science and Technology* 59.

¹³⁷ 'What Does ICANN Do? (*Internet Corporation for Assigned Names and Numbers*, 25 February 2012) <www.icann.org/resources/pages/what-2012-02-25-en> accessed 12 September 2017.

‘Australia laws’.¹³⁸ Although Google claims that the use of keywords in URLs is ‘a very small ranking factor’ regarding the ranking of a website or webpage in search results,¹³⁹ recent experiments by SEO experts appear to confirm that its importance may be much more.¹⁴⁰ But even if it were truly ‘a very small ranking factor’, its potential SEO benefit should not be discounted.

Third, the proposed <.officiallaws> gTLD will help people to identify *official sources* of legal information from official government and IGOs websites, the same way <.edu> has helped to identify institutionally accredited postsecondary educational institutions.¹⁴¹ But unlike <.edu> whose significance may not be known to most Web users because it is not a complete word, <.officiallaws> has the additional advantage that it is self-evident to every person that it is for *official laws*. The <.officiallaws> gTLD will therefore serve excellently as a unique label or signpost for official legal information for the attention of the whole world. For example, the domain name *www.canada.officiallaws* tells a Web user that the website claims to contain the official laws of Canada. It is no different from the billboard in front of a building that helps someone to know they have reached their desired destination or informs passers-by that *the* original version of a known product is available inside the building. This is the reason reputed *Internet security experts* recommend proper examination of domain names to identify genuine websites and avoid accessing fraudulent ones.¹⁴²

¹³⁸ Christopher Hofman, ‘Google Reads Coffee.Club as Coffee Club!’ (*Key-Systems*, 16 June 2015) <www.key-systems.net/en/blog/google-reads-coffee-club-as-coffee-club> accessed 12 September 2017.

¹³⁹ Barry Schwartz, ‘Google: Keywords in URLs a Very Small Ranking Factor’ (*Search Engine Roundtable*, 3 February 2016) <www.seroundtable.com/google-keywords-in-urls-a-small-ranking-factor-21577.html> accessed 12 September 2017.

¹⁴⁰ ‘Search Engine Ranking Factors 2015: Expert Survey and Correlation Data’ (*Moz*, 2015) <<https://moz.com/search-ranking-factors>> accessed 12 September 2017. See also ‘How Valuable is it to Have a Keyword in your Domain URL?’ (*HigherVisibility.com*) <www.highervisibility.com/resource/research/how-valuable-is-it-to-have-a-keyword-in-your-domain-url/> accessed 12 September 2017. Although this source does not have a date, it refers to a 2015 source.

¹⁴¹ ‘Edu Eligibility’ (*EDUCAUSE*) <<https://net.educause.edu/eligibility.htm>> accessed 12 September 2017.

¹⁴² Greg Kelley, ‘The One Mistake Companies Make that Leads Them to Fall Victim to Phishing Attacks is . . .’ in Nate Lord, ‘Phishing Attack Prevention: How to Identify & Avoid Phishing Scams’

As revealed in some of the case studies on the actual performance of new gTLDs in use,¹⁴³ easy identification of genuine resources by members of the public is a major advantage of specialised regulated domain names like <.officiallaws>.¹⁴⁴ This is because the Web, as indispensable as it is, is also a huge junkyard of information from everybody, and this creates the problem of reliability and authenticity. OLIWs that use the proposed <.officiallaws> will therefore benefit from a click-activity phenomenon that researchers at Microsoft and Stanford University call '*domain bias*'. It refers to 'a user's propensity to click on a search result because it comes from a reputable domain.'¹⁴⁵ With time, users of online legal information will recognise and remember <.officiallaws> as the trusted official legal information brand globally.

According to Roland LaPlante, the Chief Marketing Officer of Afiliis (the registry operator of <.organic> new gTLD), '.ORGANIC sets the true organic entities apart and gives consumers a direct and easy way to find them online.'¹⁴⁶ This validates part of the goal of ICANN's New gTLD Program, which is 'to enhance . . . consumer choice.'¹⁴⁷ Authenticity and reliability of legal information are crucial to every aspect of legal research, practice, adjudication, and publishing. The proposed

(*Digital Guardian*, 31 August 2017) <<https://digitalguardian.com/blog/phishing-attack-prevention-how-identify-avoid-phishing-scams>> accessed 12 September 2017.

¹⁴³ 'New Generic Top-Level Domains: Case Studies' (*Internet Corporation for Assigned Names and Numbers*) <<https://newgtlds.icann.org/en/announcements-and-media/case-studies>> accessed 12 September 2017.

¹⁴⁴ Edward Nazzaro, 'Welcome to the New Internet: The Great gTLD Experiment' (2014) 1 *Indonesian Journal of International & Comparative Law* 37, 48 <<https://instituteformigrantright.files.wordpress.com/2013/05/welcome-to-new-internet.pdf>> accessed 12 September 2017.

¹⁴⁵ Samuel leong and others, 'Domain Bias in Web Search' (*Microsoft*, February 2012) <www.microsoft.com/en-us/research/wp-content/uploads/2012/02/domainbias.pdf> accessed 12 September 2017. See also Rand Fishkin, '15 SEO Best Practices for Structuring URLs' (*Moz*, 24 February 2015) <<https://moz.com/blog/15-seo-best-practices-for-structuring-urls>> accessed 12 September 2017.

¹⁴⁶ 'Case Study: .Organic' (*Internet Corporation for Assigned Names and Numbers*, 6 August 2015) <<https://newgtlds.icann.org/en/announcements-and-media/case-studies/organic-a4-06aug15-en.pdf>> accessed 12 September 2017.

¹⁴⁷ 'New gTLD Fast Facts' (*Internet Corporation for Assigned Names and Numbers*, 29 January 2016) <<https://newgtlds.icann.org/en/about/program/materials/fast-facts-22dec15-en.pdf>> accessed 12 September 2017.

<.officiallaws> gTLD is designed to introduce the much-needed paradigm shift towards legal information as a universal public resource from authentic official sources.

Unofficial sources of legal information usually lack the reliability required for reliance on them. *Disclaimers* on third-party unofficial legal information websites (including those of FALM) clearly state that their resources are not the official versions and are not to be relied upon.¹⁴⁸ *Nigeria-law.org* which is the most popular Nigerian law website (according to Google search results ranking, using search terms like 'Nigeria law' or 'Nigerian law') provides an example of the danger of unreliability of *unofficial versions* of legal information. The International Centre for Nigerian Law (ICFNL) owns Nigeria-law.org. For instance, its version of the Nigerian Constitution contains two reprographic errors in section 12 alone: 'except' omitted in subsection (1) and 'he' inserted in subsection (2):

12. (1) No treaty between the Federation and any other country shall have the force of law **[except]** to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the **he** Exclusive Legislative List for the purpose of implementing a treaty.¹⁴⁹

Also, section 1(1) of the Legal Education (Consolidation, etc.) Act on the Nigeria-law.org website is a mixture of its text and marginal note that forms an unintelligible provision:

1. (1) There shall be a body to be known as the Council **Establishment and** of Legal Education (hereafter in this Act referred to as **functions of** "the

¹⁴⁸ 'Disclaimers of Liability' (Australasian Legal Information Institute) <www.austlii.edu.au/austlii/disclaimers.html> accessed 12 September 2017; 'Disclaimers of Liability' (World Legal Information Institute) <www.worldlii.org/worldlii/disclaimers.html> accessed 12 September 2017.

¹⁴⁹ 'Constitution of the Federal Republic of Nigeria 1999' (*Nigeria-law.org*) <www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed 12 September 2017 (emphasis added to highlight the errors). I have taken and preserved the screenshot of the webpage as permanent evidence of the error as of today, 12 September 2017.

Council") which shall be a body corporate with perpetual succession and a common seal.¹⁵⁰

In addition, all the marginal notes attached to all the original 320 sections of the Constitution are omitted, like other laws on the Nigeria-law.org website. They therefore misrepresent the authentic versions of Nigerian laws. The official and reliable version of the Nigerian Constitution is on the Federal Ministry of Justice website.¹⁵¹ The said *faulty* Constitution and other laws on Nigeria-law.org website are used and linked to by individuals and organisations worldwide, including the World Bank,¹⁵² US Library of Congress,¹⁵³ Stanford University,¹⁵⁴ New York University School of Law,¹⁵⁵ and World Intellectual Property Organization (WIPO).¹⁵⁶ It is significant that the Nigeria-law.org resources are also among the databases of the World Legal Information Institute (WorldLII)¹⁵⁷ and Commonwealth Legal Information Institute (CommonLII).¹⁵⁸

It is noteworthy that Nigeria-law.org website's unreliable, insignificant, and out-of-date resources are among the databases of the World Legal Information

¹⁵⁰ 'Legal Education (Consolidation, etc.) Act' (*Nigeria-law.org*) <[www.nigeria-law.org/Legal%20Education%20\(Consolidation,%20etc.\)%20Act.htm](http://www.nigeria-law.org/Legal%20Education%20(Consolidation,%20etc.)%20Act.htm)> accessed 12 September 2017 (emphasis added to highlight the errors). I have taken and preserved the screenshot of the webpage as permanent evidence of the error, as of today, 12 September 2017.

¹⁵¹ 'Constitution of the Federal Republic of Nigeria 1999' (*Federal Ministry of Justice*) <www.justice.gov.ng/index.php/laws/constitution> accessed 12 September 2017.

¹⁵² 'Constitution of the Federal Republic of Nigeria 1999' (*World Bank*) <http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Nigeria_Constitution_1999_en.pdf> accessed 12 September 2017.

¹⁵³ 'Nigeria' (*Library of Congress*, 2016) <www.loc.gov/law/help/guide/nations/nigeria.php> accessed 12 September 2017.

¹⁵⁴ 'Nigeria' (*Stanford University Libraries*) <<http://library.stanford.edu/africa-south-sahara/browse-country/nigeria>> accessed 12 September 2017.

¹⁵⁵ Yemisi Dina, John Akintayo and Funke Ekundayo, 'Update: Guide to Nigerian Legal Information' (*New York University School of Law GlobaLex*, November/December 2015) <www.nyulawglobal.org/globalex/Nigeria1.html> accessed 12 September 2017.

¹⁵⁶ 'Constitution of the Federal Republic of Nigeria 1999' (*World Intellectual Property Organization*) <www.wipo.int/wipolex/en/text.jsp?file_id=179202> accessed 12 September 2017.

¹⁵⁷ 'Nigeria' (*World Legal Information Institute*) <www.worldlii.org/catalog/2163.html> accessed 12 September 2017.

¹⁵⁸ 'Nigerian Legislation' (*Commonwealth Legal Information Institute*, 2005) <www.commonlii.org/ng/legis/num_act/> accessed 12 September 2017.

Institute (WorldLII) and Commonwealth Legal Information Institute (CommonLII). In addition, Nigeria-law.org¹⁵⁹ even has the *Encyclopædia Britannica's The Web's Best Sites* certification, which questions Britannica's claim that the selection of the worthy websites is based on their editors' review of "thousands of Web sites to ensure their quality and appropriateness."¹⁶⁰ The neglect by the Nigerian government to provide online access to its laws accounts for the global popularity of the Nigeria-law.org website, despite its inadequacies. It was the first website to publish some Nigerian laws, and it deserves commendation for its voluntary response to address a public need. But one would have expected the website to provide reliable legal information after all these many years of its existence and popularity.

With the nature of digital information and its vulnerability to reprographic errors from digitising print documents, fraudulent or accidental alteration, it makes good sense that only legal information from official *government* sources, whose integrity is preserved with the requisite *authentication* technologies,¹⁶¹ should have *official status* with evidentiary value for all legal purposes. But even without such authentication, there is a *presumption of reliability of only information from*

¹⁵⁹ 'The Law Library' (Nigeria-law.org) <<http://nigeria-law.org/LawLibrary.htm>> accessed 12 September 2017.

¹⁶⁰ 'Getting Started' (*Encyclopædia Britannica Online Academic Edition*, Encyclopædia Britannica 2010) <<http://help.eb.com/bolae/index.htm>> accessed 12 September 2017.

¹⁶¹ For discussion on authentication of digital (legal) information, see 'About Us' (Govinfo) <www.govinfo.gov/about> accessed 12 September 2017; 'Authentication' (US Government Printing Office, 13 October 2005) <www.gpo.gov/pdfs/authentication/authenticationwhitepaperfinal.pdf> accessed 12 September 2017; Claire M Germain, 'Worldwide Access to Foreign Law: International and National Developments Toward Digital Authentication' (2013) 9 Comparative Law Journal of the Pacific-Journal de Droit Comparé du Pacifique 185 <<https://ssrn.com/abstract=2676279>> accessed 12 September 2017; Richard A Danner and Jules Winterton (eds), *The IALL International Handbook of Legal Information Management* (Routledge 2016) 14; 'State-By-State Report on Authentication of Online Legal Resources: Executive Summary' (American Association of Law Libraries, 2007) <www.aallnet.org/Documents/Government-Relations/authen_rprt/executivesummaryreport.pdf> accessed 12 September 2017; 'IFLA Statement on Government Provision of Public Legal Information in the Digital Age' (*International Federation of Library Associations and Institutions*, 14 August 2017) <www.ifla.org/publications/node/11064> accessed 12 September 2017. See also Mitee (n 63).

an official source.¹⁶² The following statement by the Digital Access to Legal Information Committee of the American Association of Law Libraries (AALL) on official and unofficial sources of legal information is instructive:

It is important to know if you are looking at an official or unofficial version of primary law. Researchers may find both official and unofficial sources of legal information useful, depending on the nature of the research and the reason for citing a particular primary authority. For example, when preparing a legal action or writing a scholarly paper, it is necessary to use the *government-designated official source of law*.¹⁶³

The proposed <.officiallaws> gTLD will help people to avoid the error of using unreliable legal information websites by providing the much-needed universal official label for reliable legal information on OLIWs. There is a *presumption of reliability* of only information from an official source.¹⁶⁴ Over time, it will be ingrained in the consciousness of people that they have to look for official legal information websites that have <.officiallaws> in their domain names.

The pessimism of some authors on the importance of new gTLDs created by ICANN, based on the performance of a few gTLDs,¹⁶⁵ appears to lose sight of the overall information revolution that gTLDs have added, and will continue to add, to the evolving Internet infrastructure.¹⁶⁶ Further, the trademark issues associated

¹⁶² *People v Melchor*, Crim. No. 5023. First Dist., Div. One. 26 October 1965 (US) <<http://law.justia.com/cases/california/court-of-appeal/2d/237/685.html>> accessed 12 September 2017.

¹⁶³ 'Guide to Evaluating Legal Information Online' (*American Association of Law Libraries*, July 2016) <www.aallnet.org/mm/Advocacy/access/evaluatelegalinfo.html> accessed 12 September 2017 (emphasis added).

¹⁶⁴ *People* (n 162); Graham Greenleaf, Andrew Mowbray and Philip Chung, 'The Meaning of "Free Access to Legal Information": A Twenty Year Evolution' (2013) 1 *Journal of Open Access to Law* <<https://ojs.law.cornell.edu/index.php/joal/article/view/11>> accessed 12 September 2017.

¹⁶⁵ Daniela Michele Spencer, 'Much Ado about Nothing: ICANN's New gTLDs' (2014) 29 *Berkeley Technology Law Journal* 865 <<https://doi.org/10.15779/Z38FX30>> accessed 12 September 2017.

¹⁶⁶ Taryn Naidu, 'TechRepublic's Dismissal of Generic Top-Level Domains Overlooks a lot of Facts, not to Mention Nearly all SMBs' (*Right Side News*, 2016) <<http://rightside.news/techrepublics-dismissal-generic-top-level-domains-overlooks-lot-facts-not-mention-nearly-smbs>> accessed 14 April 2017.

with some new gTLDs¹⁶⁷ do not affect category-based gTLDs restricted to public services, like <.gov> and <.edu> (similar to the proposed <.officiallaws>) which serve their identification-enhancing purposes excellently.¹⁶⁸

3.4 Implementation of the Proposal for the New Official Legal Information gTLD

With the current revolution that has created 1,227 specialised new gTLDs for all categories of online resources (as of 31 August 2017),¹⁶⁹ this proposal for a *Legal Information Domain Name System* (LIDNS) based on the <.officiallaws> gTLD is not expected to have difficulties with its implementation. With the global enthusiasm for unique gTLDs that the ongoing 2012 application round has generated, it can be reasonably expected that ICANN will commence another exercise not long after 2017 when actions on all currently pending applications will have been completed.¹⁷⁰ I mentioned in Section 3.2 above that ICANN has already revealed its plan to hold additional rounds of its New gTLD Program in the future.

The proposed <.officiallaws> gTLD promises to be viable and any investment in it by the proper registry operator is expected to be worthwhile and rewarding. In addition, as a public good, its true value is far beyond its financial return on investment, like the <.edu> gTLD.¹⁷¹ The <.officiallaws> gTLD is expected to

¹⁶⁷ Sheri Lyn Falco, 'Trademarks, Domain Names, and ICANN: An Evolving Dance' (2014) 26 St Thomas Law Review 191 <<http://stthomaslawreview.org/articles/v26/2/falco.pdf>> accessed 12 September 2017.

¹⁶⁸ Edward Nazzaro, 'Welcome to the New Internet: The Great gTLD Experiment' (2014) 1 Indonesian Journal of International & Comparative Law 37, 47-50 <<https://instituteformigrantright.files.wordpress.com/2013/05/welcome-to-new-internet.pdf>> accessed 12 September 2017.

¹⁶⁹ 'Current Statistics (Updated Monthly)' (*Internet Corporation for Assigned Names and Numbers*, 31 August 2017) <<https://newgtlds.icann.org/en/program-status/statistics>> accessed 12 September 2017.

¹⁷⁰ 'Program Implementation Review' (*Internet Corporation for Assigned Names and Numbers*, 29 January 2016) 10 <www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> accessed 12 September 2017.

¹⁷¹ Edward Nazzaro, 'Welcome to the New Internet: The Great gTLD Experiment' (2014) 1 Indonesian Journal of International & Comparative Law 37, 48 <<https://instituteformigrantright.files.wordpress.com/2013/05/welcome-to-new-internet.pdf>> accessed 12 September 2017.

become the standard gTLD for all OLIWs throughout the world. As I earlier discussed in Section 3.2 above, countries that may be hesitant initially to migrate their existing OLIWs to the proposed <.officiallaws> domain names and those who prefer to use the IDNs in their non-English languages should still buy their <.officiallaws> domain names and delegate them to their OLIWs. In this way, the OLIWs of all countries in the world and IGOs will benefit maximally from the <.officiallaws> gTLD, which will facilitate an unprecedented global public access to official legal information.

Domain names are not expensive. For example, a domain name with the <.com> gTLD costs \$9.99¹⁷² (ICANN has accredited domain names registrars¹⁷³) while a <.organic> regulated domain name costs \$74.99.¹⁷⁴ They are renewable annually, usually at the rate of the same purchase price, except for any slight increase due to changes in policy. That means buying the proposed <.officiallaws> domain names will not be a problem at all to any government or IGO. It is only the so-called 'premium domain names' (that speculators and cybersquatters buy to resell) that are expensive. Cybersquatting is the purchase of a domain name in bad faith with the intent of reselling it to the owner of the trade name in the domain name (usually at an unimaginably expensive price). It constitutes an infringement of intellectual property (trademark).¹⁷⁵ Regulated gTLDs like <.officiallaws> are only meant for verified purchasers (governments and law-making IGOs) who are entitled to use them for their OLIWs, and are therefore not susceptible to cybersquatting.

ICANN's policy on new gTLDs states that '[a]ny established public or private organization located anywhere in the world can apply to form and operate a new

¹⁷² Information available online on the websites of domain names registrars.

¹⁷³ 'ICANN-Accredited Registrars' (*Internet Corporation for Assigned Names and Numbers*, 2017) <www.icann.org/registrar-reports/accredited-list.html> accessed 12 September 2017.

¹⁷⁴ Information available online on the websites of domain names registrars.

¹⁷⁵ Cayce Myers, 'Protecting Online Image in a Digital Age: How Trademark Issues Affect PR Practice' (2016) 3(1) *Research Journal of the Institute for Public Relations* <www.instituteforpr.org/wp-content/uploads/Cayce-Myers-FINAL.pdf> accessed 12 September 2017; 'About Cybersquatting' (*Internet Corporation for Assigned Names and Numbers*, 3 May 2013) <www.icann.org/resources/pages/cybersquatting-2013-05-03-en> accessed 12 September 2017.

gTLD Registry.¹⁷⁶ It is necessary to emphasise that a *private* organisation *cannot* be the appropriate organisation to apply for and operate the proposed <.officiallaws> gTLD. It has to be a *public* organisation. This is imperative because of ICANN's policy error. ICANN has the duty to review its current defective policy that led to the delegation of <.health> gTLD to DotHealth LLC (a private US company that will use it for purely commercial reasons¹⁷⁷) instead of the World Health Organization (WHO) that is responsible for global health matters and standards. It is ICANN's grave policy error that has generated justifiable global condemnation,¹⁷⁸ which must be avoided in the case of the proposed <.officiallaws> gTLD.

Perhaps a new United Nations World Legal Information Organization (UNWLIO)¹⁷⁹ could be the ideal organisation. UNWLIO will become the UN agency of intergovernmental character that will be responsible for promoting, regulating, and monitoring public access to legal information worldwide in accordance with its constitutive document. Its membership could consist of all member States of the United Nations and all territories or groups of territories and all IGOs that make laws, as full members. All other international, regional, and national bodies (both public and private organisations) that have proven interests in legal information and whose aims are in harmony with the aims of UNWLIO could be affiliate members. Such a wide range of membership will provide the robust structure, funding, interaction, and expertise needed for achieving its noble global goals.

¹⁷⁶ 'New Generic Top-Level Domains Fact Sheet' (*Internet Corporation for Assigned Names and Numbers*, 14 April 2011) 1 <<https://archive.icann.org/en/topics/new-gtlds/factsheet-new-gtld-program-14apr11-en.pdf>> accessed 12 September 2017.

¹⁷⁷ 'Delegation Report for .Health' (*Internet Assigned Numbers Authority*, 21 January 2016) <www.iana.org/reports/c.2.9.2.d/20160121-health> accessed 13 September 2017.

¹⁷⁸ Tim K Mackey and others, 'A Call for a Moratorium on the .Health Generic Top-Level Domain: Preventing the Commercialization and Exclusive Control of Online Health Information' (2014) 10:62 *Global Health* <www.ncbi.nlm.nih.gov/pmc/articles/PMC4177061/> accessed 13 September 2017; Tim Ken Mackey and others, 'Health Domains for Sale: The Need for Global Health Internet Governance' (2014) 16(3) *Journal of Medical Internet Research* e62 <www.ncbi.nlm.nih.gov/pmc/articles/PMC3961808/> accessed 13 September 2017.

¹⁷⁹ The name 'United Nations World Legal Information Organization' with its abbreviation 'UNWLIO' is my coinage.

In addition, a global organisation is necessary to regulate global legal information standards and monitor compliance with them, the way the World Health Organization (WHO) does for health.¹⁸⁰ The reason is that the right of public access to legal information is a human right and has profound implications for justice and the rule of law (discussed in Section 2.4 above). For instance, every legal liability imposed on a person for contravening any inaccessible law whose full texts the person could not have known, amounts to the same injustice as if the liability were under any *ex post facto* or non-existent law.¹⁸¹

Despite its human-right status, many governments have neglected their legal and moral duty to provide the required free and adequate access. For example, the government of Anguilla merely sells CD-ROM packages of its laws (already in electronic format) on its website instead of publishing them online with free access.¹⁸² It thereby denies its citizens (and the whole world) their right of public access to their *own* laws because citizens are the rightful owners of laws.¹⁸³ Nigeria,¹⁸⁴ Papua New Guinea,¹⁸⁵ and Tanzania,¹⁸⁶ for example, have only an insignificant number of their legislation online. Even the United States that is the world's leading democracy, is still grappling with issues of copyright in legal information and its value-added features (e.g. annotations produced by the government). Michael Carroll states this fact unequivocally: 'Some states and municipalities in the United States assert copyright in their local legislation.'¹⁸⁷

¹⁸⁰ 'About WHO' (World Health Organization) <www.who.int/about/mission/en/> accessed 13 September 2017.

¹⁸¹ Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford University Press 2009) 186-87.

¹⁸² AnguillaLaws.com <www.anguillalaws.com/> accessed 13 September 2017.

¹⁸³ African Commission on Human and Peoples' Rights (ACHPR) 'Banjul Declaration of Principles on Freedom of Expression in Africa' ACHPR/Res.62(XXXII)02 (23 October 2002) <<https://www.achpr.org/presspublic/publication?id=3>> accessed 12 September 2017.

¹⁸⁴ 'Search Documents' (Federal Republic of Nigeria National Assembly) <www.nassnig.org/document/acts> accessed 13 September 2017.

¹⁸⁵ 'Bills and Legislation' (National Parliament of Papua New Guinea) <www.parliament.gov.pg/bills-and-legislation> accessed 13 September 2017.

¹⁸⁶ 'Laws of Tanzania from 2002-2016' (Law Reform Commission of Tanzania) <www.lrct.go.tz/laws-of-tanzania/> accessed 13 September 2017.

¹⁸⁷ Michael W Carroll, 'The Movement for Open Access Law' (2006) 10 Lewis & Clark Law Review 741, 746 <https://digitalcommons.wcl.american.edu/facsch_lawrev/43/> accessed 13 September 2017.

The US federal government also charges fees for electronic access to its Public Access to Court Electronic Records (PACER). Carl Malamud and others have been campaigning against all these impediments to free public access to legal information in the United States.¹⁸⁸

Further, law is an integral part of human existence in every society and directly affects every human being worldwide. Therefore, if there can be a United Nations organisation for tourism – United Nations World Tourism Organisation (UNWTO) – that does not directly affect every human being, then there should be no problem with establishing the proposed UNWLIO for promoting, regulating, and monitoring a human right that directly affects every person.

I suggest that UNWLIO should have a Global Code of Ethics for the Provision of Public Access to Legal Information¹⁸⁹ to promote the actualisation of the right of public access to legal information worldwide. Unlike the Global Code of Ethics for Tourism of the World Tourism Organization,¹⁹⁰ the regulatory mechanisms of UNWLIO should be binding on the Member States and organisations to achieve its human rights objectives.

In addition to its other activities and programmes, UNWLIO will be expected to organise the proposed World's Legal Information Day to mark the date of its creation (like the other days of the UN agencies¹⁹¹). This will promote global awareness of the importance of the right of public access to legal information and the duty of makers of legal information to provide free access to it. Such access should be adequate for its different categories of users (including persons with disabilities), comprehensive, and up-to-date. Because of the poor state of public

¹⁸⁸ Jason Tashea, 'Carl Malamud's Crusade to Fix PACER' (*Technical.ly*, 20 April 2015) <<http://technical.ly/dc/2015/04/20/carl-malamud-pacer-dc-legal-hackers-meetup/>> accessed 13 September 2017. For the fees that PACER charges, see 'Electronic Public Access Fee Schedule' (*Public Access to Court Electronic Records*, 1 December 2013) <www.pacer.gov/documents/epa_feesched.pdf> accessed 13 September 2017.

¹⁸⁹ The term 'Global Code of Ethics for the Provision of Public Access to Legal Information' is my coinage.

¹⁹⁰ 'Global Code of Ethics for Tourism' (*World Tourism Organization*) <<http://ethics.unwto.org/en/content/global-code-ethics-tourism>> accessed 13 September 2017.

¹⁹¹ See, for example, 'Official WHO Health Days' (*World Health Organization*) <www.who.int/mediacentre/events/official_days/en/> accessed 13 September 2017.

access to online legal information, especially in developing countries¹⁹² (e.g. Anguilla, Nigeria, Papua New Guinea, and Tanzania, mentioned above in this Subsection), UNWLIO should have a Technical Assistance Projects for Public Access to Legal Information¹⁹³ that will help needy countries to develop capacity for adequate and sustainable public access to their legal information programmes.

Alternatively, an appropriate existing body within the UN system can function as the organisation to apply for the <.officiallaws> gTLD to reduce the cost of establishing a new organisation like the proposed UNWLIO. Because the right of public access to legal information is a human right derived from the parent human right of access to public information (discussed in Section 2.4 above), the UN Human Rights Council (UNHRC)¹⁹⁴ can become the applicant organisation. UNHRC's broad mandate to set universal human rights standards for States and monitor compliance therewith can accommodate this additional function.

Further, a third option could be the establishment of a World Legal Information Foundation (WLIF)¹⁹⁵ as a non-governmental organisation to perform the said functions. However, it will lack the possible coercive powers and universal influence of an IGO within the UN system that is necessary for implementing its policies worldwide.

¹⁹² Daniel Poulin, 'Open Access to Law in Developing Countries' (2004) 9 (12) First Monday <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 13 September 2017; Graham Greenleaf, Philip Chung and Andrew Mowbray, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies 2002-2005' (2007) 4(4) SCRIPTed 319, 322 <<https://scripted.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 13 September 2017; Vallery Bayly, 'Legal Information and Human Rights' (*McGill University*, 31 July 2015) <<http://blogs.mcgill.ca/humanrightsinterns/2015/07/31/legal-information-and-human-rights/>> accessed 13 September 2017.

¹⁹³ The term 'Technical Assistance Projects for Public Access to Legal Information' is my coinage.

¹⁹⁴ United Nations Human Rights Council <www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed 13 September 2017. However, the United Nations Economic and Social Council (ECOSOC) can perform the functions of the proposed UNWLIO, if the United Nations considers that a better or ready option, e.g. to save costs. As one of the principal organs of the United Nations, the specific human rights mandate of ECOSOC under Articles 62 and 68 of the Charter of the United Nations makes it better suited to perform the said functions than the United Nations Human Rights Council.

¹⁹⁵ The name 'World Legal Information Foundation' with its abbreviation 'WLIF' is my coinage.

4. Conclusion

This article has examined the use of the proposed <.officiallaws> strictly regulated official legal information gTLD as a viable tool for enhancing the findability and easy identification of the *official* sources of the *available* online legal information and the eventual free public access to them. It focused on the OLIWs owned by governments and IGOs that create legal information.

Public access to legal information is not just a legal and constitutional right but also a human right.¹⁹⁶ Its provision is the legal and moral duty of every tier of government (national, state, and local government) and every IGO that creates legal information (e.g. United Nations, European Union, and African Union). The historical records of the publishing of laws by kings (e.g. King Hammurabi and King Henry VII), judicial decisions, statutes, constitutions, and international legal instruments all support these claims.¹⁹⁷ Therefore, no government should abdicate this duty to third-parties, including the legal information institutes.¹⁹⁸ Every government should provide free and adequate access to *all* of its legal information *directly*, not through any third party whatsoever to avoid the dangers associated with such arrangements.¹⁹⁹

The legal information domain name system (LIDNS) developed in this article is based on the proposed <.officiallaws> official legal information gTLD to be created by ICANN.²⁰⁰ It will be used *exclusively* for the official legal information websites of governments and IGOs.²⁰¹ They alone have the legal and moral duty to provide free public access to their legal information which must be adequate, comprehensive, and up-to-date.²⁰² The proposed gTLD will meet the need for easy

¹⁹⁶ Section 2.4 above.

¹⁹⁷ Ibid

¹⁹⁸ Ibid

¹⁹⁹ Ibid. Every government has the legal and moral duty to provide free and adequate access to *all* categories of legal information, including customary law. For my discussion on the right of public access to the customary law of indigenous communities, see Leesi Ebenezer Mitee, 'Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access' (forthcoming peer-reviewed article).

²⁰⁰ Section 3.1 above.

²⁰¹ Section 3.2 above.

²⁰² Section 2.4 above.

identification of authentic and reliable official legal information resources.²⁰³ This is of immense importance because cyberspace is a limitless repository of information from different sources with all shades of reliability,²⁰⁴ and there is a *presumption of reliability of only information from an official source*.²⁰⁵ Over time, it will be ingrained in the consciousness of people that they have to look for official legal information websites that have <.officiallaws> in their domain names. Further, the universal and easy-to-remember domain names, e.g. <www.unitedstates.officiallaws> and its short form <www.us.officiallaws> (United States), will facilitate *direct access* to official legal information websites without performing numerous Internet searches that are sometimes fruitless.

Overall, the proposed <.officiallaws> official legal information gTLD will improve global public access to *official* legal information that has profound *human rights implications* for justice and the rule of law.²⁰⁶ The right to a fair trial, for example, is based on the knowledge of the actual state of the law for a valid prosecution, defence, and judgment. Without adequate access to legal information, injustice may emanate from judgments given in *ignorance of the current state of the law*²⁰⁷ and people are denied their right to know the laws they are bound to obey, ignorance of which is no excuse. Further, public access to official online legal

²⁰³ Section 3.3 above.

²⁰⁴ See, for example, Nigeria-law.org discussed in Section 3.3 above.

²⁰⁵ *People v Melchor*, Crim. No. 5023. First Dist., Div. One. 26 October 1965 (US) <<http://law.justia.com/cases/california/court-of-appeal/2d/237/685.html>> accessed 12 September 2017; Graham Greenleaf, Andrew Mowbray and Philip Chung, 'The Meaning of "Free Access to Legal Information": A Twenty Year Evolution' (2013) 1 Journal of Open Access to Law <<https://ojs.law.cornell.edu/index.php/joal/article/view/11>> accessed 12 September 2017.

²⁰⁶ 'Montreal Declaration on Free Access to Law' (*Free Access to Law Movement*, 2002) <www.falm.info/declaration/> accessed 12 September 2017; Brian D Anderson, 'Meaningful Access to Information as a Critical Element of the Rule of Law: How Law Libraries and Public Libraries Can Work Together to Promote Access' (IFLA World Library and Information Congress, Columbus, Ohio, United States, August 2016) <<http://library.ifla.org/1376/1/179-anderson-en.pdf>> accessed 13 September 2017.

²⁰⁷ *Regina v Chambers* [2008] EWCA Crim 2467, para 55-76 (UK) <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html>> accessed 12 September 2017; 'Chambers Review: Review of Confiscation Orders in Tobacco Cases' (*The Crown Prosecution Service*) <http://cps.gov.uk/publications/others/chambers_review.html> accessed 12 September 2017. See the discussion in Mitee (n 63).

information facilitates effective national and transnational legal research;²⁰⁸ it is necessary for the holistic actualisation of the environmental, economic, and social components of sustainable development;²⁰⁹ and it promotes transparency and accountability in governance,²¹⁰ among other numerous benefits.

²⁰⁸ Steven D Jamar, 'The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law' (2001) 1 Global Jurist Topics Number 2 Article 6 <www.degruyter.com/downloadpdf/j/gj.2001.1.2/gj.2001.1.2.1032/gj.2001.1.2.1032.pdf> accessed 12 September 2017; Daniel Poulin, 'Open Access to Law in Developing Countries' (2004) 9 (12) First Monday <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 12 September 2017.

²⁰⁹ Jamar (n 208).

²¹⁰ Jamar (n 208); Poulin (n 208). See the discussion in Mitee (n 63).

CHAPTER FOUR

Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites¹

*“Organising is what you do before you do something, so that when you do it, it is not all mixed up.” Alan Alexander Milne (1882–1956)**

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Article publication detail: Leesi Ebenezer Mitee, ‘Towards Enhanced Public Access to Legal Information: A Proposal for Official Networked One-Stop Legal Information Websites’ (2017) 8(3) *European Journal of Law and Technology* 1–38 <<http://ejlt.org/article/view/579/768>> (38 pages; reproduced from the published version, with its original numbering of sections, footnotes, and citation style). Published on 22 January 2018 (peer-reviewed) and available with free or open access on the *European Journal of Law and Technology* website.

* Quoted in Annie McKee, Travis Kemp and Gordon Spence, *Management: A Focus on Leaders* (Pearson Australia 2013) 164.

Abstract

This article identifies the publishing of fragments of legal information on multiple, isolated official legal information websites as the major factor underlying the existing problems in locating the available official online legal information of all levels of government (national, state, and local). Given this situation, knowledge of the administrative divisions and legal system of a country is often necessary to perform any reliable search for the websites of each legislature, court, government department or agency that contain legal information. Such knowledge usually requires research, which is more demanding should a person wish to know the laws of other countries for transnational academic research, business transactions, migration, tourism, etc. Examination of the official legal information websites of the 60 countries and territories included in this study reveals the existence of this problem in both developed and developing countries. As a response, a novel system of official networked one-stop legal information websites (the ONOLIWs system) is developed in this article, and argued to be the definitive solution to the global problems outlined. The ONOLIWs system guarantees the availability of the whole stock of the legal information of a legislative jurisdiction on one single website (the ONOLIW for that jurisdiction) and also easy accessibility of all the ONOLIWs of a country via an exhaustive index. Therefore, the ONOLIWs system will provide optimum access to the official online legal information of any country, the aggregation of which is seamless access to global legal information. It will thereby promote good knowledge of the law, which has many benefits for individuals, organisations, and the state itself. Governments at all levels, intergovernmental organisations that create legal information, and developers of their official legal information websites will benefit immensely from the ONOLIWs concept, its implementation mechanism, and the policy framework proposed in this article.

Keywords: Right of public access to legal information; Official networked one-stop legal information websites; Legal information top-level domains gTLDs; Law website design; Legal informatics; ICANN

1. Introduction

It is difficult, perhaps impossible in some cases, to find all the *available official* online legal information resources of any particular country due to the existing defective system of *official legal information websites* (OLIW).² The problem exists at two levels. First, it exists where there is no one OLIW of a *legislative jurisdiction* that contains the complete stock of all categories³ of its legal information, and fragments of the legal information are spread across multiple, isolated websites of that jurisdiction. A ‘legislative jurisdiction’ refers to the administrative area (national, state, or local) over which a particular legislature has the power to make laws (Mitee, 2017a, p. 1438). Second, it also exists where the numerous OLIW of all the legislative jurisdictions of a particular *country* are isolated, and not interlinked. With reference to the situation in India, as an example of the general trend, Greenleaf, Vivekanandan, Chung, Singh & Mowbray (2011) remarked that ‘information on legislation and judicial decisions is scattered and often buried in a maze of websites run by ministries at central, state and territory levels’ (p. 296). This two-level problem requires a two-pronged technical solution.

This problem exists in developed and developing countries alike.⁴ Even developed countries that are presumed to be technologically advantaged (Wheeler, Thomson, & Perkin, 2006, p. 86), such as the US, UK, Ireland, Canada, Australia, and New Zealand⁵ are not immune to it. The problem therefore transcends the digital or technological divide and other global inequalities that usually place developing countries with scarce resources at a disadvantage. This global issue requires an urgent solution because the use of websites for free global dissemination of up-to-date, comprehensive, and user-friendly legal information has become indispensable in the twenty-first century globalised world that is information technology-driven.⁶

² I coined this term and its abbreviation.

³ For the list of these categories, see the meaning of ‘official legal information’ below, in this Section 1 and in Section 2.1 below.

⁴ Section 2 below.

⁵ Section 2.4 below.

⁶ Section 2.1 below.

The cause of the problem is simply a *poor web development approach* that does not adopt the one-stop access concept, nor does it include integration of all tiers of OLIWs (national, state or regional, and local governments) of a country. It emanates from a lack of proper policy on public access to legal information. This policy gap may also have contributed to the generally poor state of free public access to *official* legal information in many developing countries, in terms of the *availability* of their laws and law-related publications online.⁷

This article therefore aims to examine the use of a network of official one-stop legal information websites as a workable technological tool for enhancing national and global public access to official legal information. The term ‘official legal information’, which is the focus of this article, refers to all the primary sources of law and all law-related documents produced and published by any government or intergovernmental organisation (IGO), especially on official websites, regardless of their evidential status or authentication; it coincides with the definition of ‘public legal information’ in the Montreal Declaration on Free Access to Law (2002):

Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.

This article contributes to the existing literature in the following ways. First, the *system of official networked one-stop legal information websites* (ONOLIWs)⁸ (‘ONOLIWs system’)⁹ that this article develops is the definitive solution to the existing difficulty in finding fragments of any country’s legal information on multiple, unconnected OLIWs. It guarantees the availability of the whole stock of the legal information of a legislative jurisdiction on just one website. In addition to its on-site collections, every ONOLIW contains external links that form an *exhaustive index* of all the ONOLIWs of the country. This will eliminate the current

⁷ Sections 2.5, 2.6, and 3.3 below.

⁸ I coined this term and its abbreviation.

⁹ Section 3 below.

findability¹⁰ problems that include a required knowledge of a country's administrative structure and its legal system in order to be able to search for all relevant legal information of that country, as revealed by the examination of the OLIWs of the 60 countries and territories included in this study.¹¹ Furthermore, this article provides a valuable guide for the appropriate policy framework necessary for implementing the ONOLIWs system.¹²

Second, this article analyses the different categories of domains that can be used for hosting OLIWs. It recommends the *regulated legal information domains* (RLIDs)¹³ category, which is not yet in existence, as the most advantageous category because it will enhance easy identification of official online repositories of legal information and facilitate access to them (Mitee, 2017b). RLIDs can be available only if the Internet Corporation for Assigned Names and Numbers (ICANN) creates a new legal information generic top-level domain (gTLD) to be used exclusively for OLIWs, which could be <.officiallaws> as proposed in my recent work (Mitee, 2017b).¹⁴

The rest of this article is structured in three sections. Section 2 presents an overview of the provision of online access to legal information. It examines the one-stop access feature of the *national official legal information websites* (NOLIWs)¹⁵ of 60 countries and territories (six developed and 54 developing countries and territories) and discusses the deficiencies of these NOLIWs. Section 3 develops the ONOLIWs system as the definitive solution to the problem of finding the *available* online legal information of any country, outlines its unique advantages, and suggests how the proposal may be implemented. Section 4 draws the conclusion that the ONOLIWs system as outlined in this article will provide optimum national and global access to the available official online legal information of any country. It also highlights the policy implications of the

¹⁰ See Section 2.2 below for the meaning of findability.

¹¹ Section 2 below.

¹² Section 3.3 below.

¹³ I coined this term and its abbreviation.

¹⁴ Section 3.1.1 below.

¹⁵ I coined this term and its abbreviation. It refers to any legal information website owned by the national (or federal) government.

proposed system for governments at all levels, IGOs that create legal information, and developers of the OLIWs.

2. Networked One-Stop Access Feature of National Official Legal Information Websites

In this section an overview of the provision of online access to legal information is presented and the NOLIWs of 60 countries and territories (six developed and 54 developing countries and territories) are examined in order to determine the accessibility features. These accessibility features are based on the categories¹⁶ of on-site legal information hosted on each NOLIW and its external links to the other OLIWs of the country. A NOLIW is the official government legal information website at the national level; it contains the first-tier legal information for that country.

2.1 Provision of Online Access to Legal Information

Every government has the obligation to provide free public access to all categories of its legal information (*Tañada v. Tuvera*, 1985; *Victoria University of Wellington Students Association v. Shearer (Government Printer)*, 1973).¹⁷ These categories include the primary sources of law (principal legislation, subsidiary legislation, judicial decisions, and the applicable international and regional legal instruments); bills and other legislative documents; and all other law-related government publications (Mitee, 2017a, p. 1437). The customary law of indigenous communities also deserves such material or documentary access because unwritten customary law is inaccessible (Mitee, 2017a, pp. 1485–1486).¹⁸

Adequate public access to legal information promotes good knowledge of the law, which has many benefits for individuals, organisations, and the state itself. For

¹⁶ For the list of these categories, see the meaning of ‘official legal information’ in Section 1 above and Section 2.1 below.

¹⁷ Article IV, Section 17 of the Constitution of the US State of Wisconsin (United States).

¹⁸ For my discussion of adequate public access to indigenous customary law, see Mitee, L. E. (2017). Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access. *Forthcoming peer-reviewed article*.

instance, it is necessary in order to justify the application of the doctrine that ignorance of the law is no excuse (Mitee, 2017a, pp. 1463–1466), which is based on the presumption of knowledge of the law (Ingram, 2015, pp. 176–177). This justification has implications for justice and human rights (Mitee, 2017a, pp. 1488–1489). Adequate public access to legal information is also necessary to facilitate sustainable development; enhance law reform; enable national and transnational legal research; and to promote the principles of democracy, including transparency and accountability (Mitee, 2017a, p. 1466–1469).

People have the right to know the laws that govern them. In my recent work (Mitee, 2017a), in which I review the relevant literature¹⁹ on this right of public access to legal information, I argue that it is an existing legal right (pp. 1437–1451) and that it qualifies for universal recognition as a human right (pp. 1451–1471). Further, I advocate a new United Nations Convention on the Right of Public Access to Legal Information, and discuss the contents of the proposed Convention that are necessary for its drafting (pp. 1473–1489).

Online legal information is the only format that has the *capabilities* for free national and global access, currency of databases, versatility for various uses and users (including persons with disabilities), and optimum searchability, all of which factors enhance the best use and knowledge of the law (Mitee, 2017a, pp. 1473–1476; Mitee, 2017b). The traditional print format lacks those advantages. The global impact of free online legal information is revealed in the following statement by Thomas Bruce (2015), co-founder and director of the Cornell University Legal Information Institute: ‘Today [2015], the web site [LII²⁰] that we built [in 1992] is visited by more than 30 million people each year, from more than 240 countries and territories.’ (p. 1)

Many governments and IGOs worldwide have recognised the indispensability of websites as repositories of their legal information (Arnold-Moore, 2004; Ward, 2016), which is commendable. However, faulty implementation has resulted in a multiplicity of websites that contain fragments of legal information. These websites are developed by the executive departments and agencies, legislatures,

¹⁹ Jamar (2001); Mommers (2011); and Danner (2012).

²⁰ Legal Information Institute: <https://www.law.cornell.edu/>

and the multitudes of courts of the judiciary of each country's different levels of government, i.e. national, regional, and local. The publishing of fragments of legal information on these websites has caused considerable difficulties in terms of locating legal information that is already available online (Greenleaf *et al*, 2011, p. 296).²¹ An examination of the national official legal information websites of particular countries is necessary in order to assess the extent of this problem of publishing a country's stock of legal information on multiple isolated websites.

2.2 Criteria for Networked One-Stop Access Feature

In order to evaluate the NOLIWs of the countries selected for this study, I have devised the '*networked one-stop access feature*' (NOSAF)²² that consists of a pair of criteria: (1) the NOLIW contains the complete stock of *all categories* of the country's national legal information; and (2) it has exhaustive *external links* to the OLIWs of all the states or regions (second-tier OLIWs) and all the OLIWs of all the local governments (third-tier OLIWs) of the country. Any NOLIW that is found to satisfy *both* criteria is considered to have the networked one-stop access feature.

The named criteria are major determinants of the ease with which people can find and access *all* the available online legal information resources of a country from any of its NOLIWs. Focussing on NOLIWs is important because a NOLIW naturally serves as the primary gateway to the official legal information resources of the whole country. One of the reasons is that the name of a country is much more prominent than that of any of its constituent administrative divisions (states and local government councils). This advantage makes it more likely for a NOLIW to attract more online visitors and thereby rank higher in Internet search engine results (Michigan Technological University, n.d.). Therefore, examining the networked one-stop access feature of NOLIWs will provide valuable insights into the existing problem of finding all of the legal information of a country.

Peter Morville helped to develop the concept of *findability*. He appropriately defines 'findability' as the 'quality of being locatable or navigable', the 'degree to which a particular object is easy to discover or locate', and the 'degree to which a

²¹ See their quoted remark in Section 1 above.

²² I coined this term and its abbreviation.

system or environment supports navigation and retrieval' (Morville, 2005, p. 4). In this discussion, it simply refers to the ease with which official online legal information can be found on the Web. Findability is of immense importance because the Web is a gigantic virtual world that contains more than one billion websites (Netcraft, 2017) and billions of pieces of information (Patel & Bhatt, 2014, pp. 168-170).

2.3 Criteria for Selection of Countries

There are two related factors applied as selection criteria for each of the countries included in this brief study: (1) English language is the official language of the country, or one of a number; and (2) the country's online legal information is officially published by the government in the English language. The choice of English-speaking countries was made to avoid the problem of translation of legal information on the basis of my understanding of English and no other foreign language, and to avoid hiring bi- or multi-lingual personnel, which would be beyond the resources and time available for this research. Although the technology for instant translation of webpages now exists, e.g. Google's instant translation (Google, n.d.-a; Google, n.d.-b), its use is limited because such translations lack the reliability that is required for the integrity of any online resource, including legal information. Therefore, I do not consider it an option. The choice of the countries included is sufficient for the current exercise, the aim of which is simply to assess the situation in *some* countries. It does not intend to investigate any possible differences due, for example, to language or legal traditions (e.g. common law, civil law, or religious law).

The selection of every country that satisfies the two criteria stated above produces a 100 per cent sample size, which means that the study aims to examine the situation in all the countries of the world where the official legal information is in the English language. The list of the 60 countries and territories²³ that meet both criteria, and are therefore selected, is based on information from the following websites: United Kingdom Government (2017), Worldatlas (n.d.), and North Carolina State University (n.d.). Of the total 60 countries and territories, I could not find what may be regarded as the NOLIWs for the national *legislation* of nine

²³ See the Appendix to this article.

developing countries.²⁴ The 60 countries and territories examined are grouped under *developed countries* (six) and *developing countries* (45) based on the 2017 classification of countries by the United Nations (2017, pp. 153–154). This grouping may provide comparative insights into the nature of the problem.

2.4 A Brief Examination of the Situation in all the Six English-Speaking Developed Countries²⁵

All the six English-speaking developed countries are selected for this brief study. They are: the US, the UK (comprising England, Wales, Scotland, and Northern Ireland as its four constituent countries), Ireland, Canada, Australia, and New Zealand. The criteria for selection are outlined in Section 2.3 above. It is significant that these countries are all technologically advanced democracies that value the rule of law and open government based on access to public information, which includes legal information. They have all the technical expertise and financial resources required to develop online legal information websites with the best features and capabilities. I used the Google search engine (see Section 2.6 below) to search for the NOLIWs of these countries. The summary of the findings is presented below.

2.4.1 United States

Govinfo (United States Government Publishing Office, 2016), launched in February 2016, is the new official one-stop website for information from the three branches (executive, legislature, and judiciary) of the US federal government.²⁶ Govinfo, in its beta version until 2018,²⁷ is in the process of replacing the Federal Digital System (FDsys) public website. Govinfo contains federal legislation (Congressional Bills, Public and Private Laws, Statutes at Large, the US Code, regulations),²⁸

²⁴ See the Appendix to this article.

²⁵ Based on the state of the websites examined in March 2017.

²⁶ About Us: <https://www.govinfo.gov/about>

²⁷ Frequently Asked Questions (FAQs): About Govinfo — When will Govinfo Replace FDsys?: <https://www.govinfo.gov/help/faqs>

²⁸ Bills and Statutes: <https://www.govinfo.gov/app/browse/#browse?&page=category>

international legal instruments, administrative memoranda, and US Courts Opinions from *selected* US appellate, district, and bankruptcy courts.²⁹

There are more than 100 federal courts below the Supreme Court in the US (United States Courts, n.d.). Each of these courts publishes its decisions on its own separate website which is a subdomain of the United States Courts website,³⁰ e.g. the US Court of Appeals for the Federal Circuit.³¹ The US Supreme Court publishes its opinions on its website.³² Govinfo, the Supreme Court website, and the United States Courts website (the country's three main NOLIWs) are not properly interlinked. Govinfo does not have links to all the OLIWs of the fifty states of America, nor to any of those of the thousands of local governments (United States Census Bureau, 2012) that have law-making powers.

The Cornell University Legal Information Institute (LII) website contains a *third-party unofficial* version of some US federal laws and links to the laws of the different states. Its conditions of use include the following: 'The LII compilations aim to provide useful information. [. . .] neither the LII nor Cornell warrants that the information is complete or accurate. Both disclaim all liability to any person for any loss caused by errors or omissions in this collection of information.'³³

2.4.2 United Kingdom

Legislation.gov.uk³⁴ is the official legislation website of the UK. It contains primary legislation (Acts) and secondary legislation (subsidiary instruments or regulations). It has internal links to the legislation databases of Scotland,³⁵ Wales,³⁶ and

²⁹ United States Courts Opinions: <https://www.govinfo.gov/app/collection/uscourts>

³⁰ Court Website Links: <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>

³¹ United States Court of Appeals for the Federal Circuit. Retrieved from <http://www.ca9c.uscourts.gov/>

³² Opinions: <https://www.supremecourt.gov/opinions/opinions.aspx>

³³ Terms of Use: <https://www.law.cornell.edu/lii/terms/documentation>

³⁴ Legislation.gov.uk: <http://www.legislation.gov.uk/>

³⁵ Browse Legislation: Scotland: <http://www.legislation.gov.uk/browse/scotland>

³⁶ Browse Legislation: Wales: <http://www.legislation.gov.uk/browse/wales>

Northern Ireland,³⁷ and external links to the Scottish Parliament Bills³⁸ and other parliamentary documents, National Assembly for Wales legislation,³⁹ and Northern Ireland Assembly Bills and statutory rules.⁴⁰

Legislation.gov.uk has no *conspicuous* navigation-menu reciprocal link (but obscure text links do exist) to the UK Parliament website (parliament.uk) that contains UK Bills and other legislative documents. In addition, it has no link to the judgments of the UK courts. The judgments of some UK courts are available on the Court and Tribunals Judiciary website,⁴¹ which has no link to the UK legislation website, nor to the judgments of the courts of Scotland⁴² or Northern Ireland.⁴³ The websites of the Supreme Court⁴⁴ and the Judicial Committee of the Privy Council,⁴⁵ which are linked only to each other, contain their own judgments. The legislation.gov.uk website has no link to any of the bylaws of the hundreds of councils with law-making powers in the UK (United Kingdom Government, n.d.–a).⁴⁶

The *third-party* BAILII website⁴⁷ contains a significant proportion of the *unofficial* UK legal information that many people rely on (Institute of Advanced Legal Studies, 2016). For example, the official UK Parliament website refers its visitors to BAILII for some court decisions.⁴⁸ BAILII's disclaimer warns that 'BAILII does not invite reliance upon, nor accept responsibility for, the information it provides. [.

³⁷ Browse Legislation: Northern Ireland: <http://www.legislation.gov.uk/browse/ni>

³⁸ Bills: <http://www.parliament.scot/>

³⁹ Legislation: <http://www.assembly.wales/en/bus-home/bus-legislation/Pages/bus-legislation.aspx>

⁴⁰ Assembly Legislation: <http://www.niassembly.gov.uk/assembly-business/legislation/>

⁴¹ Judgments: <https://www.judiciary.gov.uk/judgments/>

⁴² About Judgments: <https://www.scotcourts.gov.uk/search-judgments/about-judgments>

⁴³ Judicial Decisions: <https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Pages/default.aspx>

⁴⁴ Decided Cases: <https://www.supremecourt.uk/decided-cases/>

⁴⁵ Decided Cases: <https://www.jcpc.uk/decided-cases/index.html>

⁴⁶ Wales, Scotland, and Northern Ireland all have Councils with law-making powers.

⁴⁷ BAILII: <http://www.bailii.org/>

⁴⁸ Judgments: <http://www.parliament.uk/about/how/business/judgments/>

.] Users should confirm information from another source if it is of sufficient importance for them to do so.’⁴⁹

2.4.3 Ireland

The Electronic Irish Statute Book (EISB)⁵⁰ contains the English version of the official legislation of Ireland: Acts of the Oireachtas⁵¹ and Statutory Instruments.⁵² Its Irish version is *Achtanna an Oireachtais*.⁵³ EISB has external links to Bills, other legislative documents, and some recent legislation (Acts) on the Houses of the Oireachtas (Irish Parliament) website,⁵⁴ and to EUR-Lex (European Union Law) website.⁵⁵

The Courts of Service (CoS) website⁵⁶ contains judgments of the Supreme Court, High Court, District Court, Courts-Martial Appeal Court, Court of Criminal Appeal, Court of Appeal, Circuit Court, and Central Criminal Court. EISB has no link to CoS and *vice versa*. There could not have been external links to lower tiers of OLIWs because Ireland’s municipalities, county councils, city councils, regional authorities, and regional assemblies do not have the power to make laws. That is the reason the country’s centralised system of government with only one tier of legislature remains a cause for concern to the European Union (Council of Europe, 2013).

Similar to the situation in the UK, the *third-party* BAILII website⁵⁷ contains a significant proportion of the *unofficial* version of Irish legal information, arranged as follows: Ireland case law, Irish legislation, and other Irish materials (Irish Law Reform Commission papers and reports and Irish treaty library).

⁴⁹ Disclaimers of Liability: <http://www.bailii.org/bailii/disclaimers.html>

⁵⁰ Electronic Irish Statute Book: <http://www.irishstatutebook.ie>

⁵¹ Acts of the Oireachtas: <http://www.irishstatutebook.ie/eli/acts.html>

⁵² Statutory Instruments: <http://www.irishstatutebook.ie/eli/statutory.html>

⁵³ *Achtanna an Oireachtais*: <http://www.acts.ie/ga.toc.decade.html>

⁵⁴ Welcome to the Houses of the Oireachtas: <http://www.oireachtas.ie/parliament/>

⁵⁵ EUR-Lex: <http://eur-lex.europa.eu/homepage.html?locale=en>

⁵⁶ Judgments & Determinations:
<http://www.courts.ie/Judgments.nsf/FrmJudgmentsByCourtAll?OpenForm&l=en>

⁵⁷ BAILII Databases: <http://www.bailii.org/databases.html>

2.4.4 Canada

The Justice Laws Website (JLW) is the English version of the official legislation database of Canada.⁵⁸ The French version is *Site Web de la Législation (Justice)*.⁵⁹ JLW contains the Consolidated Acts, Consolidated Regulations, and Annual Statutes of Canada. Its Canadian System of Justice: Links to Resources webpage⁶⁰ contains links to the external websites of the following: the Canadian Legal Information Institute (CanLII), the 13 Provincial and Territorial Departments of Justice/Attorney-General, Federal Courts, Provincial Courts, and Council of Canadian Administrative Tribunals. All of these have their individual legal information resources, e.g. Supreme Court Judgments.⁶¹

JLW also has links to Bills on the Parliament of Canada's LEGISinfo database⁶² and to the government website of Canada, which contains links to Laws and Regulations by Department or Agency, International Treaties, and Treaties with Indigenous Peoples.⁶³ There is no link to any of the legal information websites of Canada's numerous municipal governments.⁶⁴

The *third-party* Canadian Legal Information Institute (CanLII) website contains an *unofficial* version of Canada's legal information. Its disclaimer states: 'CanLII, Lexum and the CanLII website's partners provide no warranty and make no claims as to the reliability, accuracy or integrity of the website's content or functioning.'⁶⁵

2.4.5 Australia

The Federal Register of Legislation⁶⁶ (FRL) is Australia's official legislation website. It contains Acts, Bills, legislative instruments, notifiable instruments,

⁵⁸ Justice Laws Website: <http://www.laws.justice.gc.ca/eng/>

⁵⁹ Site Web de la législation (Justice): <http://laws-lois.justice.gc.ca/fra/>

⁶⁰ Canadian System of Justice: Links to Resources: <http://www.justice.gc.ca/eng/contact/link-lien.html>

⁶¹ Supreme Court Judgments: http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do

⁶² LEGISinfo: <http://www.parl.gc.ca/LEGISINFO/Home.aspx?ParliamentSession=42-1>

⁶³ Treaties, Laws and Regulations: <https://www.canada.ca/en/government/system/laws.html>

⁶⁴ For a guide to Canada's municipal governments, see Quesnel and Hamel (2006).

⁶⁵ CanLII Website Terms of Use: <http://www.canlii.org/en/info/terms.html>

⁶⁶ Federal Register of Legislation: <https://www.legislation.gov.au/>

administrative arrangements orders, Norfolk Island legislation, and prerogative instruments. Norfolk Island is one of the dependent areas of Australia. Australia has six states, two territories, and six dependent areas (Central Intelligence Agency, 2013).

The four principal federal courts of Australia (PFCAs) have their separate websites: High Court of Australia (HCA), Federal Court of Australia (FCA), Family Court of Australia (FCoA), and Federal Circuit Court of Australia (FCCA). They are not linked to one another. FCoA, FCA, and FCCA share a joint portal just for access to cases before them.⁶⁷ Apart from Norfolk Island mentioned above, neither the FRL nor any of the PFCAs has links to the OLIWs of states, territories, and dependent areas. Similarly, no link exists to any OLIW of the hundreds of Australia's local governments⁶⁸ that have law-making powers, e.g. those of Queensland (Queensland Government, 2015).

The *third-party* Australasian Legal Information Institute (AustLII) website⁶⁹ contains an *unofficial* version of Australian legal information that many people rely on. AustLII's disclaimer states: 'AustLII does not invite reliance upon, nor accept responsibility for, the information it provides. [. . .] Users should confirm information from another source if it is of sufficient importance for them to do so.'⁷⁰

2.4.6 New Zealand

The New Zealand Legislation (NZL) website⁷¹ contains Acts, Bills, legislative instruments, other instruments, and supplementary order papers.⁷² It has links to the Ministry of Justice Judicial Decisions Online (JDO).⁷³ JDO has external links to

⁶⁷ Commonwealth Courts Portal: <https://www.comcourts.gov.au/>

⁶⁸ For information on Australia's local governments, see Australian Local Government Association (n.d.).

⁶⁹ Australasian Legal Information Institute: <http://www.austlii.edu.au/>

⁷⁰ Disclaimers of Liability: <http://www.austlii.edu.au/austlii/disclaimers.html>

⁷¹ New Zealand Legislation: <http://www.legislation.govt.nz/>

⁷² What's on the Site and How It Works: <http://www.legislation.govt.nz/howitworks.aspx#whatonsite>

⁷³ Judicial Decisions Online: <https://forms.justice.govt.nz/jdo/Introduction.jsp>

the Courts of New Zealand (CNZ);⁷⁴ Decisions Finder;⁷⁵ and Courts Finder.⁷⁶ NZL and CNZ have no links to any OLIW of the regions and territory of New Zealand, nor to any of the country's 78 local governments,⁷⁷ e.g. Auckland Council website that contains its regulations and bylaws.⁷⁸

JDO has links to the *third-party* New Zealand Legal Information Institute (NZLII) website that contains several *unofficial* databases of New Zealand legal information, e.g. Supreme Court of New Zealand judgments.⁷⁹ NZLII states: 'NZLII does not invite reliance upon, nor accept responsibility for, the information it provides. [. . .] Users should confirm information from another source if it is of sufficient importance for them to do so.'⁸⁰

2.4.7 General Remarks

Having outlined the findings on each of the six developed countries examined, it is important to add some general remarks on them—two here and the remainder in Section 2.6 below. First, only the US Govinfo NOLIW has all the specified categories⁸¹ of national (federal) legal information, albeit some categories are not comprehensive, e.g. court decisions. Govinfo contains only *selected* decisions of just a few of the more than 100 US federal courts whose decisions are hosted on the US Courts website. The US Supreme Court also hosts its decisions on its website. Therefore, Govinfo is not a complete one-stop NOLIW, based on the first criterion in Section 2.2 above. Only the NOLIW (legislation) of Canada has links to all of Canada's second-tier OLIWs. No NOLIW of any of the countries has a link to their third-tier OLIWs of local government councils. Therefore, they all lack the *networked one-stop access feature* because they do not satisfy the twin criteria outlined in Section 2.2 above.

⁷⁴ Courts of New Zealand: <http://www.courtsofnz.govt.nz/from/decisions/judgments.html>

⁷⁵ Decisions: <https://www.justice.govt.nz/courts/decisions/>

⁷⁶ Find Us: <https://www.justice.govt.nz/contact-us/find-us/>

⁷⁷ For information on New Zealand local governments, see New Zealand Government (2011).

⁷⁸ Licences and Regulations: <http://www.aucklandcouncil.govt.nz/EN/licencesregulations/Pages/home.aspx>

⁷⁹ Supreme Court of New Zealand: <http://www.nzlii.org/nz/cases/NZSC/>

⁸⁰ Disclaimers of Liability: <http://www.nzlii.org/nzlii/disclaimers.html>

⁸¹ For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

Second, each of the countries has a Legal Information Institute which is a *third-party* non-governmental organisation that publishes some of the country's *unofficial* legal information online. Although their services are significant, the provision of public access to legal information is a legal and moral duty of every government (Arnold-Moore, 2004; Ward, 2016; Mitee, 2017a, pp. 1445–1449). No government should rely on a *third-party* website for access to any aspect of its own legal information (Mitee, 2017a, pp. 1446–1447). This article focuses on legal information on official websites owned by governments and IGOs.

2.5 A Summary of the Situation in the English-Speaking Developing Countries⁸²

The Table in the Appendix to this article contains the list of the 54 English-speaking developing countries selected for this brief study. The selection criteria for these countries are discussed in Section 2.3 above. I used the Google Internet search engine (see Section 2.6 below) to search for the NOLIWs that contain *legislation*, which I refer to as *official national legislation websites (ONLWs)*.⁸³ A summary of the findings is presented below.

Some ONLWs of the developing countries are dedicated legal information websites (e.g. Trinidad and Tobago⁸⁴) while the others are on the websites of the legislature (e.g. Solomon Islands⁸⁵), the Attorney-General (e.g. Mauritius⁸⁶), law reform commission (e.g. Tanzania⁸⁷), and the Ministry of Justice (e.g. Jamaica⁸⁸). I use the term 'ONLW' in this context in a *broad* sense to refer to the *main* government-owned website (that I could find) which contains *some* national legislation, without regard to its comprehensiveness nor the *basic* technical features of a proper legal information database, e.g. advanced arrangement and categorisation of resources, advanced search functionality, and the requisite

⁸² Based on the state of the websites examined in March 2017.

⁸³ I coined this term and its abbreviation.

⁸⁴ Digital Legislative Library: <http://laws.gov.tt/>

⁸⁵ National Parliament of Solomon Islands: <http://www.parliament.gov.sb/index.php?q=node/237>

⁸⁶ Laws of Mauritius: <http://attorneygeneral.govmu.org/English/LawsofMauritius/Pages/default.aspx>

⁸⁷ Laws of Tanzania From 2002-2016: <http://www.lrct.go.tz/laws-of-tanzania/>

⁸⁸ Searching for a Law?: <https://moj.gov.jm/laws>

document formats. For example, Nigeria,⁸⁹ Papua New Guinea,⁹⁰ and Tanzania⁹¹ have merely an insignificant official collection of national legislation on their websites. This assessment is based on the range of years covered. The Nigerian collection, for instance, is from 1999, while Nigeria's legislation in force spans more than a century from 1914 when the Protectorates of Southern and Northern Nigeria were amalgamated to form one country under British rule (Orimolade & Iwu, 2016, p. 46).

No ONLW of any of the countries has databases of all categories⁹² of legal information on a single website, but Kenya Law website⁹³ has an impressive number of the categories. It contains legislation, court decisions, international legal instruments, bills, parliamentary debates (Hansard), and some legal notices. The website also contains an online version of The Kenya Gazette. None of the ONLWs has links to all their second- and third-tier OLIWs. Therefore, they all lack the *networked one-stop access feature* proposed in Section 2.2 above.

There are websites of legal information institutes in some of the developing countries and territories that contain *third-party unofficial* legal information of those countries, e.g. Seychelles Legal Information Institute (SeyLII)⁹⁴ and Southern African Legal Information Institute (SAFLII).⁹⁵ The Law Reporting department of the Judiciary of Uganda publishes Ugandan legal information on the Uganda Legal Information Institute (ULII) website⁹⁶ instead of publishing it on a Uganda government-owned website. The parliament website of Vanuatu contains only links to the country's legal information on the Pacific Islands Legal Information Institute (PACLII) website.⁹⁷ I remarked above (Section 2.4.7) that it is improper for the government of any country to rely on the databases of legal information institutes. Any government that abdicates, to any third party whatsoever, its legal

⁸⁹ Search Documents: <http://www.nassnig.org/document/acts>

⁹⁰ Bills and Legislation: <http://www.parliament.gov.pg/bills-and-legislation>

⁹¹ Laws of Tanzania from 2002-2016: <http://www.lrcr.go.tz/laws-of-tanzania/>

⁹² For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

⁹³ Kenya Law: <http://www.kenyalaw.org/kl/>

⁹⁴ Seychelles Legal Information Institute: <http://www.seylli.org/>

⁹⁵ Southern African Legal Information Institute: <http://www.saflii.org/>

⁹⁶ Law Reporting: <http://www.judiciary.go.ug/data/smenu/25/Law%20Reporting.html>

⁹⁷ Acts of Parliament: <https://parliament.gov.vu/index.php/icons/members-of-10th-legislature>

and moral duty to provide free and adequate public access to its legal information, denies its people their right to a vital public service.

2.6 Conclusion

As a legal professional and researcher, I had considerable difficulty in finding all the various OLIWs of the countries studied. The exercise involved numerous Internet *searches* via Google, which is the world's dominant Internet search engine (Vanberg & Ünver, 2017, p. 11; StatCounter Global Stats, 2017; Netmarketshare, 2017). There were instances when I had to research a country's *administrative structure* (using the country's official sources and *The World Factbook*⁹⁸) to establish the number and names of the constituent states (regions or provinces) and local governments in order to be able to search for their respective OLIWs. I also had to research a country's *legal system* on several occasions to know the different legislatures and courts to be able to search for their OLIWs. Finding information on a country's administrative structure and legal system from *reliable* online sources is itself another problem. The implication is that the general public who need to know the law that regulates their conduct and activities, ignorance of which is no excuse (Mitee, 2017a, pp. 1463–1466), are bound to have much greater difficulty in finding their country's numerous OLIWs. It is even worse in the case of those who want to find the OLIWs of other countries. The ease with which a person can find the legal information of other countries is vital because legal information is for the whole world for the purposes of global legal research, transactions, business operations, migration, tourism, etc. (Mitee, 2017a, p. 1445).

The difficulty as outlined reveals the inadequacy of the existing system of organising and linking the official online legal information resources of a country. In such a situation, it may sometimes be impossible for people to find all the OLIWs of a country due to the imperfection of Internet search engines and the factors that determine the reliability of their results, e.g. the requisite search skills (Popkoff, n.d.; Wood *et al*, 2016; Mitee, 2017b). In fact, the higher the number of administrative divisions of a country that create legal information, the harder the problem of finding their laws online. This reality may explain my inability to locate

⁹⁸ Central Intelligence Agency (2013).

the ONLWs of nine English-speaking developing countries in the course of this study, if in fact they do exist.

Apart from the US Govinfo, the NOLIW of Kenya (a developing country in Africa), contains more categories⁹⁹ of on-site legal information than those of all the other 49 countries examined. These include the other five English-speaking developed countries: UK, Canada, Ireland, Australia, and New Zealand. No NOLIW of any of the 60 countries and territories has external links to the OLIWs of all the states (regions or provinces) and local governments of the country. Therefore, they all lack the *networked one-stop access feature* (based on the twin criteria discussed in Section 2.2 above) that is necessary for public access to the whole stock of any country's *available* online legal information. The similarity between the developed and developing countries regarding the lack of the networked one-stop access feature means the problem has no relationship with the digital or technological divide, at least in the case of these 60 countries and territories.

However, it is in the *availability* (quantity) of online legal information and the *quality of the databases* due to the application of modern legal information systems, where there lies a stark difference between the six developed and 54 developing countries and territories studied, and this is in favour of the developed countries. For instance, the resources on some of the NOLIWs of the developing countries are so scanty that they cannot properly be called 'legal information websites', e.g. those of Nigeria (Mitee, 2017a, p. 1434), Papua New Guinea, and Tanzania (Mitee, 2017b).¹⁰⁰ Some of the laws of these countries are mere poorly scanned PDF copies of the print version, e.g. those of Nigeria. Anguilla and the Cayman Islands are examples of countries that do not provide free online access at all. Anguilla's OLIW is only for the sale of both print and electronic versions of its laws instead of publishing them online to provide free public access (Mitee, 2017b).¹⁰¹ Access to the online laws of the Cayman Islands is by paid subscription.¹⁰²

⁹⁹ For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

¹⁰⁰ See the Appendix to this article for links to their official legal information websites.

¹⁰¹ AnguillaLaws.com: <http://www.anguillalaws.com/>

¹⁰² Laws of the Cayman Islands: <https://www.judicial.ky/laws>

From the findings above, the problem of inadequate public access to all the *available* official online legal information resources of any country, as caused by the existence of fragments of these resources on multiple isolated OLIWs, exists in all the countries and territories studied, but to varying degrees. It therefore transcends the digital or technological divide and other global inequalities that usually place developing countries with scarce resources at a disadvantage. From the number of countries studied, their different continents, and their development status (developed and developing), this problem has a global dimension. Its cause is simply a poor global web development approach that does not incorporate the one-stop access concept nor the integration of all the OLIWs of a country. These defects may be linked to the lack of proper policy on public access to legal information. The web development concept and policy solution to this problem are discussed in Section 3 below.

3. The Proposal for Official Networked One-Stop Legal Information Websites

The proposal for the solution to the problem of inadequate public access to the whole stock of any country's available official online legal information due to its poor organisation, as revealed by the findings in the foregoing Section 2, is discussed below. The implementation and policy framework for the proposal are also examined.

3.1 The Proposal

To address the problem discussed in Section 2 above, I now develop and advocate adoption of the '*system of official networked one-stop legal information websites*' (the 'ONOLIWs system')¹⁰³ as the definitive solution to the global difficulty in finding the different categories¹⁰⁴ and fragments of any country's legal information on multiple unconnected OLIWs. I define an '*official networked one-stop legal information website*' (ONOLIW)¹⁰⁵ as the 'official legal information

¹⁰³ I coined both terms.

¹⁰⁴ For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

¹⁰⁵ I coined this term and its abbreviation.

website of any government (national, state, or local) which contains the complete stock of all categories of that government's legal information on-site¹⁰⁶ and an exhaustive index of all official legal information websites of that country.' An ONOLIW has the '*networked one-stop access feature*' (NOSAF)¹⁰⁷ that guarantees maximum findability of and optimum access to the whole stock of any country's *available* official online legal information. The ONOLIWs system builds upon the existing concept of one-stop access websites.

A one-stop access website allows someone to find with greatest ease all categories of any required information in the same place, some of which may be from different external sources, e.g. the European Competition Network website¹⁰⁸ (European Commission, 3 April 2006). It is not always feasible to host every database or resource *on-site*. The use of *external links* to *off-site* resources on other relevant websites enhances one-stop access in situations where it will be cumbersome, unnecessarily bureaucratic, technically inadvisable, or organisationally inexpedient to host such information on the same website.

Europa, the European Union's official one-stop website (Hoppmann, 2010, p. 169), launched in February 1995 (European Union, 21 June 2017), is one of the oldest examples of a one-stop website. It has been rightly described as 'one of the most information-heavy websites in the world' (Euractiv, 14 July 2009).

Some governments are now realising the importance of one-stop access websites as the best method of providing public access to their huge, diverse official information resources. That is the rationale behind the award-winning Gov.uk website ('Gov.uk Wins Design of the Year Award', 2013), into which '[t]he websites of all government departments and many other agencies and public bodies [were] merged. . .' (United Kingdom Government, n.d.–b). Griff Rhys Jones, who was one of the Design of the Year jury members, remarked about Gov.uk that it 'creates a benchmark for which all international government websites can be judged on' ('Gov.uk Wins Design of the Year Award', 2013). The Guardian referred to Gov.uk

¹⁰⁶ "On-site" here means on the same website.

¹⁰⁷ I coined this term and its abbreviation. See Section 2.2 above.

¹⁰⁸ European Competition Network (ECN): http://ec.europa.eu/competition/index_en.html

as ‘a *one-stop* [emphasis added] digital shop for all government services and information’ (‘“Direct and Well-Mannered” Government Website’, 2013).

A few years later (in February 2016¹⁰⁹), the US government launched its one-stop Govinfo website that contains federal information from its three arms of government, i.e. executive, legislature, and judiciary (United States Government Publishing Office, n.d.). EUR-Lex¹¹⁰ is an excellent example of the application of the concept of one-stop access website to *regional* legal information. It provides free public access, in all the 24 official languages of the European Union, to all categories of European Union law.¹¹¹

From its description above, the ONOLIWs system goes beyond the present concept of one-stop access websites. It adapts the one-stop concept to create one ONOLIW for the national government, one for each state or regional government, and one for each local government, and goes further to create an exhaustive network of all these ONOLIWs via external links. This way, each ONOLIW functions like a mega website for all the ONOLIWs of the country.

3.1.1 Domain Names and Official Networked One-Stop Legal Information Websites

The ONOLIWs system requires that every national, state (regional or provincial), and local government should have one, and only one, ONOLIW that will create a one-stop complete collection of all categories¹¹² of its legal information, each of which is hosted with the *same (second-level) domain name*. One-stop websites use *single* domains (Lazo, 1 November 2013) to host its on-site resources. There are two existing categories of domains that governments use for hosting their OLIWs in the world today: shared and dedicated legal information domains.

Shared legal information domains (SLIDs)¹¹³ are used for hosting legal information databases on a general website that contains other resources that are not part of those databases nor inextricably connected to them. Obvious examples include

¹⁰⁹ See United States Government Publishing Office (2016).

¹¹⁰ EUR-Lex: <http://eur-lex.europa.eu/homepage.html>

¹¹¹ About EUR-Lex: <http://eur-lex.europa.eu/content/welcome/about.html>

¹¹² For the list of these categories, see the meaning of ‘official legal information’ in Section 1 above.

¹¹³ I coined this term and its abbreviation.

India's treaties database on the website of the Ministry of External Affairs¹¹⁴ and the US' federal legal information databases on its Govinfo website.¹¹⁵ Govinfo contains resources from the three branches of the federal government (executive, legislature, and judiciary). SLIDs even extend subtly to situations where those other resources are law-related, e.g. the websites of the Attorney-General,¹¹⁶ the Ministry of Justice,¹¹⁷ and even the legislature (e.g. Solomon Islands¹¹⁸), as I explain under the dedicated category below. The public-access implication of SLIDs depends on the relevance and importance of the other resources hosted together which determine the volume of online traffic (visitors) to the website.

One disadvantage of SLID-websites is the possible difficulty in navigating the legal information component, which depends on the web design approach. Another disadvantage is that their *second-level domains* (SLDs) do not usually give people any identification clue about their legal information resources, e.g. *govinfo* in the US government <www.govinfo.gov> website. Further, EUR-Lex,¹¹⁹ the European Union official legal information SLID-website, uses <www.eur-lex.europa.eu> that contains *eur-lex*, a subdomain (third-level domain). 'Law' is more generally known than the Latin, 'lex' and 'European' or 'Europe' is more popular than *Europa*. Therefore, an easy-to-recognise SLD, such as <www.europeanlaw.eu> would have been more appropriate, as discussed in the next category below. In addition, the use of *hyphens* in domain names is inadvisable. It makes it difficult for people to remember them correctly (e.g. when a domain name was seen in print or heard), which is bad for direct URL access (Website.com, n.d.; Bangani, 2014). It may also have a negative impact on search engine optimisation (SEO) (Bennett, 2012).

Dedicated legal information domains (DLIDs)¹²⁰ are domains used for websites that contain only legal information. The SLDs of DLIDs usually contain relevant

¹¹⁴ Indian Treaties Database: <http://www.mea.gov.in/treaty.htm>

¹¹⁵ Govinfo: <https://www.govinfo.gov/>

¹¹⁶ Example, Mauritius:
<http://attorneygeneral.govmu.org/English/LawsofMauritius/Pages/default.aspx>

¹¹⁷ Example, Jamaica: <https://moj.gov.jm/laws>

¹¹⁸ National Parliament of Solomon Islands:
<http://www.parliament.gov.sb/index.php?q=node/237>

¹¹⁹ EUR-Lex: <http://eur-lex.europa.eu/homepage.html>

¹²⁰ I coined this term and its abbreviation.

keywords that help people identify them easily as legal information websites, e.g. <www.legislation.uk> (UK legislation) and <www.kenyalaw.org> (Kenyan legal information). Such an identification feature may *induce* online users who are searching for relevant, reliable legal information to access DLID-websites. Dedicated OLIWs should be *neutral*, i.e. not part of any website that also hosts other resources from any of the three branches of government, including the website of the legislature. The reason for this is because the executive and judiciary also create other categories of legal information.

Regulated legal information domains (RLIDs)¹²¹ form the third category of domain names that could be used for hosting official online legal information databases, but they are not yet in existence. RLIDs can only be available for use if the Internet Corporation for Assigned Names and Numbers (ICANN)¹²² creates a *generic top-level domain (gTLD)* that is reserved only for OLIWs. ICANN requires any organisation that desires to operate a new gTLD to apply for it whenever it (ICANN) embarks on an application round (Internet Corporation for Assigned Names and Numbers, 2011, p. 1). The latest application round began in 2012, and all pending applications are expected to have been concluded by the end of 2017 (Internet Corporation for Assigned Names and Numbers, 2016, p. 10).

Regulated gTLDs help people to identify official, authentic, and genuine online information, products, and institutions (Internet Corporation for Assigned Names and Numbers, n.d.; Nazzaro, 2014, p. 48). Examples of such existing gTLDs include <.health>, <.organic>, <.physio>, and <.edu>. In my recent work, *Enhancing Public Access to Legal Information: A Proposal for a New Official Legal Information Generic Top-Level Domain* (Mitee, 2017b) which is complementary to this article, I suggest <.officiallaws> as the appropriate regulated legal information gTLD for OLIWs. The proposed <.officiallaws> gTLD is essential for creating RLIDs that will facilitate easy global identification of reliable official online legal information and enhance worldwide public access to OLIWs (Mitee, 2017b). RLIDs will therefore be the most advantageous category of domains for ONOLIWs.

¹²¹ I coined this term and its abbreviation.

¹²² Internet Corporation for Assigned Names and Numbers: <https://www.icann.org/>

A SLD with the proposed <.officiallaws> gTLD (Mitee, 2017b) can be used to illustrate the ONOLIWs system. Assuming that the domain name of the US federal ONOLIW is <www.us.officiallaws>, the concept of ONOLIWs can be implemented easily using a *subdomain*, which is a *third-level domain*, for each category¹²³ or source of its legal information. For example, the subdomains of the United States Code, Congressional Bills, and Supreme Court decisions would be <www.uscode.us.officiallaws>, <www.bills.us.officiallaws>, and <www.sc.us.officiallaws>, respectively. A different team of experts could manage each subdomain-OLIW (for each category of legal information, e.g. legislation) or several subdomain-OLIWs. For example, the European Commission's websites that are a part of the official one-stop website of the European Union 'are developed by its various departments' (European Commission, 4 January 2017). Such arrangement facilitates delegation of responsibilities and decentralisation of management functions (Shapiro, 2008, pp. 207–208), which improves efficiency (Nzimakwe & Pillay, 2014; Mohammed, North, and Ashton, 2016).

Subdomains are usually short, and therefore it is much easier to remember their URLs for *direct access* without the use of an Internet search engine. The world's leading technology companies with unbelievably vast online resources use the same concept of subdomains seamlessly for their various products and services. Examples include Apple (e.g. <https://support.apple.com>); Google (e.g. <https://scholar.google.com>, <https://books.google.com>, <https://mail.google.com>); Facebook (e.g. <https://developers.facebook.com>); and Microsoft (e.g. <https://support.microsoft.com>, <https://answers.microsoft.com>). The United States Courts website (<http://www.uscourts.gov/>) is the classic example of the use of subdomains for legal information from diverse sources (here, the different courts total more than 100).

3.1.2 Model of the Navigation Menus of an Official Networked One-Stop Legal Information Website

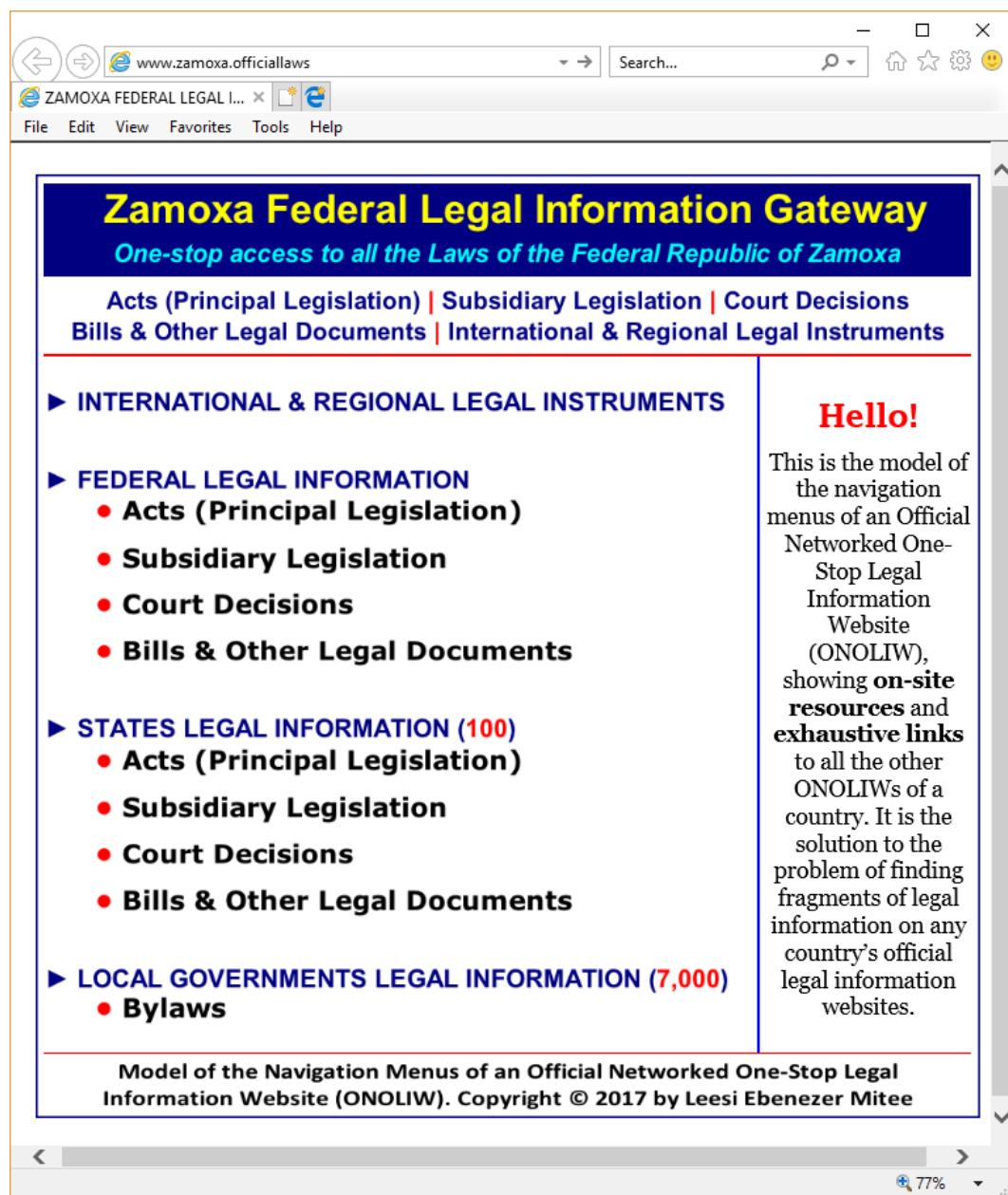
The Figure below shows the screenshot of the model of the navigation menus of a typical ONOLIW, previewed in Microsoft Edge Web browser.¹²⁴ The Federal Republic of Zamoxa is a hypothetical country that has a federal government, 100

¹²³ For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

¹²⁴ Microsoft Edge: <https://www.microsoft.com/en-us/windows/microsoft-edge>

states, and 7,000 local government councils, all of which create legal information (three tiers).

Figure: Screenshot of the model of the navigation menus of an Official Networked One-Stop Legal Information Website (ONOLIW)



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The model illustrates how the ONOLIW system can provide optimum access to a country's entire stock of online legal information, irrespective of the complexity of its administrative structure and legal system. The top navigation menu contains links to all categories¹²⁵ of legal information of the particular legislative jurisdiction (in this case, national) that are hosted on the website (on-site). The left-side navigation menu contains *conspicuous* links to all the ONOLIWs of the country (national, state, and local). This structure guarantees the required *networked one-stop access feature* of all ONOLIWs (discussed in Section 2.2 above) and provides the best possible access to the available official online legal information of every country, the aggregation of which is a seamless global access.

3.2 The Unique Advantages of Official Networked One-Stop Legal Information Websites

The ONOLIWs system has some unique advantages. First, it guarantees that, from any relevant search engine results page (SERP) or via direct access, any person can easily find an ONOLIW of any country. That ONOLIW will contain all categories¹²⁶ of the legal information of the *legislative jurisdiction* (defined in Section 1 above) that owns it, which may be the national government, a state (regional or provincial) government, or a local government. The one-stop access feature makes it possible for people to find any available official online legal information of that jurisdiction with the greatest ease.

Second, every ONOLIW of any country provides optimum access to the whole stock of that country's available online legal information via its external links that form an *exhaustive index* of the country's ONOLIWs. This unique capability solves the present problem of performing numerous Internet searches for the different OLIWs of a country, with no guarantee of success (as I explained above in Section 2.6). In addition, under the existing system, it is often necessary to know or research the *administrative structure* of a country and its *legal system* in order to be able to search for all of that country's legal information on the various isolated OLIWs; this is a tedious and time-consuming exercise in itself, which is eliminated

¹²⁵ For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

¹²⁶ For the list of these categories, see the meaning of 'official legal information' in Section 1 above.

entirely by the ONOLIW system. This is particularly significant because the users of legal information include members of the international community who may not be familiar with the administrative structure of a country and its legal system, and searching for reliable official information of another country is usually a difficult task (Brazier and Harvey, 2017).

Third, it is easier and cheaper, technically and financially, to manage one ONOLIW than a multiplicity of OLIWs under the existing system whereby each category of legal information or each unit under a category (e.g. the OLIW of each of the numerous courts under the *judicial decisions* category) is usually managed separately. The ONOLIW system allows the number of subdomain-OLIWs that are managed separately to be reduced. The use of only one second-level domain for all the subdomain-OLIWs of each ONOLIW (discussed in Section 3.1.1 above) will save whatever would have been the cost of buying all the different domain names and their perpetual annual renewal.

Fourth, the popularity of ONOLIWs due to their networked one-stop access feature will reduce the rate of use of third-party unofficial online legal information that may be obsolete, incomprehensive, or inaccurate (Mann, 2012, pp. 81–82), an example of which is Nigeria-law.org website¹²⁷ (Mitee, 2017b). Legal information is extremely dynamic due to the large volume of new laws, frequent amendment and repeal of existing laws, reversal of court decisions on appeal, changes in administrative policies and regulations, etc. This inherent characteristic of law poses a challenge to achieving up-to-date and reliable online legal information. Third-party, free-access providers of unofficial legal information are usually in a much worse situation due to many constraints of funds, technology, and expertise. Some of them also have the problem of inaccurate digitisation of print documents (Mitee, 2017b).

3.3 Implementation of The Proposal for Official Networked One-Stop Legal Information Websites

Every government can implement the ONOLIWs system described in Section 3.1 above because it is simply a web development concept. It is technically feasible to host the whole stock of the legal information of a *legislative jurisdiction* (defined

¹²⁷ The Law Library: <http://nigeria-law.org/LawLibrary.htm>

in Section 1 above) on one, and only one, ONOLIW to provide *on-site* one-stop access, and to interlink all ONOLIWs of a country. The example of the World Legal Information Institute (WorldLII), arguably the world's largest law-specific online catalogue and facility for free legal research (Greenleaf, 2010; Danner and Winterton, 2016, p. 208), validates this claim. WorldLII contains links to over 15,000 law-related websites in all the countries of the world (World Legal Information Institute, n.d.; Greenleaf, 2010)¹²⁸ and hosts several legal information databases on its website. In addition, it has connection to 1,829 databases from 123 jurisdictions through 14 legal information institutes.¹²⁹

The solution to the problem of multiple unconnected OLIWs lies in formulating and implementing the proper policy on the design standards for the OLIWs of every country. The policy should incorporate the ONOLIWs system proposed in this article. It should also make it mandatory for each state and each local government to submit the details of its ONOLIW (including its title and URL) to a designated national office responsible for preparing an *exhaustive index of all the ONOLIWs of the country*. The online version of this index should be placed only on the *national* ONOLIW so that all the other ONOLIWs can simply provide a *conspicuous link* to it on their main navigation menus, and any updating will simply be done at its national source. Similar policies can be made at the regional and international levels to strengthen the national policies.

As a web development concept, the *additional* cost implication of the ONOLIWs system is minimal. Every government has the legal and moral duty to provide free and adequate public access to its legal information (Arnold-Moore, 2004; Ward, 2016; Mitee, 2017a; Mitee, 2017b). The cost of performing this duty is one of the inevitable and inherent costs of democracy (McMahon, 1999). Any government that cannot digitise its laws (starting with those in force) and publish them on its official website with free access, for the benefit of its citizens who are bound to obey them, is not fit to govern.¹³⁰ The reason is that the cost of providing such free online access to legal information is minimal and affordable. Such a government lacks the legal and moral authority to demand compliance to its *unknowable* laws

¹²⁸ About WorldLII: <http://www.worldlii.org/worldlii/index.html>

¹²⁹ WorldLII: <http://www.worldlii.org/>

¹³⁰ Some of the benefits of free public access to legal information are mentioned in Section 2.1 above; see also Mitee (2017a, pp. 1466–1469).

because such demand amounts to grave injustice and reckless violation of the people's right to know the laws they are bound to obey, ignorance of which is no excuse for contravention (*Rex v. Bailey*, 1800; *United States v. Casson*, 1970; Matthews, 1983; Perry, 2016; Mitee, 2017a).

How much would it cost to scan the old print versions of legal information into *editable texts*, using optical character recognition technology (OCR),¹³¹ and then proofread them to ensure they are the exact version of the original? How much would it cost to buy a web hosting plan;¹³² buy a domain name;¹³³ develop a website, upload documents to it, and maintain it (all of which a mere handful of government employees can carry out)? Yet, that is all that is required for a *basic* ONOLIW that is still much, much better than print-based legal information, even without the sophistication of modern legal information systems (Mitee, 2017a, pp. 1434, 1436). A modern ONOLIW can be developed using open-source software and development tools that are available free of charge, thereby saving considerable costs. One example of such use is the government of Nauru's Online Legal Database.¹³⁴

Therefore, lack of political will (Bannister, 1996; Mitee, 2017a, pp. 1433–1437), bad governance, and corruption are the most likely causes of the lack of proper OLIWs in many developing countries. For instance, that may be the explanation for Nigeria not having any proper OLIW (Mitee, 2017a, p. 1434), unlike countries such as Kenya, The Bahamas, and Antigua and Barbuda.¹³⁵ Nigeria has been one of the world's major oil- and gas-producing countries for decades (Organisation for Economic Co-operation and Development, 2007; Consumer News and Business Channel, 2011). It ranked poorly at 157 out of 179 countries on the World Governance Index 2011 (Forum for a New World Governance, 2011) and 136 out of 176 countries on the Corruption Perceptions Index 2016 (Transparency International, 2016). This lack of political will on the part of the governments of many developing countries is a good reason for global governance of public access

¹³¹ Information on this is available on reputed online stores worldwide.

¹³² Information on this is available on reputed online stores worldwide.

¹³³ Information on this is available on reputed online stores worldwide.

¹³⁴ About the System: http://ronlaw.gov.nr/nauru_lpms/index.php/content/item/about-the-system

¹³⁵ See the Appendix to this article for the addresses of their legal information websites.

to legal information. The reason is that such governments require some external coercive measures under international law to realise the need to perform their legal and moral duty to provide free and adequate public access to their legal information (Mitee, 2017a, pp. 1431, 1457–1460), an indispensable component of which is online access (discussed in Section 2.1 above).

4. Conclusion

This article has examined the use of the *system of official networked one-stop legal information websites* (ONOLIWs) as a workable technological tool for enhancing national and global public access to *official* legal information published by governments and IGOs that make laws, who have the legal and moral duty to provide free and adequate access to them.¹³⁶

The revolutionary impact of free global online access to legal information, started by Thomas R. Bruce and Peter W. Martin when they co-founded Cornell University's Legal Information Institute (LII) in 1992, reveals the indispensability of websites to every successful public access to legal information project. More than 30 million people from over 240 countries and territories visit LII annually (Bruce, 2015, p. 1). Many governments worldwide have accepted this reality and have published their legal information online, but lack of a proper approach to its implementation has resulted in a multiplicity of isolated websites containing fragments of legal information.¹³⁷ This situation has caused people considerable difficulties in finding the *available* online legal information of any country. A review of the OLIWs of 60 countries and territories, which include all the six English-speaking developed countries (the US, UK, Ireland, Canada, Australia, and New Zealand), has confirmed the global existence of the problem which is not limited to developing countries that have economic and technological disadvantages.¹³⁸

The ONOLIWs system developed in this article is the definitive solution to the existing difficulty of finding all the fragments of a country's official legal

¹³⁶ Section 2.1 above.

¹³⁷ Section 2.1 above.

¹³⁸ Section 2 above.

information that are littered on a multiplicity of isolated OLIWs.¹³⁹ It provides a two-pronged solution that guarantees the availability of the whole stock of the online legal information of a *legislative jurisdiction* (defined in Section 1 of this article) on a single website (the ONOLIW) and the easy accessibility of all the ONOLIWs of a *country* via an exhaustive index. Every ONOLIW would contain a conspicuous link on the main navigation menu to this national index. This easy-access capability of the ONOLIWs system is indeed novel.

The proposed ONOLIWs system will therefore provide optimum access to any country's available official online legal information, the aggregation of which is seamless access to global legal information. It will thereby promote good knowledge of the law, which has many benefits for individuals, organisations, and the state itself. Governments at all levels (national, state, and local), IGOs that create legal information, and developers of their OLIWs will benefit immensely from the concept of ONOLIWs and the mechanics of its implementation developed in this article. Adoption of the proposed policy framework that incorporates the ONOLIWs concept is imperative.

¹³⁹ Section 3 above.

Appendix

Table: Official National Legislation Websites of 60 English-Speaking Countries

S/No.	Country	Official National Legislation Website	Remarks
A. DEVELOPED COUNTRIES			
1	Australia	https://www.legislation.gov.au/	No NOSAF ¹
2	Canada	http://laws.justice.gc.ca/eng/	No NOSAF
3	Ireland	www.irishstatutebook.ie/	No NOSAF
4	New Zealand	www.legislation.govt.nz/	No NOSAF
5	United Kingdom	www.legislation.gov.uk/	No NOSAF
6	United States	https://www.govinfo.gov/app/browse/category	No NOSAF
B. DEVELOPING COUNTRIES			
7	Anguilla	www.anguillalaws.com/	No NOSAF No free online access. Revised edition of its complete Acts in print and CD-ROM costs \$1,875.00; CD-ROM only costs \$1,200.00 (www.anguillalaws.com/law.php). Individual laws cost \$10.00 - \$45.00 each (www.anguillalaws.com/act.php); only regulations are free.
8	Antigua and Barbuda	http://laws.gov.ag/new/index.php	No NOSAF
9	Bahamas	http://laws.bahamas.gov.bs/cms/en/	No NOSAF
10	Barbados	www.barbadosparliament.com/bills/search	No NOSAF

¹ 'No NOSAF' means 'no networked one-stop access feature'. See Section 2.2 of this article for the networked one-stop access feature criteria.

11	Belize	www.belize-law.org/web/lawadmin/index2.html	No NOSAF
12	Bermuda	www.bermudalaws.bm/SitePages/Home.aspx	No NOSAF
13	Botswana	www.elaws.gov.bw/	No NOSAF
14	British Virgin Islands	http://eservices.gov.vg/gazette/content/about-official-gazette	I searched but could not find its official legislation website. Print Official Gazette that contains legislation is by paid subscription.
15	Cayman Islands	https://www.judicial.ky/	No NOSAF Access to the online database is by paid subscription.
16	Dominica	www.dominica.gov.dm/laws-of-dominica	No NOSAF
17	Falkland Islands	www.fig.gov.fk/legal/index.php/gazettes-supplements	No NOSAF Official Gazette on CD-ROM that contains legislation is by paid subscription (£40.00 within Falkland Islands).
18	Fiji	www.fiji.gov.fj/Fiji-Laws/2016.aspx	No NOSAF
19	Gambia	http://assembly.gov.gm/index.php/category/news/assembly-business/acts-bills/	I searched but could not find its official legislation website.
20	Ghana	www.parliament.gh/docs?type=Acts&OT	I searched but could not find its official legislation website.
21	Gibraltar	www.gibraltarlaws.gov.gi/	No NOSAF
22	Grenada	http://laws.gov.gd/	No NOSAF
23	Guernsey	www.guernseylegalresources.gg/article/6325/Home	No NOSAF
24	Guyana	http://mola.gov.gy/information/laws-of-guyana	No NOSAF
25	Hong Kong	https://www.elegislation.gov.hk/	No NOSAF

26	India	http://indiacode.nic.in/	No NOSAF
27	Isle of Man	https://legislation.gov.im/cms/	No NOSAF
28	Jamaica	https://moj.gov.jm/laws	No NOSAF
29	Jersey	https://www.jerseylaw.je/Pages/default.aspx	No NOSAF
30	Kenya	http://kenyalaw.org/kl/	No NOSAF
31	Lesotho	www.parliament.ls/assembly/index.php?option=com_docman&task=cat_view&gid=38&Itemid=89	I searched but could not find its official legislation website. No legislation was found on the Parliament website.
32	Liberia	http://legislature.gov.lr/	I searched but could not find its official legislation website. Legislature website not accessible.
33	Malawi	www.parliament.gov.mw/#/bills	No NOSAF Just a few Acts were available on the Parliament website.
34	Malta	www.justiceservices.gov.mt/	No NOSAF
35	Mauritius	http://attorneygeneral.govmu.org/English/LawsofMauritius/Pages/default.aspx	No NOSAF
36	Montserrat	http://agc.gov.ms/	No NOSAF
37	Namibia	www.parliament.na/	No NOSAF
38	Nauru	http://ronlaw.gov.nr/nauru_lpms/	No NOSAF
39	Nigeria	www.nassnig.org/	No NOSAF Just a few Acts and bills were available on the National Assembly website.
40	Papua New Guinea	www.parliament.gov.pg/bills-and-legislation	No NOSAF Just a few Acts and bills were available on the Parliament website.
41	Philippines	www.congress.gov.ph/legisdocs/?v=ra	No NOSAF
42	Pitcairn	www.government.pn/Laws/	No NOSAF

43	Seychelles	www.attorneygeneraloffice.gov.sc/index.php/resources/print-publications/laws-of-seychelles	No NOSAF
44	Sierra Leone	www.parliament.gov.sl/dnn5/ParliamentaryBusiness/Acts.aspx	No NOSAF
45	Singapore	http://statutes.agc.gov.sg/aol/home.w3p	No NOSAF
46	Solomon Islands	www.parliament.gov.sb/index.php?q=node/237	No NOSAF
47	South Africa	www.gov.za/documents/acts	No NOSAF
48	St Helena	www.sainthelena.gov.sh/laws/	No NOSAF
49	St Kitts and Nevis	https://www.gov.kn/	I searched but could not find its official legislation website.
50	St Lucia	www.govt.lc/house-of-assembly	I searched but could not find its official legislation website.
51	St Vincent and the Grenadines	www.assembly.gov.vc/assembly/	I searched but could not find its official legislation website.
52	Swaziland	www.gov.sz/index.php?option=com_content&view=category&id=73&Itemid=624	I searched but could not find its official legislation website.
53	Tanzania	www.lrct.go.tz/laws-of-tanzania/	No NOSAF Just a few Acts were available on the Law Reform Commission website.
54	Tonga	http://crownlaw.gov.to/cms/	No NOSAF
55	Trinidad and Tobago	www.legalaffairs.gov.tt/Laws_listing.html and http://laws.gov.tt/	No NOSAF
56	Turks and Caicos Islands	https://www.gov.tc/agc/laws/revised-laws-2014	No NOSAF
57	Uganda	www.ulrc.go.ug/laws-of-uganda	No NOSAF
58	Vanuatu	https://parliament.gov.vu/index.php/icons/members-of-10th-legislature	No NOSAF No legislation was available on the Parliament website which directs

			visitors to the Pacific Islands Legal Information Institute (PACLI) for its legislation.
59	Zambia	www.parliament.gov.zm/acts/volumes	No NOSAF
60	Zimbabwe	www.parlim.gov.zw/acts	No NOSAF

‘No NOSAF’ means ‘no networked one-stop access feature’. See Section 2.2 of this article for the networked one-stop access feature criteria.

Classification of countries as “developed” and “developing” is based on the United Nations classification (United Nations, 2017, pp. 153–154).

Date of last access of all the websites: 15 March 2017.

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CHAPTER FIVE

Huricompatisation: The Human Rights-Based Model of Ascertainment of Indigenous Customary Law for Adequate Public Access¹

“Ubi jus incertum, ibi jus nullum (Where the law is uncertain, there is no law).”
Latin Legal Maxim**

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** Henry Campbell Black, *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (2nd Edn New Jersey: The Law Exchange 1995) 1181.

Abstract

As a response to the growing global prominence of indigenous rights and the right of every person to know the laws that regulate the person's conduct and activities, this article examines how adequate public access to the unwritten rules of indigenous customary law can be achieved in such a way that the method of providing that access also complies with the general human rights and the specific rights of indigenous communities. The theory of legal certainty provided the theoretical framework for this article, an aspect of which is the concept of ascertainment of indigenous customary law. The other specific relevant concepts are the rule of law and the doctrine of ignorance of the law is no excuse. The United Nations-endorsed human rights-based approach (HRBA) provided the conceptual framework for analysing the human-rights requirements of the model ascertainment method, while the specific requirements for adequate public access to indigenous customary law were formulated from existing literature. The findings of the study include the following: There are four existing methods of ascertainment of unwritten indigenous customary law, namely judicialization, codification, restatement, and self-statement; and those methods neither provide adequate public access to indigenous customary law nor protect the human rights and indigenous rights of the communities affected by the ascertainment of their law. To provide an alternative to the existing deficient methods of ascertainment, this article develops the human rights-compliant and public access-adequate new model of ascertainment of indigenous customary law, acronymed *huricompatisation*. *Huricompatisation* incorporates a mix of twelve relevant general human rights and specific indigenous rights into ten essential requirements for adequate public access to indigenous customary law. This article argues that *huricompatisation* satisfies the need of the members of indigenous communities to know the applicable rules of their indigenous customary law and that it also preserves the evolving and adaptive nature of that law. Further, *huricompatisation* protects their general human rights (e.g. the right to a fair trial) and their specific indigenous rights, including their omnibus right to self-determination that encompasses their right to self-governance in their internal affairs, as well as their rights to their culture and indigenous identity. Additionally, *huricompatisation* provides the opportunity for unprecedented free public access to indigenous customary law from communities worldwide. The United Nations, regional bodies, governments at all levels, intergovernmental and nongovernmental organisations, other policymakers who work on indigenous

matters, and indigenous communities will benefit from the law-reform utility and policy relevance of this article that extends the frontiers of the right of free access to public legal information to indigenous customary law globally.

Keywords: Huricompatisation indigenous customary law ascertainment; Right of free access to public legal information; Right of public access to indigenous customary law; Customary law judicialization; Customary law codification; Customary law restatement; Customary law self-statement

1. Introduction

Oral or unwritten indigenous customary law is the original, and therefore the oldest, form and category of law because it evolved organically before the invention of the art of writing, in response to the natural instinct of humankind for order in the society. It predated customary international law because the human society, as we have it today, evolved from isolated autonomous communities that were totally self-governing before they began to interact with others over time. The *unwritten form* of indigenous customary law makes it inherently inaccessible, unreliable, and unknowable to many people (including court judges) because it exists only in the *minds* of some people and its statement therefore depends on human memory.² Therefore, people find it difficult to know exactly what its rules are. Its nebulous nature makes it susceptible to distortions, manipulations, and injustice.³ It also undermines an aspect of the principle of *legal certainty*—a principal cornerstone of the rule of law—which requires that the laws that people are bound to obey are certain so that the possible legal consequences of their conduct are predictable, as much as possible.⁴ Further, the unwritten form of indigenous customary law is not compliant with a bundle of human rights (including the right of free access to public legal information), and this noncompliance has profound adverse implications for

² Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3; Akpomuvire Mukoro, 'The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect' (2011) 26(2) Journal of Social Sciences 139, 140–141.

³ AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) The Modern Law Review 244, 248 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1957.tb00442.x/epdf>> accessed 13 August 2017; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

⁴ Sofia Ranchordás, 'Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?' (2015) 36(1) Statute Law Review 28, 36–38 <<https://doi.org/10.1093/slr/hmu002>> accessed 3 September 2017; Patricia Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2008) 2(1) Legisprudence 47–66 <www.tandfonline.com/doi/abs/10.1080/17521467.2008.11424673> accessed 23 May 2019.

justice and the rule of law. Further, it violates the right of access to justice that encompasses the right to a fair trial, including the *nullum poena sine lege*⁵ constitutional safeguard. It also destroys trust in the system of justice, as people are held liable under the laws they cannot know, thereby violating the rule of law. Unwritten indigenous customary law is therefore both public access-inadequate and human rights-noncompliant, thus making it unsustainable in the twenty-first century information and communications technology (ICT) age with its pervasive universal human rights principles.

With the invention of the art of writing, the need to solve the numerous problems associated with the unwritten *form* of indigenous customary law led to the development of the ancient concept of its *ascertainment*. Ascertainment of indigenous customary law simply refers to the process of recording or transmitting its oral or unwritten rules into writing.⁶

Global interest in indigenous matters intensified after the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁷ in 2007 with an overwhelming majority of 144 states. Only four states⁸ voted against its adoption, but they subsequently reversed their vote between 2009 and 2010;⁹ while eleven states¹⁰ abstained from the vote.¹¹ It is significant that the UN General Assembly, the UN Human Rights Council, and the UN Economic and Social Council have made a combined total of not less than 18 resolutions relating to the rights of indigenous peoples, between 21 December

⁵ A Latin maxim that means 'no punishment without law'.

⁶ Comprehensively defined in Section 4.4.1 below.

⁷ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 <<https://undocs.org/A/RES/61/295>> accessed 13 May 2019.

⁸ Australia, Canada, New Zealand, and the United States.

⁹ 'UN Declaration on the Rights of Indigenous Peoples' (*Indigenous Foundations*) <https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/> accessed 13 May 2019.

¹⁰ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine.

¹¹ 'United Nations Declaration on the Rights of Indigenous Peoples' (*United Nations*) <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 13 May 2019.

2010 and 13 November 2018.¹² The United Nations has described UNDRIP as ‘the most comprehensive international instrument on the rights of indigenous peoples.’¹³ About five years after the adoption of UNDRIP, the United Nations Development Programme (UNDP) co-sponsored the massive South Sudan Customary Law Ascertainment project in 2012.¹⁴ Meanwhile, interest in the human-right status of the right of free access to public legal information had begun in 2001,¹⁵ after which the famous Montreal Declaration on Free Access to Law was made by the Free Access to Law Movement (FALM) in 2002. Other statements and principles were made thereafter, including the Calgary Statement on Free Access to Legal Information (2011),¹⁶ and the Statement on Government Provision of Public Legal Information in the Digital Age 2016 by the International Federation of Library Associations (IFLA).¹⁷ These manifestations of the growing global prominence of indigenous rights and the right of every person to know the laws that regulate the person’s conduct and activities have now made it necessary to re-examine the global issue of ascertainment of indigenous customary law.

¹² UNGA ‘Rights of Indigenous Peoples’ UNGA 73rd Session UN Doc A/C.3/73/L.24/Rev.1 (13 November 2018) <<https://undocs.org/A/C.3/73/L.24/Rev.1>> accessed 25 May 2019.

¹³ ‘United Nations Declaration on the Rights of Indigenous Peoples’ (*United Nations*) <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 13 May 2019.

¹⁴ United Nations Development Programme, ‘Ascertainment of Customary Laws in South Sudan: Discussion Paper’ (*United Nations Development Programme*) 3 <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

¹⁵ Steven D Jamar, ‘The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law’ 2001 1(2) *Global Jurist Topics* 1–13 <<https://doi.org/10.2202/1535-167X.1032>> accessed 15 April 2018.

¹⁶ Council of Canadian Academic Law Library Directors, ‘Calgary Statement on Free Access to Legal Information’ (*Osgoode Hall Law School*, 14 May 2011) <www.osgoode.yorku.ca/wp-content/uploads/2014/07/Calgary_Statement_2011-05-14.pdf> (Calgary Statement).

¹⁷ International Federation of Library Associations, ‘IFLA Statement on Government Provision of Public Legal Information in the Digital Age’ (*International Federation of Library Associations*, 2016) <www.ifla.org/files/assets/clm/statements/ifla-statement-on-public-legal-information-and-annex.pdf> accessed 16 May 2018.

This article therefore aims to examine how adequate public access to the unwritten rules of indigenous customary law can be achieved in such a way that the method of providing that access also complies with the general human rights and the specific rights of indigenous communities. To achieve this aim, the specific objectives of this article are as follows: (1) To find out what the existing methods of ascertainment of indigenous customary law are. (2) To determine whether those existing methods in objective (1) provide adequate public access to indigenous customary law. (3) To determine whether those existing methods in objective (1) protect the general human rights and the specific indigenous rights of indigenous communities. (4) To develop a new public access-adequate and human rights-compliant ascertainment model, if the existing methods in objective (1) are deficient, based on the findings from objectives (2) and (3).

Methodologically, this study used the theory of legal certainty¹⁸ as its theoretical framework, a specific aspect of which is the concept of ascertainment of the oral or unwritten rules of indigenous customary law,¹⁹ to provide the foundation of the research and its direction. It also used the concept of the duty-right relationship between the State and the people under the rule of law²⁰ and the doctrine of ignorance of the law is no excuse (the *ignorantium juris* doctrine).²¹ The United Nations-endorsed human rights-based approach (HRBA)²² provided the conceptual framework for analysing the human-rights requirements of the proper ascertainment model, while the specific requirements for adequate public access to indigenous customary law were formulated from existing literature. The doctrinal approach helped to glean the human rights-compliant criteria in this article from the relevant provisions on general human rights and the specific rights of indigenous peoples. Those provisions were identified from the three primary sources of international law in Article 38(1) of the Statute of the International

¹⁸ Discussed in Section 4 of Chapter One.

¹⁹ Discussed in Section 4.3.3 of Chapter One.

²⁰ Discussed in Section 4.3.1 of Chapter One.

²¹ Discussed in Section 4.3.2 of Chapter One.

²² UNSDG 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (adopted by the United Nations Sustainable Development Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019 (UN Statement of Common Understanding 2003).

Court of Justice²³ (hereinafter ICJ Statute). The said provisions are from the Universal Declaration of Human Rights (UDHR);²⁴ the nine core international human rights instruments;²⁵ UNDRIP;²⁶ and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention 1989.²⁷ Understanding the technological requirements for publishing legal information online required the use of the interdisciplinary approach, based on the author's expertise.

It is necessary to clarify the scope of this article sufficiently to explain its nature so as to aid understanding of its subject, as indigenous customary law is a multidisciplinary concept that is beyond mainstream law. Firstly, this article is extensive due to the complex nature of the subject and the need for a comprehensive law-reform and policy-relevant framework that the United Nations, regional intergovernmental organisations, governments at all levels, non-governmental organisations, other policymakers who work on indigenous matters, and indigenous communities can implement to solve the contemporary public-access and human-rights problems that it deals with.

Secondly, the main thrust of the discussion is *indigenous customary law* that regulates the binding and enforceable customs and practices of indigenous communities or peoples, which is different from *customary international law*. It is

²³ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> accessed 6 July 2019 (ICJ Statute).

²⁴ Universal Declaration of Human Rights, UNGA Res 217 (III) (adopted 10 December 1948) (UDHR) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed 9 August 2019.

²⁵ UN Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties* (United Nations 2014) <www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf> accessed 5 June 2019.

²⁶ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 <<https://undocs.org/A/RES/61/295>> accessed 13 May 2019 (UNDRIP).

²⁷ Indigenous and Tribal Peoples Convention 1989 (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 9 August 2019.

for this reason that the term ‘indigenous customary law’ is deliberately used throughout this article. The term ‘customary law’ is used only in some instances when the context obviously refers to indigenous customary law and when it is necessary to preserve the term in the reference to any source under discussion.

Thirdly, the main focus of the article is on how the *form* in which indigenous customary law exists (i.e. its oral or unwritten *form* and the different types of its written *form*) complies with the requirements of the human right of free access to public legal information and other human rights that protect the rights of human beings in general and those of indigenous peoples in particular, such as the right to self-governance in their internal and local affairs. The *form* in which indigenous customary law exists is different from the issue of incompatibility of indigenous customary law *itself*—or any of its rules—with any human rights obligations, such as harmful customs and practices that violate human rights. Examples of such customs and practices include female genital mutilation (FMG);²⁸ denial of widows’ right to inherit their deceased husband’s property, including their matrimonial home;²⁹ and trial by the ordeal of rituals and all forms of dangerous practices to determine the guilt or innocence of accused persons.³⁰

Fourthly, this article focuses on two aspects of accessibility of indigenous customary law. One, the *availability* of its rules or principles in a permanent form through publication so that they are capable of being found, read, and known with the greatest ease, i.e. *primary access* which is both physical and digital. Two, publication of the ascertained rules of indigenous customary law in the indigenous language of each community (and also in any other language, as may be

²⁸ World Health Organization, ‘Female Genital Mutilation’ (*World Health Organization*, 31 January 2018) <<https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>> accessed 20 July 2019.

²⁹ Human Rights Watch, ‘Violations of Property and Inheritance Rights of Widows in Zimbabwe’ (*Human Rights Watch*, January 24, 2017) <<https://www.hrw.org/report/2017/01/24/you-will-get-nothing/violations-property-and-inheritance-rights-widows-zimbabwe>> accessed 20 July 2019.

³⁰ United Nations, ‘Liberia: UN Report Calls for Ending Sometimes Deadly Cultural Practices that Violate Human Rights’ (*United Nations*, 18 December 2015) <<https://news.un.org/en/story/2015/12/518522-liberia-un-report-calls-ending-sometimes-deadly-cultural-practices-violate>> accessed 20 July 2019.

necessary)³¹ so that those rules are capable of being understood, which is an aspect of *intelligible access*. These are also the two aspects of *legal certainty* that this article discusses.

This article contributes to the literature on indigenous customary law and international human rights law and has global societal relevance. In the first place, it fills two fundamental gaps in the concept of ascertainment. First, it applies the concept of the right of public access to indigenous customary law to ascertainment. In doing so, the article argues that indigenous customary law is a *primary* source of law and, therefore, deserves equal right of free access like the other primary sources of law, e.g. legislation. In contrast, the deficient overriding objective of the existing methods of ascertainment is *formal judicial recognition* of the rules of unwritten indigenous customary law and the mere *transmission* of those rules into their written form. Second, this article applies the United Nations-endorsed HRBA³² to ascertainment to ensure the protection of the general human rights and the specific indigenous rights of the affected indigenous communities. The article fills both gaps by developing the new concept of *human rights-compliant public access to indigenous customary law* (acronymed *huricompatisation*). This model has the potential to provide adequate public access, preserve the evolving and adaptive nature of indigenous customary law, and satisfy the provisions of the relevant international human rights law and the specific indigenous rights that protect the autonomy, self-governance, and identity of indigenous peoples and minorities, for example. *Huricompatisation* will therefore cure the defects of the existing methods of ascertainment of indigenous customary law: judicialization, codification, restatement, and self-statement. *Huricompatisation* provides a set of criteria for assessing the adequacy of public access to indigenous customary law and its compliance with human rights

³¹ Linguistic rights are human rights and are also interwoven with cultural rights. See ICCPR art 27; ICESCR arts 1, 3, 6, 15; UNDRIP arts 2, 3, 5, 8, 13, 14, 15, 16; *Lambert v California*, 225 U.S. 355 (1957); Universal Declaration on Linguistic Rights (Barcelona Declaration), World Conference on Linguistic Rights (9 June 1996) <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019; Claire Kramsch, *Language and Culture* (Oxford University Press 1998) 3.

³² UNSDG 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (adopted by the United Nations Sustainable Development Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019.

principles. In the second place, this article gives direction for the much-needed policy on, and reform of, the laws regulating indigenous customary law worldwide, e.g. the preservation of its adaptive nature; the administrative framework for indigenous customary law; and its proper recording, adoption, publication, publicity, amendment, and review. The United Nations (especially UNDP that is involved in the South Sudan Customary Law Ascertainment Project), regional bodies, governments at all levels, intergovernmental and nongovernmental organisations, other policymakers who work on indigenous matters, and indigenous communities will benefit from the law-reform utility and policy relevance of this article.

The rest of this article is structured in seven sections. Section 2 discusses the meaning of ‘indigenous communities’ and ‘indigenous customary law’ while Section 3 examines the two forms of indigenous customary law (unwritten and written). Section 4 discusses the right of public access to indigenous customary law and the concept of ascertainment, including the meaning of ascertainment and the existing ascertainment methods. Section 5 presents the public-access and human-rights defects of the existing ascertainment methods. Section 6 discusses the human rights-based approach. Section 7 develops *huricompatisation* as the new model for human rights-compliant and public access-adequate ascertainment of indigenous customary law. Section 8 (Conclusion) presents the findings and recommendations of the study.

2. The Meanings of Indigenous Communities and Indigenous Customary Law

The meanings of ‘indigenous communities’ and ‘indigenous customary law’ are discussed in this Section. They are two major concepts in customary-law jurisprudence that need clarification, especially in the context of this article.

2.1 The Meaning of Indigenous Communities

It is important to clarify the meaning of the terms ‘indigenous communities’ or ‘indigenous peoples’ in the context of this article because it is fundamental to understanding the subject of the discussion. The most popular definition of the said terms is that of José Martínez Cobo—the UN Commission on Human Rights

Special Rapporteur—which is the United Nations’ ‘working definition’.³³ Cobo defined ‘indigenous communities’ or ‘indigenous peoples’ or ‘indigenous nations’ as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.³⁴

From Cobo’s definition above, ‘indigenous communities’, ‘indigenous peoples’, and ‘indigenous nations’ are synonymous. Therefore, they can be used interchangeably, as they are used in this article. However, ‘indigenous communities’ is preferred in this article because it has the widest scope. An indigenous community refers to both the corporate status of all members of the community as a group, as well as the community itself as a distinct geographical entity with its communal sovereignty and homogenous legal system. As discussed in Section 5 of this article, the concept of communal sovereignty with its homogenous indigenous legal system is of immense importance in indigenous customary-law jurisprudence because it affects the validity of methods of ascertainment of unwritten indigenous customary law. Communal sovereignty is a cardinal aspect of each community’s distinct indigenous identity.

The said Cobo’s definition is useful to the concept of indigenous peoples, although it is not universally acceptable, and there are objections to it, as there are to the

³³ United Nations, ‘Indigenous Peoples at the UN’ (*United Nations*) <www.un.org/development/desa/indigenouspeoples/about-us.html> accessed 12 May 2019.

³⁴ José R Martínez Cobo, ‘Study of the Problem of Discrimination Against Indigenous Populations’ (1986) UN Doc E/CN.4/Sub.2/1986/7/Add.4 para 379 <<https://undocs.org/en/E/CN.4/Sub.2/1986/7/Add.4>> accessed 5 July 2019.

other numerous definitions.³⁵ However, for the *specific* purposes of indigenous customary-law jurisprudence, I define an ‘indigenous community’ broadly as a distinct, autonomous, and sovereign society of people with a common cultural, linguistic, social, political or administrative, economic, environmental, and religious³⁶ identity; whose conduct, practices, ceremonies, activities, transactions, and institutions are regulated by their own autochthonous laws and—as necessary and justifiable—by the laws of the larger society to which they belong.

This elaborate definition incorporates the concept of communal sovereignty with its homogenous indigenous legal system and it is broad enough to cover all aspects of the concept of indigenous customary law and the nature of the communities that are regulated by such law. In this context, indigenous communities are both rural and urban communities that *practice indigenous customary law*. This clarification is important because some people erroneously think that ‘indigenous’ equates to rural. There are indigenous communities that practise their customary law even in the capital cities of the most developed countries and among those in the *diaspora*. One example is that of the immigrant members of the Kurdish community in the City of London who apply their Kurdish indigenous customary law, far away in the United Kingdom.³⁷

Further, indigenous communities obviously include the well-known indigenous peoples that exist all over the world. They include the unclad, uncontacted tribes

³⁵ For the discussion of the limitations of many of these definitions, see, for example, Simon Makuvaza, *The Management of the Matobo Hills in Zimbabwe: Perceptions of the Indigenous Communities on their Involvement and Use of Traditional Conservation Practices* (Leiden University Press 2016) 13–22 <<https://openaccess.leidenuniv.nl/handle/1887/43736>> accessed 24 May 2019.

³⁶ Not all indigenous communities have a common religious identity. The human right to freedom of religion may diminish the importance of a common religious identity.

³⁷ Latif Tas, ‘Kurdish “Unofficial” Law in the *Gurbet*’ in Prakash Shah, Marie-Claire Foblets and Mathias Rohe (eds), *Family, Religion and Law: Cultural Encounters in Europe* (Routledge 2016) 209–232.

of Brazil's Amazon forest;³⁸ the Aborigines of Australia;³⁹ the Native Indians of the United States;⁴⁰ the First Nations People of Canada;⁴¹ and the Omo Valley Tribes of Ethiopia.⁴² Indigenous communities may be the constituent units of a larger *indigenous people* group or autonomous communities that do not belong any larger people group.

2.2 The Meaning of Indigenous Customary Law

Indigenous customary law is also referred to as common law, folk law, indigenous law, informal law, living law, primitive law, traditional law, unwritten law, unofficial law, native law, and tribal law.⁴³ Such a rare variety of different terms for one concept is indicative of problems underlying the understanding of its nature. This is no surprise because, apart from lawyers, professionals from different academic disciplines—including folklorists, classicists, anthropologists, historians, sociologists, and philosophers—all lay claim to expertise in indigenous customary law.⁴⁴

³⁸ Joanna Eede, 'Uncontacted Tribes: The Last Free People on Earth' (*National Geographic*, 1 April 2011) <<https://voices.nationalgeographic.org/2011/04/01/uncontacted-tribes-the-last-free-people-on-earth/>> accessed 22 August 2017.

³⁹ Robert Tonkinson and Ronald M Berndt, 'Australian Aboriginal Peoples', *Encyclopaedia Britannica* (21 June 2017) <www.britannica.com/topic/Australian-Aboriginal> accessed 24 May 2019.

⁴⁰ WorldAtlas, 'US States with the Largest Native American Populations' (*WorldAtlas*, 25 April 2017) <www.worldatlas.com/articles/us-states-with-the-largest-native-american-populations.html> accessed 24 May 2019.

⁴¹ Government of Canada, 'First Nations in Canada' (*Government of Canada*, 2 May 2017) <<https://www.rcaanc-cirnac.gc.ca/eng/1307460755710/1536862806124>> accessed 14 July 2019.

⁴² Survival, 'The Omo Valley Tribes' (*Survival*) <www.survivalinternational.org/info> accessed 22 August 2017.

⁴³ Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) xiii; A Weis Bentzon, 'Negotiated Law: The Use and Study of Law Data in International Development Research' (1994) Roskilde University International Development Studies Occasional Paper No 13 92, 97 <<https://rossy.ruc.dk/index.php/ocpa/article/view/4158>> accessed 21 June 2019.

⁴⁴ Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) xiii.

‘Indigenous customary law’ is used throughout this article, and I suggest that it should be the preferred term globally. The reason is that the term ‘customary law’ has already rightly acquired universal acceptance over the centuries as the term for law derived from binding and enforceable *custom* at both international and national levels. To distinguish between them to avoid any confusion in terminology, customary law at the national level should be appropriately qualified as *indigenous* customary law, as opposed to customary *international* law at the international level. The fact of its origin from *custom* is what is essential for purposes of *terminology*, not whether it is unwritten or written. For instance, some rules of indigenous customary law exist in different types of its written form,⁴⁵ similar to those of codified customary international law in international treaties.

There are numerous definitions of indigenous customary law, but their detailed examination is beyond the scope of this article. One relevant definition is that of Patricia Adjei which states that ‘[c]ustomary law refers to the laws, practices and customs of indigenous and local communities which are an intrinsic and central part of the way of life of these communities.’⁴⁶ She rightly explains that ‘[c]ustomary laws are embedded in the culture and values of a community or society; they govern acceptable standards of behavior and are actively enforced by members of the community.’⁴⁷

I define ‘indigenous customary law’—from the public legal information perspective—simply as a category of the primary sources of law which consists of the valid and enforceable practices and rules of a particular indigenous community that are binding in that community. It should be noted that, as international customs are a primary source of international law, so are indigenous customs a primary source of domestic law in plural legal systems. My definition contains the essential aspects of indigenous customary law, as outlined below.

⁴⁵ Section 3.2 below.

⁴⁶ Patricia Adjei, ‘What Place for Customary Law in Protecting Traditional Knowledge?’ (*World Intellectual Property Organization*, August 2010) <www.wipo.int/wipo_magazine/en/2010/04/article_0007.html> accessed 24 May 2019.

⁴⁷ *Ibid*

First, it is significant that indigenous customary law is ‘a category of the primary sources of law.’ That means indigenous customary law requires legal certainty and publication to provide free and adequate public access to it, similar to legislation, judicial decisions, and binding international legal instruments, for instance.

Second, indigenous customary law ‘consists of valid and enforceable practices and rules.’ Every practice or rule of indigenous customary law must be valid to be enforceable. For instance, any custom that discriminates on the basis of the circumstances of one’s birth or denies the inheritance rights of widows is invalid and unenforceable because it violates the human rights of its victims.

Third, indigenous customary law is that ‘of a particular indigenous community’, which means it is community-dependent or ‘community-specific’, as rightly stated by Korang.⁴⁸ This explains the difference in the indigenous customary law of even border communities and communities that belong to the same ethnic group.⁴⁹ Therefore, the idea of *uniform* indigenous customary law across different indigenous communities or groups reveals a faulty understanding of the inherent nature of indigenous customary law.

Fourth, the said community-specific nature of indigenous customary law makes it ‘binding in that community’ only, because it lacks ‘extracommunal’ validity due to *community sovereignty* that is a microcosmic equivalent of State or national sovereignty. Community sovereignty here means each indigenous community is sovereign over its internal affairs in relation to other indigenous communities and, therefore, cannot be bound by the indigenous customary law of another community.

It is noteworthy that any reference to ‘long usage’ or ‘time immemorial’ is no longer relevant to the definition of indigenous customary law, because of its changing or evolving nature.⁵⁰ Colonial governments imported those terms from

⁴⁸ Daniel Korang, ‘Ascertainment of Customary Law: A Question of Law or of Fact or Both?’ (2015) 38 Journal of Law, Policy and Globalization 93, 94 <www.iiste.org/Journals/index.php/JLPG/article/viewFile/23519/23925> accessed 19 July 2017.

⁴⁹ Paul Kuruk, ‘African Customary Law and the Protection of Folklore’ (2002) 36(2) Copyright Bulletin 4, 6 <<http://unesdoc.unesco.org/images/0012/001277/127784e.pdf>> accessed 19 July 2017.

⁵⁰ Eugene Cotran, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72, 73–74; Jean G Zorn, ‘Custom Then

their home legal systems into indigenous customary law as one of the requirements for the validity of local customs, but many independent States have expunged them from their laws.⁵¹ For example, Schedule 1.2 of the Constitution of the Independent State of Papua New Guinea 1975 defines ‘custom’ as ‘the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.’

3. The Forms of Indigenous Customary Law

In this thesis, the ‘form of indigenous customary law’ refers to the nature of the *medium* in which the rules of indigenous customary law exist, which may be oral (unwritten) or written.⁵² There are two diametrically opposed views on the acceptable form of indigenous customary law: One view extols unwritten indigenous customary law while the other abhors it. In-between both extremes are different views on the proper method of recording or documenting indigenous customary law.

3.1 The Oral or Unwritten Form of Indigenous Customary Law

Customary law is the original *human* law for human societies. It originated organically or spontaneously⁵³ and has evolved from a complex and dynamic

and Now: The Changing Melanesian Family’ in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Australian National University E Press 2010) 95, 97 <www.jstor.org/stable/pdf/j.ctt24h3jd.14.pdf> accessed 24 May 2019.

⁵¹ Jean G Zorn, ‘Custom Then and Now: The Changing Melanesian Family’ in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Australian National University E Press 2010) 95, 97 <www.jstor.org/stable/pdf/j.ctt24h3jd.14.pdf> accessed 24 May 2019.

⁵² M W Prinsloo, ‘Restatement of Indigenous Law’ (1987) 20 Comparative and International Law Journal of Southern Africa 411, 411–412.

⁵³ For the theory of spontaneous customary law, see Francesco Parisi, ‘Spontaneous Emergence of Law: Customary Law’ in Boudewijn Bouckaert and Gerrit de Geest (eds), *Encyclopedia of Law & Economics, Volume 5* (Edward Elgar 2000) 603–630 <www.scribd.com/document/239535/Spontaneous-Emergence-of-Law-Customary-Law> accessed 17 August 2017.

interplay of the cultural, religious, economic, political, environmental, religious, and social realities that underlie the evolution of society. It originated as oral traditions because it predated the art of writing or existed in 'preliterate culture'⁵⁴ and it has been in existence 'since the emergence of early man.'⁵⁵ Oral customary law therefore existed before any form of written law.⁵⁶

Despite the epoch-making invention of the cuneiform⁵⁷ as the first writing system in about 3100 BC⁵⁸ and progressive, revolutionary developments in writing and publishing technologies over several millennia, customary law has survived in its original, organic, oral form. It is still the dominant *form* of indigenous customary law in the world today.⁵⁹

At one extreme of the views on the acceptable form of indigenous customary law are some scholars who extol its unwritten form, and may be referred to as 'oralists'. Oralists hold two major conceptions of the nature of indigenous customary law. First, some of them advocate that indigenous customary law should exist undisturbed in its oral form;⁶⁰ to them the idea of documenting or recording indigenous customary law in *any* written form whatsoever is anathema. They argue that oral customary law develops organically, freely, or spontaneously

⁵⁴ Rodrigo Míguez Núñez, 'Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case' (2016) 24 *Rechtsgeschichte — Legal History* 302, 303 <http://data.rg.mpg.de/rechtsgeschichte/rg24_302miguez.pdf> accessed 17 August 2017.

⁵⁵ GCJJ van Den Bergh, 'The Concept of Folk Law in Historical Context: A Brief Outline' in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 5, 5.

⁵⁶ MP Jain, 'Custom as a Source of Law in India' in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 49, 50.

⁵⁷ Jaan Puhvel, 'Cuneiform', *Encyclopædia Britannica* <www.britannica.com/topic/cuneiform> accessed 24 May 2019.

⁵⁸ James Burke, 'Invention', *Encyclopædia Britannica* <www.britannica.com/technology/invention-technology> accessed 24 May 2019.

⁵⁹ Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 *International and Comparative Law Quarterly Supplementary Publication* 72, 73; MW Prinsloo, 'Restatement of Indigenous Law' (1987) 20 *Comparative and International Law Journal of Southern Africa* 411, 412.

⁶⁰ Nico Horn, Book Review (2011) 3(1) *Namibia Law Journal* 133, 139 <www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/11-1/NLJ_section_11.pdf> accessed 19 July 2017 (emphasis added).

and that recording it in writing (even when it is not codified as statute law) formalises it and destroys its native flexibility as the *living customary law*.⁶¹ According to them: 'It is trite that the writing down of customary law renders it no longer customary.'⁶² Second, some oralists seem to mystify unwritten indigenous customary law as sacred law whose ghost broods in the shadows as the 'living law'. For example, according to Horn, 'some traditional authorities still see the unwritten [customary] laws [of Namibian communities] as *mystical secrets*.'⁶³

It is difficult to justify the position of the oralists, because it misses the essence of indigenous customary law: Its essence is not its oral form, but in its evolution, acceptability, adaptability, and application within a distinct indigenous community as its own autochthonous body of binding rules. Therefore, the concept of oral indigenous customary law as the 'living law' should relate to its ability to adapt to necessary changes in the society;⁶⁴ not its continued existence in its inaccessible, unascertained, nebulous, and unsustainable oral state. Rules of indigenous customary law are dynamic and may change in the following major ways: through obsolescence, without any deliberate intervention, when they are no longer useful or relevant; and by deliberate communal assent. They also change consequentially, when they are naturally or inherently inconsistent with any appropriate law that is higher in hierarchy (e.g. legislation and court decisions) and human rights principles; and when any appropriate law (including international legal instruments) *specifically* effects the change, e.g. via direct abrogation; and when they violate human rights principles.

The *proper* transmission of oral or unwritten indigenous customary law into its written form—as proposed in this article—does not jeopardise, nor derogate from, its customariness.⁶⁵ The mystification of indigenous customary law that

⁶¹ For the meaning of 'living customary law', see Daniel Huizenga, 'Articulations of Aboriginal Title, Indigenous Rights, and Living Customary Law in South Africa' (2018) 27(1) Social & Legal Studies 3–24 <<https://doi.org/10.1177/0964663917710986>> accessed 24 May 2019.

⁶² Andrew Harding, 'Legal Pluralism and the Constitutional Position of East Malaysia's Indigenous Peoples: The View from the Longhouse' in Gary F Bell (ed), *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M B Hooker* (ISEAS Publishing 2017) 185.

⁶³ Nico Horn, Book Review (2011) 3(1) Namibia Law Journal 133, 139.

⁶⁴ Johanna Bond, 'Gender and Post-Colonial Constitutions in Sub-Saharan Africa' in Helen Irving (ed), *Constitutions and Gender* (Edward Elgar Publishing 2017) 81, 83.

⁶⁵ Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72, 73.

shrouds it in secrecy is a formidable barrier to its development and the right of public access to it.

The oralists' conception of indigenous customary law as law that must remain unwritten is partly responsible for its subservient status to the documented or enacted primary sources of law, such as legislation. The simple reason is that it is trite that documentary evidence is usually superior to oral evidence—a principle that is based on the need for certainty, whose four related aspects are authenticity, accuracy, verifiability, and permanence for historical or archival purposes.

3.2 The Written Form of Indigenous Customary Law

The defects of the unwritten form of indigenous customary law—discussed in Section 3.1 above—led to different attempts to produce its written form. These attempts may be grouped into the following three categories: codification, ordinary recording, and judicial recording.

First, at the other extreme of the oralists' views on the acceptable form of indigenous customary law are some scholars who abhor its unwritten form: They may be referred to as 'abrogationists'. Abrogationists advocate codification and the complete abrogation of unwritten indigenous customary law because of the adverse consequences of its nebulous, uncertain nature. Codification here simply means the formal enactment of the rules of indigenous customary law as legislation or statute law.

Jain provides a good example of the views of abrogationists. He posits that indigenous customary law's lack of uniformity; its variations across families, regions, and communities; its burden on the judiciary, for example, its time-consuming nature; its costs from calling witnesses to prove its existence; its vagueness; and its indefinite nature, 'point to one inevitable result: abrogation of custom and enactment of legislation instead.'⁶⁶ Referring to India in his abrogationist proposal, Jain asserts that the 'time is ripe for uniform legislation

⁶⁶ MP Jain, 'Custom as a Source of Law in India' in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 49, 74.

and abolition of custom' whenever the society has achieved sophistication and literacy.⁶⁷ He concludes with the assertions that customs in India should be abrogated because they perpetuate class distinctions and hinder societal integration, and that the importance of custom diminishes with the advancement of every society.⁶⁸

Second, in-between both extremes of the oralists' and abrogationists' views on the form of indigenous customary law is the view that it should be recorded in an *ordinary* written form—but not codified as legislation—so that people can easily know its rules, based on the advantages of documentation. The recording may be done by an individual or a group of persons who may be members of the community or outsiders. The two existing approaches to this type of recording of indigenous customary law are *restatement* and *self-statement*. One major difference between them is the emphasis of self-statement—as the name suggests—on the recording process as the exclusive task for the members of the community, not by outsiders.

Third, *judicial recording* produces another category of written indigenous customary law. It takes place when any court accepts the existence and validity of any rule of indigenous customary law based on credible evidence. The court records the facts of the rule so that they are permanently available in its record of proceedings and judgment. Some of such judgments are thereafter published in law reports while the others remain unreported. This category of written indigenous customary law is referred to as 'judicial ascertainment'.

4. The Right of Public Access to Indigenous Customary Law and the Concept of Ascertainment

This section discusses the public-access and human-rights implications of the unwritten *form* of indigenous customary law, the right of public access to indigenous customary law, and the meaning of indigenous customary law ascertainment and its existing methods.

⁶⁷ Ibid

⁶⁸ Ibid

4.1 The Public-Access Implications of the Unwritten Form of Indigenous Customary Law

Oral or unwritten indigenous customary law is inherently inaccessible, unreliable, and unknowable to many people; it may therefore be termed secret law. It is, undoubtedly, the most inaccessible category of law in existence in the world today. It lacks every aspect of *public access* because it exists in an uncertain state in the *minds* of some people,⁶⁹ usually the community head, chiefs, elders, and other leaders of a community who are regarded as its custodians or *human repositories*. Apart from being inaccessible to the other members of the community, unwritten indigenous customary law is also, ironically, inaccessible to its custodians because its facts depend on their memory that may not always be accurate.⁷⁰

A further worrying dimension to the uncertainty and unreliability of unwritten indigenous customary law is that the powerful members of the society are able to manipulate and distort its oral rules through corruption, intimidation, and undue influence, thereby causing injustice.⁷¹ Ubink rightly stated this thus: 'The uncertainty within customary law is exacerbated by power, wealth and other asymmetries between the parties',⁷² which is a form of *elite capture*.⁷³ Labonte rightly defined 'elite capture' as a practice which 'occurs when elites control,

⁶⁹ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3; Akpomuvire Mukoro, 'The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect' (2011) 26(2) Journal of Social Sciences 139, 140–141.

⁷⁰ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

⁷¹ AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) The Modern Law Review 244, 248; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

⁷² Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

⁷³ Ibid 1.

shape, or manipulate decision-making processes or institutions in ways that serve their self-interests and priorities, typically resulting in personal gain at the expense of non-elites and local communities.⁷⁴ These deficiencies explain why the written sources of law (e.g. legislation and judicial decisions) usually supersede indigenous customary law.

4.2 The Human-Rights Implications of the Unwritten Form of Indigenous Customary Law

The unwritten *form* of indigenous customary law adversely affects several human rights. First, it is not compliant with the human right of free access to public legal information. The reason is that it does not exist in any concrete, material, tangible, viewable or readable form, and it is therefore uncertain and inaccessible and unknowable to many people who are under the rule-of-law duty to obey it. Requiring people to obey any law they are unable to know is grave injustice, as it is tantamount to requiring them to do the impossible and violates their inalienable right to personal freedom or self-determination.

Second, oral indigenous customary law is incompatible with the human right to a fair trial that hinges upon fair hearing. One of the pillars of this human right is the right against retroactive and non-existent criminal laws.⁷⁵ The rationale behind the right is that every person is presumed to know an *existing* law, so that ignorance of that law is no excuse.⁷⁶ In terms of the possibility of knowing the law that should guide one's conduct, a *retroactive* law is analogous to a *non-existent* law because both are unknown as at the time of one's act. They are analogous to a law that is *inaccessible* and thereby also unknown⁷⁷ (such as oral indigenous customary law that exists only in the minds of some people) and laws that have been enacted but not published or not adequately published.⁷⁸

⁷⁴ Melissa T Labonte, 'From Patronage to Peacebuilding? Elite Capture and Governance from Below in Sierra Leone' (2012) 111(442) *African Affairs* 90, 91 <<https://doi.org/10.1093/afraf/adr073>> accessed 24 May 2019.

⁷⁵ Example, ICCPR art 15(1); UDHR art 11(2).

⁷⁶ *Rex v Bailey* (1800) 168 Eng Rep 651; *United States v Casson*, 434 F.2d 415 (D.C. Cir. 1970).

⁷⁷ Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford University Press 2009) 186–187.

⁷⁸ Section D.II.5 of Chapter Two.

The equivalence between unwritten indigenous customary law and non-existent law is the reason provisions in constitutions and other statutes expressly or consequentially abrogate *unwritten* customary-law criminal offences.⁷⁹ The *locus classicus* in Nigeria, for example, is *Aoko v Fagbemi*⁸⁰ in which a High Court quashed the judgment of a customary court that had convicted the appellant of adultery under oral indigenous customary law. The Nigerian Supreme Court stated unequivocally in *Omoju v The Federal Republic of Nigeria* that ‘a person cannot be punished for an offence in *customary law, which is not written*.’⁸¹ It is also the reason courts require the ascertainment of the *existence* of unwritten indigenous customary law, in the first instance, by the sufficient proof of witnesses.

Third, oral indigenous customary law is non-compliant with the human rights of persons with disabilities because it does not exist in any format that meets the special information access requirements in Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD),⁸² such as text, Braille, and recorded audio. The CRPD specifically requires ‘access to cultural materials in *accessible formats*’⁸³ which should include indigenous customary law that is the embodiment of the people’s culture.⁸⁴ Non-publication of indigenous customary law is therefore tantamount to denial of the human right of persons with disabilities to access to information stipulated in Article 21 of the CRPD, which includes public legal information on their rights and duties.

Fourth, unwritten indigenous customary law jeopardises the human right of indigenous communities to self-determination that includes their autonomy, sovereignty, and self-governance in their internal and local affairs.⁸⁵ One reason is

⁷⁹ Example, Nigerian Constitution 1999, s 36(12).

⁸⁰ (1961) 1 All NLR 400 <www.lawnigeria.com/Court-Judgments/1961-JUDGMENTS/1961-AOKO%20V.-FAGBEMI.html> accessed 25 August 2017.

⁸¹ (2008) 7 NWLR (Part 1085) 38 (emphasis added).

⁸² Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁸³ CRPD art 30(1)(a) (emphasis added).

⁸⁴ Patricia Adjei, ‘What Place for Customary Law in Protecting Traditional Knowledge?’ (*World Intellectual Property Organization*, August 2010) <www.wipo.int/wipo_magazine/en/2010/04/article_0007.html> accessed 24 May 2019.

⁸⁵ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 art 4.

that its inaccessible and nebulous nature provides the justification for its judicial ascertainment whereby the courts require proof of its existence based on the testimony of witnesses. The discretionary nature of judicial ascertainment removes the control of indigenous customary law from the communities. Another reason is that the quest for other methods of ascertainment—such as codification and restatement—has resulted in the imposition of strange or obsolete versions of indigenous customary law on indigenous communities through the use of the doctrines of judicial notice and precedent.

4.3 The Right of Public Access to Indigenous Customary Law

The nature of unwritten indigenous customary law, as a *secret* law because it is unknowable to many members of the community and its other defects have led to advocacy for its complete abrogation.⁸⁶ As law that governs the conduct and activities of people, like the other categories of the primary sources of law (e.g. legislation), those who are bound to obey the rules of indigenous customary law have the equal right of free access to those rules, so that they can know and obey them.

Indigenous customary law is a category of public legal information, the right of free access to which requires legal certainty. That means the *exact texts* of indigenous customary law should be published so that every person who is bound by them can know them and decide their actions accordingly.

The right of free access to public legal information may be defined, comprehensively, as follows: The legal entitlement of every citizen, every resident, and every legal entity to the opportunities and facilities provided by any government (national, state, or local) or intergovernmental organisation (IGO) to enable people—in their different circumstances—to find, read, and know the full, up-to-date texts of the whole stock of its laws and law-related publications, which guarantee the availability and free use of all formats online and in public libraries, without copyright in their texts nor in their official value-added features produced

⁸⁶ MP Jain, 'Custom as a Source of Law in India' in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 49, 74.

by the government or IGO either directly or under any arrangement with a third party.⁸⁷

Every person has the right of free access to public legal information because the doctrine of ‘ignorance of the law is no excuse’ casts a corresponding legal and moral obligation on every government to provide free and adequate access to its laws.⁸⁸ The right is necessary for an aspect of legal certainty because it enables people to know the principles of the law and the possible consequences of their actions.⁸⁹

The right of free access to public legal information exists in the following ways. First, it is a *legal right* under the general right of free access to public or government-held information, for example, under freedom of information laws.⁹⁰ Freedom of information is also referred to as the ‘right to know’.⁹¹

Second, it is also a *human right* included in the right of free access to public information that is embodied in the right of freedom to seek and receive information under the omnibus human right to freedom of opinion and expression.⁹² The said omnibus human right is enshrined in several international human rights instruments, e.g. the UDHR,⁹³ International Covenant on Civil and

⁸⁷ The author’s definition, which is the modified latest version of the original version in Section C of the first article (Chapter Two) published by the *German Law Journal* in 2017. For a list of the countries that have copyright protection in their laws, see Mireille van Eechoud and Lucie Guibault, ‘International Copyright Reform in Support of Open Legal Information’ (Open Data Research Symposium, Madrid, Spain, 5 October 2016) 1, 10–12 <https://www.ivir.nl/publicaties/download/OpenDataCopyrightReform_ODRSdraft-WP_sep16.pdf> accessed 16 August 2019.

⁸⁸ Jefferson L Ingram, *Criminal Evidence* (12th edn, Anderson Publishing 2015) 176–177; *Tañada v Tuvera*, 220 Phil 422 (1985), GR No. L-63915 24 April 1985 (Philippines).

⁸⁹ Sofia Ranchordás, ‘Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?’ (2015) 36(1) *Statute Law Review* 28, 36–38 <<https://doi.org/10.1093/slr/hmu002>> accessed 3 September 2017.

⁹⁰ *Deaton v Kidd*, 932 S.W.2d 804, 806 (Mo. Ct. App. 1996).

⁹¹ Luis Kutner, ‘Freedom of Information: Due Process of the Right to Know’ (2017) 18(1) *The Catholic Lawyer* <<http://scholarship.law.stjohns.edu/tcl/vol18/iss1/8/>> accessed 4 September 2017.

⁹² Section C.I of Chapter Two.

⁹³ UDHR art 19.

Political Rights (ICCPR),⁹⁴ CRPD,⁹⁵ Convention on the Rights of the Child (CRC),⁹⁶ and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW).⁹⁷ It also exists in regional human rights instruments, e.g. the European Convention on Human Rights (ECHR)⁹⁸ and African Charter on Human and Peoples Rights (ACHPR).⁹⁹

Third, courts have upheld and enforced the right of free access to public legal information.¹⁰⁰ The right imposes on the duty-bearers the obligation to provide adequate public access and, like the right to education, it is a right in itself and also an empowerment right.

Indigenous customary law is, undoubtedly, the most neglected category of public legal information in terms of public access; yet members of indigenous communities have equal right of free public access to all their laws so that they can know and abide by them. That is the reason behind the advocacy in this article for the due recognition of indigenous customary law as a bona fide category of public legal information that deserves equal treatment with all the other categories, such as legislation. Such equal treatment will remedy one aspect of the numerous injustices suffered by indigenous communities worldwide, in developing countries and the developed countries.

⁹⁴ ICCPR art 19.

⁹⁵ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 21.

⁹⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 13
<https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf>
accessed 9 August 2019.

⁹⁷ ICMW art 13(2).

⁹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 art 10
<<https://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf>>
accessed 9 August 2019.

⁹⁹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 1520 UNTS 217 art 9.

¹⁰⁰ *Deaton v Kidd*, 932 S.W.2d 804, 806 (Mo. Ct. App. 1996) (United States); *Tañada v Tuvera*, G.R. No. L-63915 (SC 24 April 1985) (Philippines).

The global importance of the right of public access to indigenous customary law is evident from the fact that indigenous communities with their customary legal systems exist worldwide in many countries,¹⁰¹ including developed countries. The United Nations Regional Information Centre for Western Europe (UNRIC) estimates that there are 'over 370 million indigenous people in some 90 countries, living in all regions of the world.'¹⁰² The indigenous peoples in developed countries include the Sami people of Norway, Finland, Sweden, and Russia;¹⁰³ the Aborigines of Australia;¹⁰⁴ the Native Indians of the United States;¹⁰⁵ and the First Nations People of Canada.¹⁰⁶

It is important to mention that the foregoing estimate of the world's population of indigenous peoples does not include all indigenous communities that practise indigenous customary law. For example, indigenous customary law is the native law of communities in both rural areas and cities throughout Nigeria, especially the whole of Southern Nigeria where indigenous customary law forms an official plural legal system.¹⁰⁷ Nigeria is a country with a population of about 195 million people.¹⁰⁸ That is the reason the term 'indigenous communities' is preferred to 'indigenous peoples' in this article, because indigenous communities include all classifications of people worldwide who practise indigenous customary law, not

¹⁰¹ University of Ottawa, 'Customary Law Systems and Mixed Systems with a Customary Law Tradition' (*JuriGlobe: World Legal Systems*) <www.juriglobe.ca/eng/sys-juri/class-poli/droit-coutumier.php> accessed 14 July 2019.

¹⁰² United Nations Regional Information Centre for Western Europe, 'The Sami of Northern Europe – One People, Four Countries' (*United Nations Regional Information Centre for Western Europe*) <<https://www.unric.org/en/indigenous-people/27307-the-sami-of-northern-europe--one-people-four-countries>> accessed 14 July 2019.

¹⁰³ Ibid

¹⁰⁴ Robert Tonkinson and Ronald M Berndt, 'Australian Aboriginal Peoples', *Encyclopaedia Britannica* (21 June 2017) <www.britannica.com/topic/Australian-Aboriginal> accessed 24 May 2019.

¹⁰⁵ WorldAtlas, 'US States with the Largest Native American Populations' (*WorldAtlas*, 25 April 2017) <www.worldatlas.com/articles/us-states-with-the-largest-native-american-populations.html> accessed 24 May 2019.

¹⁰⁶ Government of Canada, 'First Nations in Canada' (*Government of Canada*, 2 May 2017) <<https://www.rcaanc-cirnac.gc.ca/eng/1307460755710/1536862806124>> accessed 14 July 2019.

¹⁰⁷ Based on the author's knowledge of the country, as a citizen and as a lawyer.

¹⁰⁸ World Bank, 'Nigeria' (*World Bank*) <<https://data.worldbank.org/country/nigeria>> accessed 6 August 2019.

only those conventionally designated as ‘indigenous peoples’ who are arguably the minority in terms of the population of the people who practise it.¹⁰⁹

4.4 Indigenous Customary Law Ascertainment and its Existing Methods

4.4.1 The Meaning of Ascertainment of Indigenous Customary Law

The problem of the inherent uncertainty and inaccessibility of unwritten indigenous customary law led to the ancient concept of *ascertainment*.¹¹⁰ It is an ancient concept because it has been developed over a period of several centuries during which colonialism played a major role.¹¹¹ For example, the Babylonian Code of Hammurabi (1792–1750 BC) and the Roman Code of the XII Tables (451–450 BC), whose objective ‘was merely to put the previous law into a written form without changing its contents’,¹¹² are some of the popular examples of ascertainment of unwritten indigenous customary law.

‘Ascertainment of indigenous customary law’ has been defined simply as ‘a process by which the existence of customary law is given formal legal recognition.’¹¹³ For its comprehensive meaning, as used in this article, the author defines it as the process of systematically recording or transmitting its oral or unwritten rules into writing, to provide concrete and permanent evidence of the existence of those rules and to make them accessible, transparent, knowable, and difficult to manipulate, which will thereby promote indigenous justice

¹⁰⁹ Discussed in Section 2.1 above.

¹¹⁰ J Vanderlinden, ‘The Recording of Customary Law in France During the Fifteenth and Sixteenth Centuries and the Recording of African Customary Laws’ (1959) 3(3) *Journal of African Law* 165–175.

¹¹¹ Kaius Tuori, ‘Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law’ (2010) 62 *Journal of Pluralism and Unofficial Law* 43, 44 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 24 May 2019.

¹¹² Jean Maillet, ‘Historical Significance of French Codifications’ (1970) 44 *Tulane Law Review* 681, 689.

¹¹³ William Tate Olenasha and others, ‘Report on the Ascertainment of the Customary Laws of 14 Communities in South Sudan’, Series 1, vol 1 (*United Nations Development Programme*, 2012) 11 <<https://www.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Ascertainment%20Study%20-%20Volume%201.pdf>> accessed 5 July 2019.

mechanisms. In the case of judicialization, it is the ad hoc judicial process to establish the existence and validity of any rule of indigenous customary law in dispute, the outcome of which is formally recorded in writing as part of the court proceedings.¹¹⁴

From the definitions above, ascertainment produces different types of the written, permanent *form* of indigenous customary law that can be accessed by any person, in contrast to its oral or unwritten *form* that exists only in the minds and memory of the chiefs, elders, and others who are regarded as its custodians.¹¹⁵

4.4.2 The Existing Methods of Ascertainment of Indigenous Customary Law

From existing literature, including the work of Ubink in which they are all outlined,¹¹⁶ the following four existing methods of ascertainment of indigenous customary law can be identified: judicialization (judicial ascertainment), codification, restatement, and self-statement. As objective (1) of this article is to find out what the existing methods of ascertainment of indigenous customary law are, a list of the ascertainment methods and their sources are presented in the Table in the Appendix to this Chapter.¹¹⁷

4.4.2.1 Judicialization of Indigenous Customary Law

Judicialization is an old concept; for example, France practised it as early as the fifteenth century.¹¹⁸ It originated as a necessary legal tool because it is unjust to enforce any law that is inaccessible and thereby unknowable to the people. The reason is that the existence of such a law is merely fictional, and people cannot be expected to obey any law they cannot know. Wright rightly stated that 'it is unjust to punish someone for breaking a rule that they did not and could not have known

¹¹⁴ The author's definition.

¹¹⁵ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

¹¹⁶ Ibid

¹¹⁷ The tabular presentation helps to avoid an unwieldy set of footnotes that may occupy the whole page.

¹¹⁸ Marie Seong-Hak Kim, 'Customary Law and Colonial Jurisprudence in Korea' (2009) 57(1) American Journal of Comparative Law 205, 221.

existed.’¹¹⁹ Shenton pointedly posited that ‘[l]aw which cannot be ascertained cannot be obeyed.’¹²⁰

The new terms, ‘*judicialization* of customary law’ or ‘*juridicalisation* of customary law’ (herein shortened as ‘judicialization’ and ‘juridicalisation’) are introduced in this article; they can be used interchangeably. Both terms are of benefit to customary-law jurisprudence because they provide the much-needed easy, one-word reference to the concept of *judicial ascertainment of indigenous customary law*,¹²¹ the same way codification, restatement, and self-statement easily refer to the other methods. The verb ‘judicialize’ means ‘to treat judicially’ or ‘to subject to judicial process or decision’.¹²²

The author defines ‘judicialization’ as the process by which a court uses its discretion (based on proof by the evidence of witnesses, the doctrines of judicial notice and judicial precedent, relevant books and other publications, as well as the opinions of the appropriate bodies or authorities on the issue) to decide the existence of a rule of indigenous customary law so that the court can, thereafter, determine the validity and application of that rule. An example of the ancient use of the judicialization method is that of France, as early as the fifteenth century.¹²³

A century ago, the Judicial Committee of the Privy Council laid down the requirements of the ascertainment of indigenous customary law, based on proof by witnesses and judicial notice, in the West African case of *Angu v Atta*.¹²⁴ That case is the *locus classicus*, at least in Africa, for the requirements that became known as *the rule in Angu v Atta*. The Privy Council stated:

¹¹⁹ Fran Wright, ‘Certainty and Ascertainability of Criminal Law after the Pitcairn Trials’ (2008) 39 Victoria University of Wellington Law review 659, 662.

¹²⁰ Clarence G Shenton, ‘Common-Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence’ (1918) 23(2) Dickinson Law Review 37, 37.

¹²¹ AN Allott, ‘The Judicial Ascertainment of Customary Law in British Africa’ (1957) 20(3) The Modern Law Review 244, 244–63.

¹²² ‘judicialize (also judicialise)’ (*Oxford Dictionaries*, Oxford University Press) <<https://en.oxforddictionaries.com/definition/judicialize>> accessed 24 May 2019.

¹²³ Marie Seong-Hak Kim, ‘Customary Law and Colonial Jurisprudence in Korea’ (2009) 57(1) American Journal of Comparative Law 205, 221.

¹²⁴ *Angu v Atta* [1916] Gold Coast Privy Council Judgments, 1874–1928, 43.

As is the case with all customary law, it has to be proved in the *first instance* by calling *witnesses* acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take *judicial notice* of them.¹²⁵

The requirement of proof is based on the treatment of rules of oral customary law as *matters of fact* that must be pleaded¹²⁶ because they are unknown to the court. In the South African case of *Van Breda v Jacobs*,¹²⁷ as many as eleven witnesses were required to prove the existence of a custom 'beyond any reasonable doubt.'¹²⁸ Witnesses are usually those considered to have good knowledge of the rule of customary law in question, e.g. chiefs and elders of the community¹²⁹ and experts, e.g. anthropologists.¹³⁰

On the issue of judicial notice, the controversy over the frequency of previous cases that should justify its judicial notice led to the amendment of the earlier provision in the Nigerian Evidence Act, for example, to 'when [the rule of indigenous customary law] has been adjudicated upon once by a superior court of record.'¹³¹

Courts use the common-law doctrine of judicial precedent to accept the existence of any rule of indigenous customary law that a competent court had upheld in a

¹²⁵ Ibid 44 (emphasis added).

¹²⁶ *Olubeko v Awolaja* [2017] LPELR-41854 (CA) (Nigeria). For the same position in other jurisdictions, see Winifred Kamau, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' (2015) East African Law Journal 140, 147 (Kenya); Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, Routledge-Cavendish 2008) 58–59 (South Pacific countries).

¹²⁷ [1921] (AD) 330.

¹²⁸ JC Bekker and IA van der Merwe, 'Proof and Ascertainment of Customary Law' (2011) 26(1) Southern African Public Law 115, 120 <<https://hdl.handle.net/10520/EJC153213>> accessed 17 June 2019.

¹²⁹ Isaac Owusu-Mensah, 'Politics, Chieftaincy and Customary Law in Ghana's Fourth Republic' (2014) 6(7) The Journal of Pan African Studies 261, 271.

¹³⁰ Jean G Zorn and Jennifer Corrin Care, "'Barava Tru": Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' (2002) 51(3) International and Comparative Law Quarterly 611, 616, 622–624.

¹³¹ Evidence Act 2011, s 17 (Nigeria).

previous case.¹³² They use any relevant book or any other type of publication that they recognise as a reliable authority on the existence of the rule of custom in question.¹³³ They also rely on the opinions of the appropriate bodies or institutions that are deemed to be the custodians of the indigenous customary law of their communities, e.g. the council of chiefs.¹³⁴ Section 9 of the Zimbabwean Customary Law and Local Courts Act 1990, for instance, encapsulates all these requirements:

If a court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made and such evidence thereof as may be tendered by or on behalf of the parties, it may, without derogation from any other lawful source to which it may have recourse, consult reported cases, text books and other sources and may receive opinions, either orally or in writing, to enable it to arrive at a decision in the matter . . .

Where a court accepts that the existence of the rule of indigenous customary law in question has been established by any of the methods outlined above, its final task is to determine the validity and application of that rule. A rule must neither be repugnant to natural justice, equity, and good conscience;¹³⁵ contrary to public policy;¹³⁶ nor incompatible or inconsistent with any law force in force in the jurisdiction or any enacted law applicable therein.¹³⁷

¹³² Jean G Zorn and Jennifer Corrin Care, ‘“Barava Tru”: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific’ (2002) 51(3) *International and Comparative Law Quarterly* 611, 631–633.

¹³³ Winifred Kamau, ‘Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya’ (2015) *East African Law Journal* 140, 147–148.

¹³⁴ Example, Ghanaian Courts Act 1993, s 55(5).

¹³⁵ Example, Supreme Court Ordinance of 1876, s 19 (Gold Coast, present-day Ghana); Evidence Act 2011, s 18(3) (Nigeria).

¹³⁶ Example, Evidence Act 2011, s 18(3) (Nigeria).

¹³⁷ Southern Cameroon High Court Law 1955, s 27(1) (Cameroon). See also Mikano E Kiye, ‘The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon’ (2015) 15(2) *African Studies Quarterly* 85, 87.

4.4.2.2 Codification of Indigenous Customary Law

Dissatisfaction with judicialization led to codification as an ascertainment method,¹³⁸ a classic example of which is that of France in the fifteenth and sixteenth centuries.¹³⁹ After the French codification of indigenous customary law, the practice became widespread and prominent during the colonialism of the eighteenth and nineteenth-centuries.¹⁴⁰

Codification is a method of ascertainment of the unwritten rules of indigenous customary law whereby those rules are enacted through the formal State legislative process as binding statute law or legislation.¹⁴¹ Like judicialization, codification also has an ancient origin. For example, the famous French codification began in 1454 in the fifteenth century, when ‘a royal statute ordained that *all the local customs of the kingdom*, then existing only orally, be written down’,¹⁴² which was a programme of ascertainment of indigenous customary law. France codified its customs in the fifteenth and sixteenth centuries.¹⁴³

Codification may be comprehensive or selective. *Comprehensive codification* of all the rules of indigenous customary law of any community is hard to achieve

¹³⁸ AN Allott, ‘The Judicial Ascertainment of Customary Law in British Africa’ (1957) 20(3) The Modern Law Review 244, 257.

¹³⁹ Marie Seong-Hak Kim, ‘Customary Law and Colonial Jurisprudence in Korea’ (2009) 57(1) American Journal of Comparative Law 205, 221.

¹⁴⁰ See, for example, MW Jurriaanse, ‘The Compilation of the Customary Law of Jaffna (Thesawalamai) in 1707’ (1954) 110(4) Journal of the Humanities and Social Sciences of Southeast Asia 293–304 <<https://doi.org/10.1163/22134379-90002368>> accessed 25 May 2019; HW Tambiah, *The Laws and Customs of the Tamils of Jaffna* (Women’s Education & Research Centre 2004) <<http://noolaham.net/project/11/1082/1082.pdf>> accessed 24 May 2019; Janine Ubink, ‘Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia’ (2011) International Development Law Organization Traditional Justice: Practitioners’ Perspectives’ Working Paper Series 1, 4, 8.

¹⁴¹ The author’s definition. For a similar idea, see Eugene Cotran, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72, 73.

¹⁴² Jean Maillet, ‘Historical Significance of French Codifications’ (1970) 44 Tulane Law Review 681, 681 (emphasis added).

¹⁴³ Marie Seong-Hak Kim, ‘Customary Law and Colonial Jurisprudence in Korea’ (2009) 57(1) American Journal of Comparative Law 205, 221.

because of the inherent difficulties, e.g. the Natal Code of Native Law that was compiled between 1875 and 1878.¹⁴⁴ *Selective codification*, which involves the enactment of only selected rules of indigenous customary law, is much easier to achieve and it is common in plural legal systems, such as those of Fiji¹⁴⁵ and Tanzania.¹⁴⁶

4.4.2.3 Restatement of Indigenous Customary Law

The defects of codification as an ascertainment method led to the concept of restatement¹⁴⁷ that emanated from the American Law Institute's model of the restatement of the primary sources of American law (not indigenous customary law). Prinsloo defined the general concept of 'restatement' in his work, *Restatement of Indigenous Law*, as

a systematic, analytical, and comprehensive account of a branch of the law which is unwritten or is scattered between a variety of sources. It implies a re-arrangement, in improved form, of statements of the existing law. The result is not a legislative code, but a *guide* for juridical purposes.¹⁴⁸

Restatement is a method of ascertainment of the unwritten rules of indigenous customary law (usually with the goal of harmonising those rules) which are recorded by an individual, a team of individuals, an organisation, or a government,

¹⁴⁴ AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) *The Modern Law Review* 244, 261.

¹⁴⁵ Jennifer Corrin, 'Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 59 *Journal of Legal Pluralism* 29, 35.

¹⁴⁶ Dorothy L Hodgson, 'Gender, Justice, and the Problem of Culture: From Customary Law to Human Rights in Tanzania' (Indiana University Press 2017) 8–9.

¹⁴⁷ AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) *The Modern Law Review* 244, 257.

¹⁴⁸ MW Prinsloo, 'Restatement of Indigenous Law' (1987) 20 *Comparative and International Law Journal of Southern Africa* 411, 411 (emphasis added). See also Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 *International and Comparative Law Quarterly Supplementary Publication* 72, 84; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) *International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series* 1, 5. Cotran was responsible for the Kenya restatement of customary law projects.

and published as a nonbinding guide.¹⁴⁹ One famous restatement project, albeit unsuccessful like other restatement projects,¹⁵⁰ is the one that the British colonial government embarked on in its colonies via the Restatement of African Law Project of the School of Oriental and African Studies of the University of London that started in 1959, with Antony Nicholas Allott as its director.¹⁵¹

From the foregoing definitions, one of the distinctive features of restatement is that it is *nonbinding*, and therefore not authoritative. On the issue of harmonisation or unification of indigenous customary law in restatement, Azinge (who was the Director of the Restatement of Customary Law of Nigeria project, published in 2013) stated that '[t]he idea of a Restatement is to identify common principles or trends in a particular area of law with the objective of *unifying* the further development of the law.'¹⁵²

Colonialism, which introduced plural legal systems, played the leading role in the early attempts to record indigenous customary law in writing.¹⁵³ For instance, in India, village administrative officers recorded their indigenous customary laws pursuant to Regulation VII of 1822, and those records were admissible as proof of

¹⁴⁹ The author's definition.

¹⁵⁰ Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 *Journal of Pluralism and Unofficial Law* 43, 61 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 9 May 2019.

¹⁵¹ School of Oriental and African Studies, 'The Restatement of African Law Project' (1959) 3(3) *Journal of African Law* 149–151 <<https://www.jstor.org/stable/i229873>> accessed 20 June 2019 (*The Restatement of African Law Project 1959*). See also Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 *Journal of Pluralism and Unofficial Law* 43, 46 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 9 May 2019.

¹⁵² Restatement of Customary Law of Nigeria (2013) x (emphasis added). See also Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 *International and Comparative Law Quarterly Supplementary Publication* 72, 85.

¹⁵³ Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 *Journal of Pluralism and Unofficial Law* 43, 44 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 9 May 2019.

customs under Section 35 of the Indian Evidence Act 1872.¹⁵⁴ The procedure for such recording was flawed and sometimes resulted in concocted indigenous customary law to serve the selfish interests of those behind it.¹⁵⁵

4.4.2.4 Self-Statement of Indigenous Customary Law

The concept of self-recording or self-stating indigenous customary law dates back, at least, to 1454 in France¹⁵⁶ and among the barbarian Germanic tribes (5th and 6th centuries).¹⁵⁷ About three decades ago, dissatisfaction with the elitist method of recording indigenous customary law by professionals and strangers via restatement, led to a *resurgence* of interest in its recording by the communities *themselves*, who are its owners.

The modern renaissance of self-statement may be traced to April 1992 when the Kwangali traditional community in Namibia officially presented ‘The Laws of Ukwangali’ at a conference that the Ministry of Justice organised,¹⁵⁸ which birthed the Namibian Customary Law Ascertainment project. The ongoing UNDP co-sponsored South Sudan Customary Law Ascertainment project that started in 2012,¹⁵⁹ adopted the Namibian concept of self-statement. Hinz, who coordinated

¹⁵⁴ MP Jain, ‘Custom as a Source of Law in India’ in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 49, 67.

¹⁵⁵ Ibid 67–68.

¹⁵⁶ John P Dawson, ‘The Codification of the French Customs’ (1940) 38(6) *Michigan Law Review* 765, 770 (emphasis added).

¹⁵⁷ Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton University Press 1997) 74.

¹⁵⁸ Manfred O Hinz, ‘Law Reform from Within: Improving the Legal Status of Women in Northern Namibia’ (1997) 39 *Journal of Legal Pluralism* 69, 69–70.

¹⁵⁹ United Nations Development Programme, ‘Ascertainment of Customary Laws in South Sudan: Discussion Paper’ (*United Nations Development Programme*) 3 <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

the Namibian project¹⁶⁰ and thereafter participated in that of South Sudan,¹⁶¹ defined self-statement thus:

Self-stating customary law refers to a process of ascertaining customary law by the owners of the law to be ascertained, namely the people – or, rather, the community to which the people belong – and the traditional leaders as the custodians of customary law.¹⁶²

The author (of this thesis) defines it simply as a method of ascertainment of the unwritten rules of the customary law of an indigenous community whose distinctive feature is the recording of those rules by the community. Self-statement is binding,¹⁶³ unlike restatement that is merely a nonbinding guide.

It is noteworthy that the new term ‘self-statement’ of customary law that Hinz coined in the 1990s¹⁶⁴ (less than 30 years ago) is merely a *new label* on an *ancient concept* that has existed at least since 1454, nearly 600 years ago.¹⁶⁵ Therefore, any claim that the Namibian self-statement of indigenous customary law project is a new concept, ‘a very special development’¹⁶⁶ or ‘an innovative approach to

¹⁶⁰ Manfred O Hinz, ‘The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For?’ in Manfred O Hinz and Alexander Gairiseb (eds), *Customary Law Ascertained, Volume 2: The Customary Law of the Bakgalagari, Batswana and Damara Communities of Namibia* (University of Namibia Press 2013) 3.

¹⁶¹ Manfred O Hinz, ‘The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For? The experience of the Customary Law Ascertainment Project in Namibia’ (2012) 2(7) Oñati Socio-legal Series 85, 85 <<http://opo.iisj.net/index.php/osls/article/view/181>> accessed 19 July 2017.

¹⁶² Ibid 91.

¹⁶³ Ibid

¹⁶⁴ Manfred O Hinz, ‘Law Reform from Within: Improving the Legal Status of Women in Northern Namibia’ (1997) 39 Journal of Legal Pluralism 69, 70.

¹⁶⁵ John P Dawson, ‘The Codification of the French Customs’ (1940) 38(6) Michigan Law Review 765, 770 (emphasis added).

¹⁶⁶ Manfred O Hinz, ‘The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For? The experience of the Customary Law Ascertainment Project in Namibia’ (2012) 2(7) Oñati Socio-legal Series 85, 88 <<http://opo.iisj.net/index.php/osls/article/view/181>> accessed 19 July 2017.

recording customary law¹⁶⁷ appears to be unmindful of legal history. Codification and restatement of indigenous customary law by foreigners and professionals who claim to be experts—which have become the reference for the enthusiasm in the renaissance of the *contemporary* self-statement approach—are a part of the relics of global colonial history. Some indigenous communities or tribes, naturally, recorded their laws *by themselves* in various places in ancient history.¹⁶⁸ A valid argument is that those laws, of course, were their customary laws, as the modern formal legislative process for making statute law is not an ancient tradition of tribal peoples.

5. Public-Access and Human-Rights Defects of the Existing Methods of Ascertainment

The public-access and human-rights defects of the existing methods of ascertainment of indigenous customary law are discussed in this Section. The Section concludes with the implication of the defects and the need for the application of the adequate public-access concept and the human rights-based approach to the ascertainment of indigenous customary law.

5.1 Public-Access Defects of the Existing Methods of Ascertainment

5.1.1 Non-Comprehensive Compilation of Rules of Indigenous Customary Law

Piecemeal, ad hoc, or non-comprehensive ascertainment of indigenous customary law produces grossly inadequate public access that does not meet the requirements of the right of free access to public legal information. For example, judicialization cannot produce a comprehensive ascertainment of any community's rules of indigenous customary law, because only a limited number of

¹⁶⁷ Example, Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 2.

¹⁶⁸ For the example of the barbarian Germanic tribes, as early as the 5th and 6th centuries, see Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton University Press 1997) 74.

cases involving those rules ever get to the formal State courts for adjudication. According to Janse, 'at least 80 or 90 per cent of disputes in *developing countries* are resolved by non-state justice systems.'¹⁶⁹

It is significant that the countries where indigenous customary law forms part of a *plural legal system* are mainly developing countries.¹⁷⁰ Everyday customary-law disputes in developing countries are settled through communal dispute resolution processes at different social levels: family, clan, council of traditional rulers, and village courts that do not apply the statutory rules on ascertainment. One explanation for this trend is that members of indigenous communities suffer various disadvantages, including extreme poverty,¹⁷¹ and therefore cannot afford the cost of litigation in State courts.¹⁷² Another reason is the problem of inordinate delays associated with formal court procedures, especially in developing countries.¹⁷³ Therefore, the number of judicialized rules of indigenous customary law that may be accessible via official court records is likely to be insignificant.

Additionally, the decisions of indigenous customary courts and other lower courts, e.g. magistrates' courts and even High Courts (where such matters are usually settled, as courts of first instance), are hardly ever published, especially in the developing countries. For example, 'Pepperdine law students arriving in Uganda in June 2008, found the basement of the High Court building filled with decades of

¹⁶⁹ Ronald Janse, 'A Turn to Legal Pluralism in Rule of Law Promotion?' (2013) 3–4 *Erasmus Law Review* 181, 181 <www.erasmuslawreview.nl/tijdschrift/ELR/2013/3_4/ELR-D-13-00010.pdf> accessed 17 August 2017 (emphasis added).

¹⁷⁰ University of Ottawa, 'Customary Law Systems and Mixed Systems with a Customary Law Tradition' (*JuriGlobe: World Legal Systems*) <www.juriglobe.ca/eng/sys-juri/class-poli/droit-coutumier.php> accessed 23 June 2019.

¹⁷¹ M Brugnach, M Crapsand and A Dewulf, 'Including Indigenous Peoples in Climate Change Mitigation: Addressing Issues of Scale, Knowledge and Power' (2017) 140 *Climatic Change* 19, 24. See also Anna Carr, Lisa Ruhanen and Michelle Whitford, 'Indigenous Peoples and Tourism: The Challenges and Opportunities for Sustainable Tourism' (2016) 24(8–9) *Journal of Sustainable Tourism* 1067, 1074.

¹⁷² See, for example, Marc Masson and Ovais Tahir, 'The Legal Information Needs of Civil Society in Zambia' (2016) 4 *Journal of Open Access Law* 1, 5–6.

¹⁷³ Qing-Yun Jiang, *Court Delay and Law Enforcement in China: Civil Process and Economic Perspective* (Universität Hamburg 2005) 7–13.

unorganized and unreported case law.¹⁷⁴ The problem of unreported court decisions also exists in the developed countries.¹⁷⁵

Further, there is poor access to even the available *limited* stock of judicialized indigenous customary law. The reason is that customary-law plural legal system is predominantly present in developing countries¹⁷⁶ whose governments generally provide poor public access to their legal information. Public access to court decisions is even worse than that of legislation that is the dominant category of public legal information.¹⁷⁷ The situation is further worsened by the cost of buying law reports containing judicialized indigenous customary law, which is a luxury to members of indigenous communities who have good cause to be concerned with other financial priorities such as food, due to extreme poverty.¹⁷⁸

Scholars who advocate codification of indigenous customary law argue that it provides the *greatest legal certainty* and makes indigenous customary law

¹⁷⁴ Jay Milbrandt & Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 63.

¹⁷⁵ Mark Page, Jane Taylor and Matt Blenkin, 'Forensic Identification Science Evidence Since Daubert: Part I—A Quantitative Analysis of the Exclusion of Forensic Identification Science Evidence' (2011) 56(5) Journal of Forensic Sciences 1180, 1181 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1556-4029.2011.01777.x>> accessed 13 May 2019; 'Unreported Judgments Online' (LexisNexis) <www.lexisnexis.com.au/en-AU/Products/unreported-judgments-online.page> accessed 13 May 2019.

¹⁷⁶ Ronald Janse, 'A Turn to Legal Pluralism in Rule of Law Promotion?' (2013) 3–4 Erasmus Law Review 181, 181 <www.erasmuslawreview.nl/tijdschrift/ELR/2013/3_4/ELR-D-13-00010.pdf> accessed 17 August 2017. See also University of Ottawa, 'Percentage of the World Population, Civil Law and Common Law Systems' (*JuriGlobe: World Legal Systems*) <www.juriglobe.ca/eng/syst-demo/tableau-dcivil-claw.php> accessed 23 June 2019.

¹⁷⁷ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 8; Marc Masson and Ovais Tahir, 'The Legal Information Needs of Civil Society in Zambia' (2016) 4 Journal of Open Access Law 1, 17–20 <<https://ojs.law.cornell.edu/index.php/joal/article/view/45/61>> accessed 5 September 2017.

¹⁷⁸ M Brugnach, M Crapsand and A Dewulf, 'Including Indigenous Peoples in Climate Change Mitigation: Addressing Issues of Scale, Knowledge and Power' (2017) 140 Climatic Change 19, 24.

accessible.¹⁷⁹ However, that popular argument is a *misconception*, for two major reasons. First, codification usually provides only limited access to *selected* rules of indigenous customary law, thereby leaving the uncoded rules unwritten,¹⁸⁰ with the same problem of their ascertainment. The reason is that comprehensive codification of *all* the rules of the indigenous customary law of each of the multitudes of indigenous communities is not a feasible State legislative venture. That is why it is difficult to find modern or post-colonial comprehensive codification projects in the world today, despite the spirited advocacy for codification.¹⁸¹ Second, the selected codified rules of indigenous customary law are hidden among colossal volumes of State legislation, which makes them *organisationally inaccessible* to the members of the communities they regulate and other people who may want to know them.

Self-statement also provides poor public access to indigenous customary law due to its non-comprehensive approach to ascertainment, which makes it incapable of solving the problem of uncertainty of unwritten indigenous customary law. Hinz, the coordinator of the Namibian indigenous customary law ascertainment project,¹⁸² made the following statement that reveals serious conceptual flaws with the Namibian self-statement:

It was up to the communities to decide what aspect of customary law they wanted to have ascertained in writing. The self-statements do not intend to repeal orally transmitted customary law, nor parts of it: the orally

¹⁷⁹ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

¹⁸⁰ AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) The Modern Law Review 244, 261.

¹⁸¹ Manfred O Hinz, 'The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For? The experience of the Customary Law Ascertainment Project in Namibia' (2012) 2(7) Oñati Socio-legal Series 85, 90 <<http://opo.iisj.net/index.php/osls/article/view/181>> accessed 19 July 2017.

¹⁸² He was responsible for the University of Namibia's Customary Law Ascertainment Project: Manfred O Hinz, 'The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For? The experience of the Customary Law Ascertainment Project in Namibia' (2012) 2(7) Oñati Socio-legal Series 85, 85 <<http://opo.iisj.net/index.php/osls/article/view/181>> accessed 19 July 2017.

transmitted customary law remains valid, and will assist in interpreting the stated rules. This means that the self-stated laws of the various communities are not codifications of customary law.¹⁸³

From Hinz's statement above, his concept of self-statement of indigenous customary law appears to be self-defeating. The scope of the project across the communities is haphazard¹⁸⁴ and the chaotic amalgam of oral and written indigenous customary law is puzzling.¹⁸⁵ It is trite that documented facts *usually* supersede oral claims on the same issue. Therefore, contrary to Hinz's stated intention above, self-statement has the effect of modifying or repealing any unwritten rule of indigenous customary law on the same issue,¹⁸⁶ which produces *unintended consequences*. Because the self-statement may be only a fraction of the existing rules of indigenous customary law, it is thereby fraught with the very public-access defects of *unwritten* indigenous customary law it aims to solve.

5.1.2 Poor Publication of the Indigenous Customary Law

All the four ascertainment methods provide poor public access to indigenous customary law because of their inadequate publication. This poor access causes ignorance of indigenous customary law, and that ignorance violates their human rights, including their omnibus right of access to justice that encompasses other human rights.¹⁸⁷

No website *dedicated* to the online publication of judicialized, codified, restated, or self-stated *indigenous customary law* was found in course of this study; yet such websites are indispensable to the provision of adequate public access to every category of public legal information. Only the 2012 South Sudan Customary Law Ascertainment co-sponsored by the United Nations Development Programme

¹⁸³ Manfred O Hinz and Alexander Gairiseb (eds), *Customary Law Ascertained, Volume 2: The Customary Law of the Bakgalagari, Batswana and Damara Communities of Namibia* (University of Namibia Press 2013) 20.

¹⁸⁴ In addition, Hinz and his assistant did not bother about whether any community followed its own ascertainment rules: Ibid 18.

¹⁸⁵ Nico Horn, Book Review (2011) 3(1) *Namibia Law Journal* 133, 139.

¹⁸⁶ Ibid 137–138.

¹⁸⁷ Ibid 133.

(UNDP) is available online on *UNDP* website,¹⁸⁸ which is not the required *dedicated* website. Its publication on the UNDP website, simply because UNDP co-sponsored it, is insufficient because neither the Government of South Sudan nor the affected indigenous communities have control over the medium of its online publication. The communities' awareness of the existence of their ascertained customary law and their eventual access to it on the 'foreign' UNDP website cannot be as effective as it should have been, if it were published on their local *dedicated* website under their own control.

In restatement and self-statement, the ascertained indigenous customary laws of the various communities are published in *commercial* books by their private authors or organisations, from which their authors are expected to benefit from royalties on the sale of each copy—the usual practice in the book publishing industry. Such publishing approach makes the contents of those books inaccessible to the people who need to know them, thus violating their human right of free public access to their own indigenous customary law. For example, copies of the books containing Nigeria's *Restatement of Customary Law of Nigeria* and Namibia's self-stated *Customary Law Ascertained, Volume 3* are sold commercially by African Books Collective on its website for £40.00 and £44.00, respectively;¹⁸⁹ thus there is no *free access* to the laws those books contain, either in print or online. How would they expect the members of those indigenous communities, most of whom are living below poverty line, to buy the books containing their own laws, for them to be able to know the ascertained rules that govern their conduct and activities?

The judicialized rules of indigenous customary law are buried among the State judicial decisions in both unreported court proceedings and law reports that are

¹⁸⁸ For links to the three volumes of the South Sudan Ascertainment Study Reports, see 'Reports on Ascertainment of Customary Laws in South Sudan' (*United Nations Development Programme*) <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan.html> accessed 11 May 2019.

¹⁸⁹ Nigerian Institute Advanced Legal Studies, *Restatement of Customary Law of Nigeria* (Safari Books 2013) <www.africanbookscollective.com/books/restatement-of-customary-law-of-nigeria> accessed 16 June 2019; Manfred O Hinz and Alexander Gairiseb (eds), *Customary Law Ascertained, Volume 3: The Customary Law of the Nama, Ovaherero, Ovambanderu, and San Communities of Namibia* (University of Namibia Press 2016) <www.africanbookscollective.com/books/customary-law-ascertained-volume-3> accessed 16 June 2019.

inaccessible to indigenous communities. Similarly, codified rules are hidden among a colossal volume of legislation that even lawyers find difficult to navigate, not to mention members of indigenous communities. In addition, access to judicialization and codification publications depends on the access provided by the State to those publications, which is generally poor, especially in developing countries.¹⁹⁰ For example, Cayman Islands charges (CI\$350/US\$420), (CI\$40/US\$48), and (CI\$10/US\$12) as annual, monthly, and weekly subscription fees, respectively, for access to its laws on its official website,¹⁹¹ instead of providing free online access to them. It therefore means those who want to know the isolated judicialized and codified rules of indigenous customary law that exist in the enacted laws and in the judicial decisions of such countries must buy the publications that contain those State laws and judicial decisions. In such situations, the rules of indigenous customary law in those publications are inaccessible because they are difficult to find and there is no free access to them.

5.1.3 Deficiency in Authoritativeness of the Published Indigenous Customary Law

Judicialization, codification, restatement, and self-statement have problems of authoritativeness. Although judicialization and codification produce authoritative rules of indigenous customary law, reliance on them is fraught with the problem of uncertainty because they may no longer be the applicable rules. For instance, higher courts may have overturned the decisions of the courts that upheld those rules or legislation may have repealed or modified them. The problem of ignorance of repealed legislation is real, even among court judges and lawyers in developed countries that are expected to have the most modern and efficient access to public legal information systems and practice (as it happened in the England and Wales Court of Appeal cases discovered in *Regina v Chambers*¹⁹²).

¹⁹⁰ See Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 8; Marc Masson and Ovais Tahir, 'The Legal Information Needs of Civil Society in Zambia' (2016) 4 Journal of Open Access Law 1, 17–20 <<https://ojs.law.cornell.edu/index.php/joal/article/view/45/61>> accessed 5 September 2017.

¹⁹¹ Laws of the Cayman Islands (*Cayman Islands Judicial Administration*) <www.judicial.ky/laws> accessed 14 May 2018.

¹⁹² [2008] EWCA (Crim) 2467.

As a mere nonbinding guide, restatement is not authoritative. Therefore, it does not provide *certainty* of the existing rules of indigenous customary law, as it is not the definitive source of those rules. Courts have the *discretion* to take judicial notice of restatement, for example, the volumes on the restatement of Kenyan law by Cotran.¹⁹³ This fundamental defect of restatement arguably makes it a futile exercise, which may partly explain the unacceptability and failure of restatement projects.¹⁹⁴

In the case of self-statement, its skeletal, haphazard selection of the rules to be recorded and the resultant side-by-side existence of written and oral indigenous customary law, produce a curious normative amalgam that taints it with uncertainty. Consequently, restatement and self-statement both share aspects of the public-access and human-rights defects of the oral *form* of indigenous customary law.

5.1.4 Lack of Currency of the Published Indigenous Customary Law

Judicialization, codification, restatement, and self-statement all lack the capability of continuous review which is indispensable to the currency of every category of public legal information. Their lack of currency causes varying degrees of uncertainty of the true state of the applicable rules of indigenous customary law which, in turn, causes poor access. In other words, they lack what may be referred to as *certainty accessibility*.

Judicialization and codification are the worst culprits because indigenous communities have no control whatsoever over their review: they are *inherently* incapable of continuous review. They create dead, ossified, and obsolete official versions of indigenous customary law that loses its adaptive nature,¹⁹⁵ while the

¹⁹³ Winifred Kamau, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' (2015) East African Law Journal 140, 147–148.

¹⁹⁴ On the failure of restatement projects, see Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 Journal of Pluralism and Unofficial Law 43–70 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 27 May 2019.

¹⁹⁵ Birgit Bräuchler, The Cultural Dimension of Peace: Decentralization and Reconciliation in Indonesia (Palgrave Macmillan 2015) 185.

communities apply their version of evolving or living customary law that responds to societal dynamics.¹⁹⁶ They destroy the inherent adaptive and evolving nature of indigenous customary law, thereby making it no longer *customary* law.¹⁹⁷ Judicialization and codification therefore violate the people's rights to self-determination, culture, and indigenous identity. Although restatement is nonbinding, it has a similar effect, because indigenous communities do not have control over it. In addition, restatement is the customary law of experts; it is not the law of the indigenous communities themselves.

Self-statement also lacks currency because its emphasis on, and provision for, the adaptive philosophy and continuous review of indigenous customary law is inadequate. For example, an interval of five years is specified as the period for review of the *Laws of Uukwambi* in Namibia.¹⁹⁸ Such rigidity stifles the development, fluidity, and dynamism of indigenous customary law as an ever-evolving social organism, a living law. There should be no stipulation of any time frame within which any review should be carried out; review should be made on a continuous basis, as often as the need arises.

5.2 Human-Rights Defects of the Existing Methods of Ascertainment

5.2.1 Improper Compilation of Indigenous Customary Law and Inadequate Public Participation

All the four ascertainment methods are fraught with various degrees of inadequate public awareness of the process of ascertainment. Poor public

¹⁹⁶ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 8; Rita Ozoemena, 'Living Customary Law: A Truly Transformative Tool?' (2014) 6 Constitutional Court Review 147, 151 <<http://www.saflii.org/za/journals/CCR/2016/8.pdf>> accessed 19 June 2019.

¹⁹⁷ Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72, 73; AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) The Modern Law Review 244, 258.

¹⁹⁸ Birgit Bräuchler, *The Cultural Dimension of Peace: Decentralization and Reconciliation in Indonesia* (Palgrave Macmillan 2015) 185; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 14.

awareness of any democratic process adversely affects the integrity of such process.

Judicialization is a court process that involves only the parties to a case and their witnesses, while codification is a legislative process that indigenous communities are usually not aware of. Restatement is an elitist project, usually carried out by experts, thereby requiring minimal community awareness.

Although the philosophy of self-statement is, rightly, the recording of indigenous customary law by the community, public awareness is not its emphasis. That defect accounts for the high rate of ignorance of self-stated customary law. For example, Ubink's survey of the Namibian self-statement revealed that only 40.7 percent of the people responded that they knew 'the Uukwambi Traditional Authority had written customary laws.'¹⁹⁹

Inadequate public awareness is a clear indication of inadequate public participation in any ascertainment method, because nobody can participate in a project the person is unaware of. Therefore, the four ascertainment methods all lack adequate public participation, which violates the people's right to adequate participation in the public affairs of one's community.

It is significant that, although the recording of the indigenous customary law of a community by the community is the hallmark of self-statement, not every community actually participated in the Namibian self-statement project that Hinz coordinated.²⁰⁰

¹⁹⁹ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 14.

²⁰⁰ Nico Horn, Book Review (2011) 3(1) Namibia Law Journal 133, 135.

Codification,²⁰¹ restatement,²⁰² and self-statement (to some extent)²⁰³ all adopt the improper compilation approach that aims towards the *harmonisation* or *unification* of the diverse indigenous customary laws of different communities. Codification even aims to *universalize* indigenous customary law by providing a uniform set of binding rules for all the numerous distinct indigenous communities under the State jurisdiction. According to Onuoha, for example, ‘The unification of customary laws will apply a single set of laws to all major tribes in Nigeria, eliminating the problems of uncertainty and inconsistency that multiple sets of law impose.’²⁰⁴

The United Nations Development Programme (UNDP) also made the same mistake when they stated that one of the four objectives of the UNDP Ascertainment of Customary Law Project for South Sudan, based on self-statement, was ‘[t]o harmonize the different customary laws of various communities, which will ultimately inform a coherent customary law regime in South Sudan.’²⁰⁵

Harmonisation or unification of indigenous customary law violates the human rights and indigenous rights of each of the affected communities, e.g. their rights to self-determination (particularly their right to autonomy, sovereignty, and self-governance in their internal and local affairs) and to a distinct indigenous identity.

²⁰¹ Reginald Akujobi Onuoha, ‘Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue’ (2008) 10(2) *International Journal of Not-for-Profit Law* 79, 89–91.

²⁰² Nigerian Institute Advanced Legal Studies, *Restatement of Customary Law of Nigeria* (Safari Books 2013) x <www.africanbookscollective.com/books/restatement-of-customary-law-of-nigeria> accessed 16 June 2019. See also Eugene Cotran, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 *International and Comparative Law Quarterly Supplementary Publication* 72, 85.

²⁰³ Nico Horn, Book Review (2011) 3(1) *Namibia Law Journal* 133, 135; Janine Ubink, ‘Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia’ (2011) *International Development Law Organization Traditional Justice: Practitioners’ Perspectives’ Working Paper Series* 1, 10–12

²⁰⁴ Reginald Akujobi Onuoha, ‘Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue’ (2008) 10(2) *International Journal of Not-for-Profit Law* 79, 90.

²⁰⁵ United Nations Development Programme, ‘Consultant: Ascertainment of Customary Law’ (*United Nations Development Programme*, 2016) <https://jobs.undp.org/cj_view_job.cfm?cur_job_id=63027>. The publication describes the project as ‘part of a series of ascertainment studies of the ethnic groups in South Sudan’. See also Olenasha and others (2012) 9.

The reason is that such harmonisation denies the affected communities control over their respective indigenous customary laws, which affects their culture and tradition, and imposes alien indigenous customary law upon them. The alien indigenous customary law is usually that of the most powerful or influential community in the affected group of communities.

The imposition of alien indigenous customary law, through the processes of judicialization, codification, and restatement, violates the rights of each indigenous community to its autonomy, sovereignty, and self-governance in its internal and local affairs; causes injustice; and amounts to usurpation of the right of the community to determine its own laws.²⁰⁶

In judicialisation, the courts use their unfettered discretion that causes arbitrariness to dictate the applicable rules of indigenous customary law through the tests of validity²⁰⁷ and the application of the doctrines of judicial notice and judicial precedent. The application of those doctrines and the use of books and other types of publications for determining the existence of rules of indigenous customary law produce a dead and obsolete version of the law.²⁰⁸

Restatement is essentially ‘the customary law of experts’, e.g. the lawyers, anthropologists, and sociologists who carry it out.²⁰⁹ Their ‘professional’ version

²⁰⁶ Mikano E Kiye, ‘The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon’ (2015) 15(2) *African Studies Quarterly* 85, 89.

²⁰⁷ RD Leslie, ‘The Repugnancy Rule in African Law and the Public Policy Rule in Conflict of Laws’ (1977) *Acta Juridica* 117–127; Matthew Enya Nwocha, ‘Customary Law, Social Development and Administration of Justice in Nigeria’ (2016) 7(4) *Beijing Law Review* 430, 437–438.

²⁰⁸ A Weis Bentzon, ‘Negotiated Law: The Use and Study of Law Data in International Development Research’ (1994) Roskilde University International Development Studies Occasional Paper No 13 92, 98 <<https://rossy.ruc.dk/index.php/ocpa/article/view/4158>> accessed 21 June 2019. See also Birgit Bräuchler, *The Cultural Dimension of Peace: Decentralization and Reconciliation in Indonesia* (Palgrave Macmillan 2015) 185; Lea Mwambene, ‘The Essence Vindicated? Courts and Customary Marriages in South Africa’ (2017) 17 *African Human Rights Law Journal* 35, 52 <<http://dx.doi.org/10.17159/1996-2096/2017/v17n1a2>> accessed 9 May 2019.

²⁰⁹ Gordon R Woodman, Book Review (1992) 32 *Journal of Legal Pluralism* 149–153. For Professor Twining’s incisive criticism of the restatement of Kenya customary law, see Eugene Cotran, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 *International and Comparative Law Quarterly Supplementary Publication* 72, 87.

of the rules of indigenous customary law may not be the true version the way the communities know and practise them.

Codification removes the development of indigenous customary law from the communities to the State bureaucratic apparatus, e.g. the codification of Indonesian *adat*²¹⁰ law (indigenous customary law) by the Dutch colonial government of the East Indies.²¹¹

Judicialization has several other defects that need more elucidation. For instance, it violates the general human right to equality and non-discrimination and the specific rights of women, as they are prevented from being elders, chiefs, or expert witnesses in some indigenous communities, thereby denying them equal opportunity with men in customary law matters.

Further, judicialization denies justice to the poor, illiterate, and lowly who may not be capable of eloquently proving the existence of their *valid* indigenous customary law, for example, the case of the Indian people of the Kumaon Hills.²¹²

Evidentiary proof of the existence of indigenous customary law by calling witnesses,²¹³ makes cases unnecessarily ‘too expensive and too protracted’, as the Judge rightly stated in *Ngcobo v Ngcobo*.²¹⁴ Judicialization therefore exacerbates the already too many injustices and inequalities that indigenous communities suffer worldwide.

²¹⁰ *Adat* is from the Arabic word for ‘custom’: JF Holleman (ed), *Van Vollenhoven on Indonesian Adat Law* (JF Holleman, Rachel Kalis & Kenneth Maddock (trs), 1981) 4.

²¹¹ Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (Routledge 2013) 43.

²¹² MP Jain, ‘Custom as a Source of Law in India’ in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 49, 68.

²¹³ For instance, *eleven witnesses* were required to prove the existence of a custom in the South African case of *Van Breda v Jacobs* [1921] (AD) 330.

²¹⁴ [1929] (AD) 233–234. JC Bekker and IA van der Merwe, ‘Proof and Ascertainment of Customary Law’ (2011) 26(1) Southern African Public Law 115, 117 <<https://hdl.handle.net/10520/EJC153213>> accessed 17 June 2019; MP Jain, ‘Custom as a Source of Law in India’ in Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) 49, 74.

In addition, judicialization violates the rights of indigenous communities *qua* communities against discrimination and unfair treatment.²¹⁵ It is so because there is no such burdensome and unjust requirement of evidentiary proof of the existence of any provision of the other primary sources of law (e.g. legislation and judicial decisions): courts simply take judicial notice of them and accept their published official versions in all judicial proceedings.

5.2.2 Non-Publication of Indigenous Customary Law in Indigenous Languages

Judicialization, codification, and restatement violate the linguistic rights of the affected indigenous communities,²¹⁶ as they are not published in their indigenous languages. This defect makes their indigenous customary law *linguistically inaccessible*. The Namibian self-statement is different: it is published in both English and the language of each traditional authority, although there appears to be no proper legal framework to sustain it. All the four methods lack the legal framework that is needed to create policies for publishing indigenous customary law in indigenous languages.

5.2.3 Non-Availability of Alternate Formats of the Published Indigenous Customary Law for Persons with Disabilities

None of the four ascertainment methods publish indigenous customary law in the required alternate formats for public access by persons with disabilities, thereby denying them their right of access under the CRPD. It is also a violation of their human right of public access to indigenous customary law.

5.2.4 Copyright Protection in the Published Indigenous Customary Law

Copyright in the texts of the judicialized, codified, restated, and self-stated indigenous customary law violates the people's right of free public access to *their*

²¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 art 2; UN Declaration on Minorities arts 2, 3, 4.

²¹⁶ Linguistic rights are human rights and are also interwoven with cultural rights. See ICCPR art 27; ICESCR arts 1, 3, 6, 15; UNDRIP arts 2, 3, 5, 8, 13, 14, 15, 16; *Lambert v California*, 225 U.S. 355 (1957); Universal Declaration on Linguistic Rights (Barcelona Declaration), World Conference on Linguistic Rights (9 June 1996) <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019; Claire Kramsch, *Language and Culture* (Oxford University Press 1998) 3.

law. As judicialized and codified rules of indigenous customary law exist in the State judicial and legislative publications, the copyright in such customary law depends on each country's copyright laws and policies on public legal information. For example, although the US federal law prohibits copyright in federal government information that includes federal legal information,²¹⁷ '[s]ome states and municipalities in the United States assert copyright in their local legislation.'²¹⁸

The authors and publishers of the books containing the restated and self-stated rules of indigenous customary law own the copyright in those publications. For instance, Sweet and Maxwell has copyright in the volumes on the *Restatement of African Law Project* the company published.²¹⁹ The *Restatement of Customary Law of Nigeria*, produced by the Nigerian Institute of Advanced Legal Studies, is published by Safari Books (a commercial publisher in Nigeria),²²⁰ which has private copyright implications. The Human Rights Documentation Centre (University of Namibia) and the Council of Traditional Leaders of Namibia jointly own the copyright in the volumes of the *Customary Law Ascertained* books on the Namibian self-statement published by the University of Namibia Press.²²¹ However, the South Sudan version of self-statement is an exception, as the volumes of its ascertained indigenous customary laws are available with free access on the UNDP website,²²² probably because UNDP co-sponsored the project.

²¹⁷ United States Government Publishing Office, 'Public Domain & Copyright Notice' (*Govinfo*) <www.govinfo.gov/about/policies#copyright> accessed 14 May 2018.

²¹⁸ Michael W Carroll, 'The Movement for Open Access Law' (2006) 10 *Lewis & Clark Law Review* 741, 746 <https://digitalcommons.wcl.american.edu/facsch_lawrev/43/> accessed 22 July 2019.

²¹⁹ Aim25, 'School of Oriental and African Studies: Restatement of African Law Project' (*Aim25*, April 2002) <www.aim25.com/cgi-bin/vcdf/detail?coll_id=5958&inst_id=19&nv1> accessed 25 May 2019. The archive holds the collections 1902–1977.

²²⁰ Nigerian Institute Advanced Legal Studies, *Restatement of Customary Law of Nigeria* (Safari Books 2013) <www.africanbookscollective.com/books/restatement-of-customary-law-of-nigeria> accessed 16 June 2019.

²²¹ Manfred O Hinz and Alexander Gairiseb (eds), *Customary Law Ascertained, Volume 3: The Customary Law of the Nama, Ovaherero, Ovambanderu, and San Communities of Namibia* (University of Namibia Press 2016) <www.africanbookscollective.com/books/customary-law-ascertained-volume-3> accessed 16 June 2019.

²²² For links to the three volumes of the South Sudan Ascertainment Study Reports, see United Nations Development Programme, 'Reports on Ascertainment of Customary Laws in South Sudan' (*United Nations Development Programme*)

It is reiterated that there should be no copyright whatsoever in the published texts of public legal information.

5.3 Conclusion

All the four existing methods of ascertainment of indigenous customary law have such public-access and human-rights defects that make each of them *unfit for purpose*. From the historical background to the four methods in the foregoing discussion, it is significant that all of them evolved over *several centuries ago before* the modern concept of adequate access to public legal information that gained global prominence after the invention of the World Wide Web in 1989 and the subsequent development of free online global access to public legal information in 1992. Similarly, all the four methods were in existence *before* the modern emphasis on the application of the United Nations-endorsed human rights-based approach²²³ to projects and programmes that affect people worldwide, which emerged in 1995.

Further, none of the four existing ascertainment methods has so far incorporated the adequate public-access concept nor the human rights-based approach, more than two decades after its emergence in 1995, not even the recent 2012 South Sudan Customary Law Ascertainment project co-sponsored by the United Nations Development Programme (UNDP).²²⁴

<www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan.html> accessed 11 May 2019.

²²³ UNSDG 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (adopted by the United Nations Sustainable Development Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019 (UN Statement of Common Understanding 2003).

²²⁴ United Nations Development Programme, 'Ascertainment of Customary Laws in South Sudan: Discussion Paper' (*United Nations Development Programme*) 3 <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

The public-access and human-rights defects of all the four existing methods of ascertainment are *inherent* in their existence because their fundamental objectives neither include the provision of adequate access to indigenous customary law nor consideration for the impact of ascertainment on the affected indigenous communities.

There is therefore the need for the application of the adequate public-access concept and the human rights-based approach to the ascertainment of indigenous customary law. Such application will enhance adequate public access to indigenous customary law in a manner that also meets the contemporary demands of the pervasive influence of the general human rights and the specific rights of indigenous communities worldwide.

6. The Human Rights-Based Approach as a Conceptual Framework for Ascertainment of Indigenous Customary Law

The human rights-based approach (HRBA) emerged in 1995 from ‘The Right Way to Development: Human Rights Approach to Development Assistance’ published by the Human Rights Council of Australia.²²⁵ The United Nations Sustainable Development Group (UNSDG)²²⁶ adopted The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies statement in 2003²²⁷ (shortened as ‘the Common Understanding’). One of the items of the Common Understanding states: ‘All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.’²²⁸

²²⁵ Sakiko Fukuda-Parr, ‘Human Rights and Politics in Development’ in Michael Goodhart (ed), *Human Rights: Politics and Practice* (2nd edn, Oxford University Press 2013) 161, 166.

²²⁶ Also referred to as United Nations Development Group (UNDG).

²²⁷ UNSDG ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ (adopted by the United Nations Sustainable Development Group in 2003) <<https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/>> accessed 14 July 2019.

²²⁸ Ibid

The United Nations defines ‘human rights-based approach’ as ‘a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.’²²⁹ The United Nations’ three HRBA strategies are as follows:

As development policies and programmes are formulated, the main objective should be to fulfil human rights.²³⁰

A human rights-based approach identifies rightsholders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.²³¹

Principles and standards derived from international human rights treaties should guide all development cooperation and programming in all sectors and in all phases of the programming process.²³²

Other HRBA strategies include rights talk to promote awareness of the rights of a group and legal advocacy or mobilisation through litigation in domestic courts to enforce and promote human rights.²³³

HRBA aims to influence political will towards human rights-compliant policies and programmes because ‘[t]he opportunity of all people . . . to enjoy their human rights can be compromised by a reluctance on the part of those in power to grant

²²⁹ UN Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (HR/PUB/06/8, United Nations 2006) 15 <<https://undg.org/wp-content/uploads/2016/09/FAQen2.pdf>> accessed 1 June 2019 (UN Human Rights-Based Approach 2006).

²³⁰ Ibid 15.

²³¹ Ibid

²³² Ibid 16.

²³³ Paul J Nelsona and Ellen Dorsey, ‘Who Practices Rights-Based Development? A Progress Report on Work at the Nexus of Human Rights and Development’ (2018) 104 *World Development* 97, 99 <<https://doi.org/10.1016/j.worlddev.2017.11.006>> accessed 13 April 2018.

such rights and a tendency for minority groups to miss out in the face of “majority rule.””²³⁴

In addition to the mainstream conception of HRBA, stated above, it has recently acquired added significance as a legal research mechanism. In her 2017 study of inadequate housing and risk of homelessness among families in Toronto’s aging rental high rises, Paradis ingeniously used HRBA to overcome a research dilemma, as it provided a holistic conceptualisation of a problem that revealed the bigger picture so that the proper solution could be designed.²³⁵ This way, HRBA helps in the formulation of the criteria for assessment of situations and projects, and provides *strategic* data analysis that mere *scholarly* data analysis based on quantitative techniques cannot capture.²³⁶ Wilkinson’s analysis demonstrates the holistic outcome of HRBA.²³⁷ After its emergence in 1995,²³⁸ just over two decades ago, HRBA has witnessed overwhelming global enthusiasm,²³⁹ and it has birthed ‘human rights-based analytical methods’²⁴⁰ for various uses.

In the case of quantitative legal research, like the aforementioned Paradis’ research, the reason for HRBA intervention as a legal research tool is that statistical inferences do not always represent the true state of affairs, due to factors such as unrepresentative samples, faulty methodology, and the sheer

²³⁴ John G Love and Rory Lynch, ‘Enablement and Positive Ageing: A Human Rights-Based Approach to Older People and Changing Demographics’ (2018) 22(1) *The International Journal of Human Rights* 90, 90 <<https://doi.org/10.1080/13642987.2017.1390310>> accessed 13 April 2018.

²³⁵ Emily Paradis, ‘Homelessness “In Their Horizon”: A Right-Based, Feminist Study of Inadequate Housing and Risk of Homelessness Among Families in Toronto’s Aging Rental High Rises’ in Fran Klodawsky, Janet Siltanen and Caroline Andrew (eds), *Toward Equity and Inclusion in Canadian Cities: Lessons from Critical Praxis-Oriented Research* (McGill-Queen’s University Press 2017) 180, 186.

²³⁶ Ibid

²³⁷ Gale Wilkinson, ‘A Human Rights-Based Approach to Education’ (*Australian Institute of International Affairs*, 7 April 2016) <www.internationalaffairs.org.au/australianoutlook/a-human-rights-based-approach-to-education/> accessed 25 May 2019.

²³⁸ Sakiko Fukuda-Parr, ‘Human Rights and Politics in Development’ in Michael Goodhart (ed), *Human Rights: Politics and Practice* (2nd edn, Oxford University Press 2013) 161, 166.

²³⁹ Paul J Nelsona and Ellen Dorsey, ‘Who Practices Rights-Based Development? A Progress Report on Work at the Nexus of Human Rights and Development’ (2018) 104 *World Development*, 97, 100 <<https://doi.org/10.1016/j.worlddev.2017.11.006>> accessed 13 April 2018.

²⁴⁰ Ibid 105.

unpredictability of people's action. In addition, statistics are sometimes manipulated for various reasons, including political reasons,²⁴¹ as it happened in the Lok Sabha (Parliament of India)²⁴² and Argentina²⁴³ elections. In such situations, policies based on the resultant faulty statistical figures are also faulty. HRBA contributes to legal research methodology and the formulation of appropriate policies that are transparent; effective; acceptable; sustainable; and, uniquely, universal.

Indeed, HRBA has become a universal mechanism for the assessment of policies; projects; programmes; and the performance of institutions, including governments. That is the position of the United Nations, as revealed by the first of the programming principles for the UNESCO Country Programming Document for Myanmar 2013–2015 which stated:

All UNESCO programmes, activities and projects in Myanmar are planned, implemented, monitored and evaluated in accordance with human rights-based principles. In particular, focus is given to the root causes of discrimination, inequality and exclusion of vulnerable and marginalized groups.²⁴⁴

Recent use of HRBA in 2018 include the following: to evaluate higher education law and policy in Finland, Iceland and Sweden;²⁴⁵ to advocate for food and

²⁴¹ Olwen McNamara, 'Evidence-Based Practice Through Practice-Based Evidence' in Olwen McNamara (ed), *Becoming an Evidence-Based Practitioner: A Framework for Teacher-Researchers* (RoutledgeFalmer 2002) 15, 17.

²⁴² Himanshu, 'Electoral Politics and the Manipulation of Statistics' (2009) 44(19) *Economic and Political Weekly* 31–35 <www.jstor.org/stable/40279334> accessed 13 April 2018.

²⁴³ Frida Boräng and others, 'Cooking the Books: Bureaucratic Politicization and Policy Knowledge' (2017) 31(1) *Governance* <<https://doi.org/10.1111/gove.12283>> accessed 13 April 2018.

²⁴⁴ UNESCO 'UNESCO Country Programming Document for Myanmar 2013–2015' (2013) Doc BGK/UCPD/2013/MYA 12 <<https://unesdoc.unesco.org/ark:/48223/pf0000223703>> accessed 5 July 2019.

²⁴⁵ Jane Kotzmann, *The Human Rights-based Approach to Higher Education: Why Human Rights Norms Should Guide Higher Education Law and Policy* (Oxford University Press 2018).

nutrition security in Nigeria,²⁴⁶ and to advocate for justice and the welfare of older people in the UK.²⁴⁷

The policy document adopted by the General Assembly of the States Parties²⁴⁸ to the Convention for the Protection of the World Cultural and Natural Heritage²⁴⁹ requires States Parties to '[e]nsure that the full cycle of World Heritage processes from nomination to management is compatible with and supportive of human rights.'²⁵⁰ It is one of the all-four HRBA strategies in the said document. Global health governance is one of the other areas where the United Nations has recorded success through HRBA on global health issues, such as HIV/Aids, malaria, and tuberculosis.²⁵¹

As earlier stated in the conclusion of Section 5 above, it is necessary to apply the human rights-based approach as a conceptual framework for ascertainment of indigenous customary law (as discussed in this Section) to protect the general human rights and the specific indigenous rights of indigenous communities worldwide. Therefore, the non-application of the human rights-based approach to

²⁴⁶ Clementina Oluwafunke Ajayi and Kemisola O. Adenegan, 'Rights-Based Approach to Food and Nutrition Security in Nigeria' in Abiodun Elijah Obayelu (ed), *Food Systems Sustainability and Environmental Policies in Modern Economies* (IGI Global 2018) 217–233.

²⁴⁷ John G Love and Rory Lynch, 'Enablement and Positive Ageing: A Human Rights-Based Approach to Older People and Changing Demographics' (2018) 22(1) *The International Journal of Human Rights* 90, 90–107 <<https://doi.org/10.1080/13642987.2017.1390310>> accessed 13 April 2018.

²⁴⁸ UNESCO 'Policy Document for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention' (19 November 2015) WHC GA Res 20 GA 13, 20th Session, UN Doc WHC-15/20.GA/15 <<https://whc.unesco.org/archive/2015/whc15-20ga-15-en.pdf>> accessed 6 July 2019.

²⁴⁹ Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 <<https://treaties.un.org/doc/Publication/UNTS/Volume%201037/volume-1037-I-15511-English.pdf>> accessed 9 August 2019.

²⁵⁰ UNESCO, 'Policy Document for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention' (as adopted by Res 20 GA 13 of the General Assembly of States Parties to the World Heritage Convention at its 20th Session, UNESCO, 2015) <<https://whc.unesco.org/document/139747>> accessed 6 July 2019.

²⁵¹ Benjamin Mason Meier and Lawrence O Gostin (eds), *Human Rights in Global Health: Rights-Based Governance for a Globalizing World* (Oxford University Press 2018).

any of the four existing methods of ascertainment of indigenous customary law is a major defect in them, and it is one of the gaps this article aims to fill.

7. Huricompatisation as the Human Rights-Based Model of Ascertainment of Indigenous Customary Law

This Section discusses the meaning of the new concept of *huricompatisation* developed in this article; the human rights that are relevant to the concept, including their sources; its public access-adequate and human rights-compliant features; and its proper legal framework.

7.1 The Meaning of Huricompatisation

Indigenous customary law has its peculiarities that require the adaptation of the general concept of the right of free access to public legal information, defined in Section 4.3 above, to meet its needs. For example, the dominant form of indigenous customary law is unwritten²⁵² and its owners are indigenous communities that need special protection under international human rights law. Article 8 of the Indigenous and Tribal Peoples Convention 1989 is one of the provisions that seeks to ensure that all interventions in the affairs of indigenous communities respect and preserve their rights, their way of life, and their customary laws.

Like the general concept of human rights-compliant access to public legal information,²⁵³ public access to indigenous customary law should be both public access-adequate and human rights-compliant. That is the new concept that I describe as *human rights-compliant public access to indigenous customary law*, acronymed for ease of use as the new word *huricompatisation*.²⁵⁴

²⁵² Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72, 73; MW Prinsloo, 'Restatement of Indigenous Law' (1987) 20 Comparative and International Law Journal of Southern Africa 411, 412.

²⁵³ Discussed extensively in Chapter Two.

²⁵⁴ I coined the new word *huricompatisation* (noun) on 14 July 2017 as the acronym from the first one or more letters in the phrase, '**h**uman **r**ights-**c**ompliant **p**ublic **a**ccess **t**o indigenous customary

I define *huricompatisation* as follows: *Huricompatisation* is a public access-adequate and human rights-compliant mechanism for systematically recording or transmitting all the binding oral or unwritten rules of *each* community's indigenous customary law into writing (whose aim is to guarantee the permanent evidence of the existence of those rules and provide free and adequate access to them, so as to make them knowable and transparent) in a manner that preserves the adaptive nature and bindingness of those rules and also protects the general human rights and the specific indigenous rights of *that particular community* and its members.²⁵⁵

The above definition satisfies the objective to craft a one-sentence definition that is comprehensive and presents a graphic overview of the new concept of *huricompatisation*, as it covers all the public-access and human rights-compliant features, discussed in this article.

Huricompatisation requires the systematic recording or transmission, compilation, production, publishing, publicity, and continuous review of all the binding customs and practices of a particular indigenous community which form its customary law. All these activities should be carried out by the community *itself* through transparent processes that comply with human rights law, including the special indigenous rights of indigenous communities.

law', in which the letter 'I' represents 'indigenous customary law'. Its verb is *huricompatise* and its adjective, past tense, and past participle is *huricompatised*. The letter 'z' replaces 's' in its alternative (American) spelling: *huricompatization*, *huricompatize*, *huricompatized*. The word '*huricompatisation*' has been available online since November 2017 when the *German Law Journal* published the first article that forms Chapter Two of this thesis: Leesi Ebenezer Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right' (2017) 18(6) German Law Journal 1429, 1437, 1486 <<https://doi.org/10.1017/S2071832200022392>> accessed 10 August 2019. The word was, subsequently, also used in both articles that form Chapter Three and Chapter Four.

²⁵⁵ The specific indigenous rights referred to in this definition are enshrined in UNDRIP and other legal instruments on or relating to indigenous peoples. For a discussion of aspects of indigenous rights, see Geneva EB Thompson, 'Environmentalism and Human Rights Legal Framework: The Continued Frontier of Indigenous Resistance' (2017) 4(1) The Indigenous Peoples' Journal of Law, Culture & Resistance 9, 27–28 <<https://escholarship.org/uc/item/7s6639wt>> accessed 25 May 2019.

7.2 The Sources of the Human Rights that are Relevant to Huricompatisation

An outline of the sources of the human rights for assessing human rights-compliant public access to indigenous customary law, using the human rights-based approach (discussed in the immediately preceding Section 6), is presented here to show their relevance in terms of their legal effect in international law.

Article 38(1) of the ICJ Statute specifies the sources of public international law as ‘international conventions’; ‘international custom, as evidence of a general practice accepted as law’; ‘the general principles of law recognized by civilized nations’; and ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’.

The criteria for assessing human rights-compliant public access to indigenous customary law are gleaned from the relevant international human rights instruments from the aforementioned sources. They are discussed below under the following heads: conventional international law, customary international law, and general principles of international law that are the three primary sources of international law.²⁵⁶

7.2.1 Conventional International Law

International human rights instruments create binding obligations on the member States. This is in accordance with Article 26 of the Vienna Convention on the Law of Treaties which is based on the universal doctrine of *pacta sunt servanda*.²⁵⁷ The said Article 26 states: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

A treaty is binding automatically on a party to it upon that party’s ratification of that treaty at the international level under the international law doctrine of monism, e.g. under Section 2(6) of the Constitution of Kenya 2010: ‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this

²⁵⁶ Kevin Aquilina and Klejda Mulaj, ‘Limitations in Attributing State Responsibility Under the Genocide Convention’ (2018) 17(1) Journal of Human Rights 123, 133 <<https://doi.org/10.1080/14754835.2017.1300521>> accessed 25 May 2019.

²⁵⁷ A Latin expression which means ‘agreements must be kept’.

Constitution.’ But under dualism, a treaty is binding upon its specific adoption (also referred to as ‘domestication’²⁵⁸) as a post-international ratification act at the national level, e.g. under Section 12(1) of the Nigerian Constitution 1999: ‘No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’

7.2.1.1 *United Nations Treaties*

The seven UN multilateral treaties that contain human rights that the provision of public access to indigenous customary law should comply with include the following: International Covenant on Economic, Social and Cultural Rights²⁵⁹ (ICESCR); International Covenant on Civil and Political Rights²⁶⁰ (ICCPR); and the Convention on the Elimination of All Forms of Discrimination against Women²⁶¹ (CEDAW). The others are: the Convention on the Rights of Persons with Disabilities²⁶² (CRPD); International Convention on the Elimination of All Forms of

²⁵⁸ Raymond Adibe, ‘Energy Hegemony and Maritime Security in the Gulf of Guinea: Rethinking the Regional Trans-Border Cooperation Approach’ (2018) *Review of African Political Economy* 1, 3 <<https://doi.org/10.1080/03056244.2018.1484350>> accessed 7 August 2019.

²⁵⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 <https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf> accessed 9 August 2019.

²⁶⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 <https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf> accessed 9 August 2019.

²⁶¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 <https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf> accessed 9 August 2019.

²⁶² Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 <https://treaties.un.org/doc/Publication/CTC/Ch_IV_15.pdf> accessed 9 August 2019.

Racial Discrimination²⁶³ (ICERD); Convention on the Rights of the Child²⁶⁴ (CRC); and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families²⁶⁵ (ICMW).

These seven treaties are among the nine 'core international human rights instruments'.²⁶⁶ Their country ratification status is as follows: CRC (196), CEDAW (189), ICERD (179), CRPD (176), ICCPR (170), ICESCR (167), and ICMW (51).²⁶⁷ ICMW has the least ratification, perhaps due to the receiving States' fear of its immigration implications and other consequences, and it has been described as 'one of the most unpopular treaties'.²⁶⁸

7.2.1.2 *International Labour Organisation Indigenous and Tribal Peoples Convention 1989*

The seven core UN international human rights instruments (mentioned in the immediately preceding Section 7.2.1.1) are not the only conventional sources of the human rights that the provision of public access to indigenous customary law

²⁶³ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 <https://treaties.un.org/doc/Treaties/1969/03/19690312%2008-49%20AM/Ch_IV_2p.pdf> accessed 9 August 2019.

²⁶⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 <https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf> accessed 9 August 2019.

²⁶⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) <https://treaties.un.org/doc/Treaties/1990/12/19901218%2008-12%20AM/Ch_IV_13p.pdf> accessed 9 August 2019.

²⁶⁶ UN Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties* (United Nations 2014) <www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf> accessed 5 June 2019.

²⁶⁷ UN Office of the High Commissioner for Human Rights, 'Status of Ratification Interactive Dashboard' (*UN Office of the High Commissioner for Human Rights*) <<http://indicators.ohchr.org/>> accessed 25 May 2019.

²⁶⁸ Antoine Pécoud, 'The UN Convention on Migrant Workers' Rights at 25' (*Open Democracy*, 18 December 2015) <www.opendemocracy.net/beyondslavery/antoine-p-coud/un-convention-on-migrant-workers-rights-at-25> accessed 25 May 2019.

must comply with. For instance, the Indigenous and Tribal Peoples Convention 1989²⁶⁹ of the International Labour Organization (ILO) also contains relevant provisions on the issue. ILO, founded in 1919, is one of the specialized agencies in the UN system.

It is significant that 'ILO has been engaged with indigenous and tribal peoples' issues since the 1920s.'²⁷⁰ For over eight decades now, ILO has been at the forefront of the adoption of conventions on several aspects of the rights and welfare of indigenous peoples. Recruiting of Indigenous Workers Convention 1936²⁷¹ was the first of its seven conventions on indigenous peoples. The Indigenous and Tribal Populations Convention 1957²⁷² was the first of its conventions to make general provisions on the rights of indigenous peoples.

The International Labour Conference (ILC) of ILO adopted the Indigenous and Tribal Peoples Convention 1989 on 27 June 1989 in Geneva, at its 76th session. The said Convention entered into force on 5 September 1991, and replaced the Indigenous and Tribal Populations Convention 1957 as its revision. This background is significant because it reveals that the Indigenous and Tribal Peoples Convention 1989, as the revised version of the Indigenous and Tribal Populations

²⁶⁹ Indigenous and Tribal Peoples Convention 1989 (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 9 August 2019.

²⁷⁰ International Labour Organization, 'Indigenous and Tribal Peoples' (*International Labour Organization*) <www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm> accessed 10 March 2018 (ILO Indigenous and Tribal Peoples). See also Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15 Oklahoma City Law Review 677, 679.

²⁷¹ Recruiting of Indigenous Workers Convention 1936 (adopted 20 June 1936, entered into force 8 September 1939) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C050> accessed 9 August 2019.

²⁷² Indigenous and Tribal Populations Convention 1957 (adopted 26 June 1957, entered into force 2 June 1959) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> accessed 8 August 2019.

Convention 1957,²⁷³ contains provisions on the rights of indigenous peoples that are now more than sixty years old. Twenty-two countries, including Denmark, Netherlands, Norway, and Spain, have ratified the Convention.²⁷⁴ Like every treaty that is binding on the parties to it,²⁷⁵ the Convention is 'binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.'²⁷⁶

The Indigenous and Tribal Peoples Convention 1989 has become one of the world's major sources of the rights of indigenous peoples. In fact, it is 'the only international treaty open for ratification that deals exclusively with the rights of [indigenous and tribal] peoples'²⁷⁷ and 'the sole treaty devoted to the rights of indigenous peoples'.²⁷⁸

It is noteworthy that Article 30 of the Indigenous and Tribal Peoples Convention 1989 requires governments 'to make known to [the peoples] their rights and duties.' Their rights and duties include those under their own unwritten indigenous customary law, which exist only in the *minds*²⁷⁹ of their elders and

²⁷³ For a detailed analysis of the revision of the Indigenous and Tribal Populations Convention 1957 by the Indigenous and Tribal Peoples Convention 1989, see Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15 *Oklahoma City Law Review* 677–714.

²⁷⁴ International Labour Organization, 'Ratifications of C169 — Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (*International Labour Organization*) <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 25 May 2019.

²⁷⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 26.

²⁷⁶ Indigenous and Tribal Peoples Convention 1989 art 38(1).

²⁷⁷ International Labour Organization, 'Indigenous and Tribal Peoples' (*International Labour Organization*) <www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm> accessed 10 March 2018.

²⁷⁸ Rachael Lorna Johnstone, 'Indigenous Rights in the Marine Arctic' in Cécile Pelaudeix and Ellen Margrethe Basse (eds), *Governance of Arctic Offshore Oil and Gas* (Routledge 2018) 72, 74 <<http://site.uit.no/ravna/files/2018/08/Securing-the-Coastal-S%C3%A1mi-Culture-and-Livelihood.pdf>> accessed 25 May 2019.

²⁷⁹ Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3; Akpomuvire Mukoro,

community leaders. The duty of governments in the said Article 30 involves the provision of *documentary* access to such rights and duties.

7.2.2 Customary International Law

Undocumented or uncodified customary international law, like unwritten indigenous customary law, is fraught with the problem of uncertainty²⁸⁰ and poor access that have made it difficult for some scholars to accept it as a ‘proper “source” of international law’.²⁸¹ Customary international law has always been a controversial source of international law. Justice Bankole Thompson, a former Judge of the UN-approved Special Court for Sierra Leone,²⁸² noted its controversial nature recently in 2015.²⁸³ The controversy was the same in 1953, and the years before then, as Kunz stated: ‘the problem of the nature of customary international law is still controversial within the science of international law.’²⁸⁴ Some scholars have even gone to the point of advocating its abrogation: ‘In this article, I argue that CIL [customary international law] should be eliminated as a source of international legal norms and replaced by consensual processes.’²⁸⁵

‘The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect’ (2011) 26(2) *Journal of Social Sciences* 139, 140–141.

²⁸⁰ Jack Goldsmith and Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122(7) *Harvard Law Review* 1791, 1804–1805 <https://harvardlawreview.org/wp-content/uploads/pdfs/goldsmith_levinson.pdf>. The problem of uncertainty of unwritten customary international law has led to the codification of many of its principles by various treaties. See Sofia Michaelides-Mateou, ‘Customary International Law in Aviation: A Hundred Years of Travel Through the Competing Norms of Sovereignty and Freedom of Overflight’ in Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) ch 10, para 10.7.

²⁸¹ Samantha Besson, Jean D’Aspremont and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 380. See also Fabian Augusto Cardenas Castaneda, ‘Customary International Law as an Argumentative Framework: An Alternative Theoretical Approach in International Environmental Law’ (PhD Thesis, National University of Colombia 2016) <<https://dx.doi.org/10.2139/ssrn.2834291>> accessed 25 May 2019.

²⁸² United Nations, *Special Court for Sierra Leone* <www.rscsl.org/> accessed 6 March 2018.

²⁸³ Bankole Thompson, *Universal Jurisdiction: The Sierra Leone Profile* (Asser Press 2015) 6.

²⁸⁴ Josef L Kunz, ‘The Nature of Customary International Law’ (1953) 47(4) *The American Journal of International Law* 662, 663 <www.jstor.org/stable/pdf/2194914.pdf> accessed 25 May 2019.

²⁸⁵ J Patrick Kelly, ‘The Twilight of Customary International Law’ (2000) 40 *Virginia Journal of International Law* 449, 452.

Despite its inadequacies, numerous scathing criticisms, and predictions of and calls for its demise, customary international law has continued to survive gallantly as a prominent primary source of international law. One of the reasons for its prominence is the unique advantage it has over conventional international law: its capability of automatic universal bindingness on all States, without the need for any ratification.²⁸⁶

According to Article 38(1)(b) of the ICJ Statute, international custom, as a primary source of international law, is ‘evidence of a general practice accepted as law’.²⁸⁷ This definition contains the two requirements of state practice and *opinio juris* that are necessary to create binding customary international law. On these requirements, the International Court of Justice held that

. . . two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.²⁸⁸

The ‘general practice accepted as law’ in Article 38(1)(b) of the ICJ Statute is traditionally a practice that is oral or unwritten. Unwritten customary law is the

²⁸⁶ Michael P Scharf, ‘Accelerated Formation of Customary International Law (2014) 20(2) ILSA Journal of International & Comparative Law 305, 309 <http://scholarlycommons.law.case.edu/faculty_publications/1167> accessed 25 May 2019 (reference omitted) (‘Unlike treaties, which bind only the parties thereto, once a norm is established as customary international law, it is binding on all States, even those new to a type of activity, so long as they did not persistently object during its formation.’).

²⁸⁷ Legal Information Institute of Cornell Law School, ‘Customary International Law’ (*Legal Information Institute of Cornell Law School*) <www.law.cornell.edu/wex/customary_international_law> accessed 25 May 2019 (“Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation.”).

²⁸⁸ *North Sea Continental Shelf, Judgment*, ICJ Reports 1969 3 <www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>

organic or native *form* of customary international law and indigenous customary law. The said general practice may also evolve from sufficient recognition and enforcement of provisions of treaties and the resolutions of authoritative bodies like the UN General Assembly.²⁸⁹ This is the reason for the plethora of enthusiastic academic inquiry into whether any UN declaration, for instance, has attained the exalted binding status of customary international law. It is so because declarations are soft law²⁹⁰ and therefore nonbinding; they can become binding—and that, on all States—only when they have attained the status of customary international law.²⁹¹

UN resolutions that contain provisions that are particularly relevant to the criteria for assessing human rights-compliant public access to indigenous customary law include UDHR and UNDRIP. It is noteworthy that all the relevant rights in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁹² (UN Declaration on Minorities) are also found in UNDRIP where they are better articulated. Therefore, it is not necessary to include the UN Declaration on Minorities in this discussion. The status of UDHR and UNDRIP is examined below.

7.2.2.1 *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR), proclaimed and adopted by the UN General Assembly on 10 December 1948 and already translated into not

²⁸⁹ Samantha Besson, Jean D'Aspremont and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 866–867.

²⁹⁰ For recent discussion on soft law and hard law, see Junhai Liu, 'Globalisation of Corporate Governance Depends on Both Soft Law and Hard Law' in JJ du Plessis and CK Low (eds), *Corporate Governance Codes for the 21st Century* (Springer 2017) 275–294; Andrei Marmor, 'Soft Law, Authoritative Advice, and Nonbinding Agreements' (2017) Cornell Law School Research Paper No 17–24 <<https://ssrn.com/abstract=2968128>> accessed 25 May 2019.

²⁹¹ Sylvanus Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples' (2007) 6(2) Contemporary International Human Rights Law International Human Rights Law Review 242, 244.

²⁹² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992) UN Doc A/RES/47/135 (UN Declaration on Minorities) <<https://undocs.org/A/RES/61/295>> accessed 10 August 2019.

less than 508 languages,²⁹³ may be termed the mother of human rights law due to its all-pervasive influence on all aspects of human rights. It is arguably 'the United Nations' best known document'²⁹⁴ and the world's most popular international legal instrument. The United Nations rightly refers to it as 'a milestone document in the history of human rights'.²⁹⁵

It is significant that the preambles of all the nine core international human rights instruments²⁹⁶ expressly recognise or affirm the UDHR. The preambles of regional human rights instruments also contain the same recognition and affirmation, such as those of the African Charter on Human and Peoples' Rights,²⁹⁷ European Convention on Human Rights,²⁹⁸ American Convention on Human Rights,²⁹⁹ and the Arab Charter on Human Rights.³⁰⁰

²⁹³ UN Office of the High Commissioner for Human Rights, 'About the Universal Declaration of Human Rights Translation Project' (*UN Office of the High Commissioner for Human Rights*) <www.ohchr.org/en/udhr/pages/introduction.aspx> accessed 25 May 2019.

²⁹⁴ Anita Jowitt, 'The Notion of Human Rights' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Australian National University E Press 2010) 185, 186 <www.jstor.org/stable/pdf/j.ctt24h3jd.18.pdf> accessed 25 May 2019.

²⁹⁵ Universal Declaration of Human Rights, UNGA Res 217 (III) (adopted 10 December 1948) (UDHR) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed 9 August 2019.

²⁹⁶ UN Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties* (United Nations 2014) <www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf> accessed 5 June 2019

²⁹⁷ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 1520 UNTS 217 preamble.

²⁹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 preamble.

²⁹⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 preamble.

³⁰⁰ Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) preamble <http://www.eods.eu/library/LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf> accessed 8 August 2019.

Further, the human rights principles in the UDHR are replicated in the nine core international human rights treaties with a high ratification rate³⁰¹ in regional human rights treaties and national constitutions, and they are accepted and enforced in national legal systems worldwide.³⁰² Although there may be no universal consensus on the issue—which is understandable, as part of the uncertainty problems of customary international law—from the seminal analysis of Hannum, there is overwhelming evidence of State practice and *opinio juris* that leads to the conclusion that the UDHR acquired the status of customary international law since 1995.³⁰³ It is significant that the UDHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its Optional Protocols officially form the world's *International Bill of Human Rights*, according to the United Nations.³⁰⁴

7.2.2.2 United Nations Declaration on the Rights of Indigenous Peoples

Following its adoption by the UN General Assembly on 13 September 2007 by an overwhelming majority of 144 States (the four countries that initially voted against it have since reversed their votes), the United Nations has extolled the United

³⁰¹ Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law' (2017) 20(1) International Journal of Speech-Language Pathology 12, 12 <www.tandfonline.com/doi/abs/10.1080/17549507.2018.1392612> accessed 25 May 2019.

³⁰² Hurst Hannum, 'The UDHR in National and International Law Health and Human Rights' (1998) 3(2) Fiftieth Anniversary of the Universal Declaration of Human Rights 144–158 <www.jstor.org/stable/pdf/4065305.pdf> accessed 25 May 2019; Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Georgia Journal of International and Comparative Law 287–329 <<http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl>> accessed 25 May 2019.

³⁰³ Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Georgia Journal of International and Comparative Law 287, 322–329 <<http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl>> accessed 25 May 2019.

³⁰⁴ 'Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights' (United Nations, June 1996) <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> accessed 25 May 2019.

Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as ‘the most comprehensive international instrument on the rights of indigenous peoples’.³⁰⁵

Although UNDRIP is soft law and therefore a nonbinding international legal instrument, it has the authority of the UN General Assembly,³⁰⁶ it contains universal principles of humanity and justice, and it amplifies existing human rights principles, as they specifically relate to indigenous peoples and minorities.³⁰⁷

Some scholars recognise the huge universal legal weight of UNDRIP, but are unable to conclude that it has attained customary international law status.³⁰⁸ However, like the UDHR,³⁰⁹ other scholars have argued that UNDRIP should be binding on all States as customary international law. For example, Tobin rightly posited: ‘Although UNDRIP is not of itself legally binding, it has already been relied upon by international treaty bodies, and is widely seen as reflecting the status of international human rights of Indigenous peoples, as set out in international human rights instruments and in customary international law.’³¹⁰ Tobin rightly emphasised the importance of ‘the recognition by customary international law of Indigenous peoples’ rights to their own legal regimes and the concomitant

³⁰⁵ United Nations, ‘United Nations Declaration on the Rights of Indigenous Peoples’ (*UN Department of Economic and Social Affairs*) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 4 August 2019. See also Brendan M Tobin, ‘Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights’ (2013) 9(2) *Law, Environment and Development Journal* 142, 145 <www.lead-journal.org/content/13142.pdf> accessed 13 September 2017.

³⁰⁶ Sylvanus Gbendazhi Barnabas, ‘The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 6(2) *Contemporary International Human Rights Law International Human Rights Law Review* 242, 261.

³⁰⁷ *Ibid* 254.

³⁰⁸ For example, *ibid* 244–256.

³⁰⁹ Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995) 25 *Georgia Journal of International and Comparative Law* 287, 322–329 <<http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl>> accessed 25 May 2019.

³¹⁰ Brendan M Tobin, ‘Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights’ (2013) 9(2) *Law, Environment and Development Journal* 142, 145 <www.lead-journal.org/content/13142.pdf> accessed 13 September 2017 (references omitted).

obligation of states to respect and recognise Indigenous peoples' legal regimes in order to secure their human rights.'³¹¹

In his 1996 seminal work, well before the adoption of UNDRIP in 2007, Anaya argued extensively that several significant international developments over a number of years had crystallized the rights of indigenous peoples into customary international law.³¹² In his subsequent work in 2004, Anaya analysed the implications of the *draft* UNDRIP; the proposed Organization of American States (OAS) declaration on indigenous rights; the Indigenous and Tribal Peoples Convention 1989; and several international and regional human rights treaties and initiatives, and cases. He concluded: 'It is thus evident that certain minimum standards concerning indigenous land rights, rooted in accepted precepts of cultural integrity, property, non-discrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law.'³¹³ More than a decade after Anaya's treatise, Johnstone posited that 'the increasing deference paid to [UNDRIP] by states in the Arctic and elsewhere is evidence of *opinio juris*, and commitments to its implementation are evidence of state practice, i.e. the two necessary conditions to create customary international law.'³¹⁴

7.2.3 General Principles of Law Recognized by Civilized Nations

Article 38(1)(c) of the ICJ Statute makes 'the general principles of law recognized by civilized nations' one of the primary sources of international law. Like customary international law, there are unresolved controversies on the identification of the exact general principles that are binding on States. General

³¹¹ Ibid 146.

³¹² S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 1996) 49–58.

³¹³ S James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21(1) *Arizona Journal of International & Comparative Law* 13, 47 <<http://arizonajournal.org/wp-content/uploads/2015/11/Anaya.pdf>> accessed 25 May 2019.

³¹⁴ Rachael Lorna Johnstone, 'Indigenous Rights in the Marine Arctic' in Cécile Pelaudeix and Ellen Margrethe Basse (eds), *Governance of Arctic Offshore Oil and Gas* (Routledge 2018) 72, 85 <<http://site.uit.no/ravna/files/2018/08/Securing-the-Coastal-S%C3%A1mi-Culture-and-Livelihood.pdf>> accessed 25 May 2019.

principles have been described as ‘one of the most debated issues’³¹⁵ and ‘the most controversial of the sources of international law’.³¹⁶ The controversy even extends to the overlap between general principles and custom.³¹⁷

An examination of cases decided by international courts and tribunals reveals that it is not easy to circumscribe with any precision the range of principles that they accept as general principles.³¹⁸ However, it is certain that they include principles of law from national and international legal systems, such as *res judicata*, unjust enrichment, good faith, and due process;³¹⁹ legal maxims, prohibition of the use of force, and self-determination.³²⁰

It is significant the ICJ gives due consideration to the resolutions of the UN General Assembly in its determination of what constitutes general principles.³²¹ For example, it has been argued that the indigenous rights in UNDRIP qualify for their due recognition as general principles of international law.³²² Articulating the

³¹⁵ Marcelo Vázquez-Bermúdez, ‘General Principles of Law’ in United Nations General Assembly, *Report of the International Law Commission*, UN Doc A/72/10 (Supplement No 10, United Nations 2017) 224, 225 <<https://undocs.org/en/A/72/10>> accessed 5 July 2019.

³¹⁶ Rumiana Yotova, ‘Challenges in the Identification of the “General Principles of Law Recognized by Civilized Nations”: The Approach of the International Court’ (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 269, 272 <www.cjcl.ca/wp-content/uploads/2017/08/Yotova-Challenges-in-Identifying.pdf> accessed 25 May 2019.

³¹⁷ Rumiana Yotova, ‘Challenges in the Identification of the “General Principles of Law Recognized by Civilized Nations”: The Approach of the International Court’ (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 269, 276–277 <www.cjcl.ca/wp-content/uploads/2017/08/Yotova-Challenges-in-Identifying.pdf> accessed 25 May 2019.

³¹⁸ Marcelo Vázquez-Bermúdez, ‘General Principles of Law’ in United Nations General Assembly, *Report of the International Law Commission*, UN Doc A/72/10 (Supplement No 10, United Nations 2017) 224, 302–306 <<https://undocs.org/en/A/72/10>> accessed 5 July 2019.

³¹⁹ *Ibid* 304–305.

³²⁰ Rumiana Yotova, ‘Challenges in the Identification of the “General Principles of Law Recognized by Civilized Nations”: The Approach of the International Court’ (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 269, 300–303 <www.cjcl.ca/wp-content/uploads/2017/08/Yotova-Challenges-in-Identifying.pdf> accessed 25 May 2019.

³²¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16 [Namibia Opinion]. See also *ibid* 303.

³²² Rumiana Yotova, ‘Challenges in the Identification of the “General Principles of Law Recognized by Civilized Nations”: The Approach of the International Court’ (2017) 3(1) *Canadian Journal of*

importance of general principles, as evidenced in the decisions of the ICJ, some scholars have posited:

Sometimes this reference to general principles has explicitly included a reference to the principles enunciated in the 1948 Universal Declaration of Human Rights (UDHR),³²³ presumably through their pre-existence or later recognition in domestic bills of rights, thus confirming that UDHR rights are recognized as general principles of international law and have acquired legal validity through that source.^{324 325}

Based on the rigorous analyses by international law scholars, some of which are mentioned above, the potential for the UDHR and UNDRIP to be binding both as customary international law and general principles of law recognized by civilized nations is indeed significant for the general concept of human rights-compliant access to public legal information and its specific application to indigenous communities worldwide. Such scholarly analyses matter in international law, because international courts and tribunals consider them ‘as subsidiary means for the determination of rules of law’ under Article 38(1)(d) of the ICJ Statute.

7.3 The Human Rights that are Relevant to Huricompatisation

The human rights that are relevant to the *huricompatisation* of indigenous customary law may be categorised as general human rights and specific indigenous rights. In the context of this discussion, *general human rights* are those human rights that apply to all persons, including indigenous peoples, children, women, minorities, persons with disabilities, migrants, etc. *Indigenous rights* are those specific rights in binding and non-binding international human rights

Comparative and Contemporary Law 269, 254–261 <www.cjcl.ca/wp-content/uploads/2017/08/Yotova-Challenges-in-Identifying.pdf> accessed 25 May 2019.

³²³ Universal Declaration of Human Rights, UNGA Res 217 (III) (adopted 10 December 1948) (UDHR) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed 9 August 2019.

³²⁴ See, for example, Case concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Judgment) [1980] ICJ Rep 3, 42.

³²⁵ Samantha Besson, Jean D’Aspremont and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 854 (references included).

instruments that protect different aspects of the life, environment, culture, language, identity, self-governance, heritage, religion, and existence of indigenous peoples or communities, both as individuals and as collectivities.

There is controversy on whether indigenous rights are human rights.³²⁶ However, as my definition above shows, there are indigenous rights that are unequivocally human rights because they also exist in human rights conventions, not just in UNDRIP, for instance.

Some scholars have questioned the relevance of specific indigenous rights, arguing that the existing regime of general human rights covers them adequately.³²⁷ Referring to this criticism against indigenous rights in 2002, Thornberry said: 'If this is the case, the need for indigenous rights is weakened or collapses.'³²⁸ The said criticism was not valid before the adoption of UNDRIP in 2007, and it is more invalid today, in the post-UNDRIP era.

International recognition of the specific rights of indigenous peoples may be traced to the 1920s when ILO commenced international engagement with indigenous matters.³²⁹ ILO engagement culminated in its seven conventions on indigenous peoples, starting with the ILO Recruiting of Indigenous Workers Convention 1936, subsequently the Indigenous and Tribal Populations Convention 1957, and its latest Indigenous and Tribal Peoples Convention 1989.³³⁰

Today, the universal recognition of UNDRIP and the spirited commitment of the United Nations and an overwhelming majority of States worldwide to its implementation have now strengthened indigenous rights. Therefore, any

³²⁶ See, for example, Andrew Erueti, 'Observations Relating to the U.N. Special Rapporteur's Report of Maori People in New Zealand – 2011: Introducing a Human Rights Discourse to Treaty Jurisprudence' (2015) 32(1) *Arizona Journal of International and Comparative Law* 195–208 <<http://arizonajournal.org/wp-content/uploads/2015/10/9-Erueti.pdf>> accessed 7 August 2019.

³²⁷ See, for example, Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester United Press 2002) 3–4.

³²⁸ *Ibid* 3.

³²⁹ International Labour Organization, "Indigenous and Tribal Peoples." See also Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15 *Oklahoma City Law Review* 677, 679.

³³⁰ Section 7.2.1.2 above.

opposition to indigenous rights is now merely a fruitless academic adventure because indigenous rights have come to stay.

Justification for UNDRIP and the concept of the specific rights of indigenous peoples is evident in its preamble and in UN publications.³³¹ The outcome of the UN General Assembly's World Conference on Indigenous Peoples (2014) is instructive:

We, the Heads of State and Government, ministers and representatives of Member States, reaffirming our solemn commitment to the purposes and principles of the Charter of the United Nations, in a spirit of cooperation with the indigenous peoples of the world . . . reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007 [and] reaffirm our solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to uphold the principles of the Declaration.³³²

The provision of adequate access to public legal information requires due consideration to a bundle of both general human rights and the specific rights of indigenous peoples, as outlined below.

7.3.1 The Right of Free Access to Public Legal Information

The right of free access to public legal information (discussed in Section 4.3 above) itself is the first human right to consider when assessing human rights-compliant public access to indigenous customary law. The right requires every government to provide *free* and *adequate* access to the whole of its stock of public legal information.

³³¹ For example, United Nations, 'United Nations Development Group's Guidelines on Indigenous Peoples Issues' (United Nations, 2009) <www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf> accessed 25 May 2019.

³³² UNGA 'Outcome Document of the High-Level Plenary Meeting of the General Assembly known as the World Conference on Indigenous Peoples' UNGA 69th Session UN Doc A/69/L.1 (15 September 2014) <<https://undocs.org/A/69/L.1>> accessed 25 May 2019.

It is emphasised that every government has the moral and legal obligation to provide such free access to all categories of its legal information both *without charge* and *directly* to the *people*—not through third parties—via its official public legal information website (i.e. preferably a single one-stop website, as discussed in Chapter Four) and public libraries. Therefore, the assertion by some scholars that ‘free access’ means the government should ‘provide [primary legal] materials to *other parties* [such as the legal information institutes] to republish, without fee’³³³ does not appear to be valid.

The free-access philosophy is based on two major premises. First, the people are the rightful owners of public information: Every government merely holds such information in trust for the people. Therefore, the people cannot be required to pay for access to *their* own information, which is their own property. Moreover, free access to public legal information is a human right, as discussed in Chapter Two. The Free Access to Law Movement (FALM) formulated this free-access philosophy in its famous Declaration of Free Access to Law 2002 thus:

Legal information institutes of the world, meeting in Montreal, declare that: Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law; Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge . . .³³⁴

Second, the free-access philosophy also emanates from sound logic and the demands of justice that the rule-of-law duty to obey the law and the presumption of knowledge of the law³³⁵—ignorance of which is no excuse—presuppose that the law can be known so that it can be obeyed (discussed in Section 4.3 of Chapter One). The presupposition that the law can be known further presupposes that the law is readily available and there is no barrier to that availability, e.g. the cost of

³³³ Graham Greenleaf, Andrew Mowbray and Philip Chung, ‘The Meaning of “Free Access to Legal Information”: A Twenty Year Evolution’ (2013) 1(1) *Journal of Open Access to Law* 1, 30 <<https://ojs.law.cornell.edu/index.php/joal/article/view/11/14>> accessed 25 May 2019 (emphasis added).

³³⁴ Montreal Declaration on Free Access to Law 2002.

³³⁵ Section 4.2.2 of Chapter One; Section D.II.5 of Chapter Two.

access. This reasoning is based on the universal legal principle in the Latin maxim, *lex non cogit ad impossibilia*—whose alternative version is *lex neminem cogit ad vana seu impossibilia*—which means ‘[t]he law does not compel one to do impossible things.’³³⁶

In this poverty-stricken world where people die of hunger and struggle with the basic necessities of life, and 10.7% of the world population live below the international poverty line of US\$1.90 per person per day,³³⁷ requiring them to buy all copies of public legal information is requiring them to do an impossible thing. For example, how many persons in Anguilla are likely to be able to afford to buy a set of the Laws of Anguilla which the government sells for \$1,875.00 or at least \$1,200.00?³³⁸ But that is just the cost of buying legislation—it does not include the other categories of public legal information, e.g. judicial decisions that are published in commercial law reports.

A study in 2006 revealed that 79.72% of lawyers did not own a set of the *Laws of the Federation of Nigeria*, the bound volumes of the federal legislation of Nigeria (a developing country), because its price of ₦150,000.00 (about £600.00 at that time) was too expensive.³³⁹ If lawyers are unable to buy the laws they use for their professional practice, then the situation must be much worse for the generality of the population. But the problem is not peculiar to developing countries. For instance, due to the high cost of subscription for legal databases, the American Bar Association Law Practice Division published a book in 2014 that ‘will help

³³⁶ ‘Lex non cogit ad impossibilia’ (*Oxford Reference*, Oxford University Press) <www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1271> accessed 25 May 2019.

³³⁷ World Bank, *Poverty and Shared Prosperity 2016: Taking on Inequality* (World Bank Publications 2016) 3 <<https://openknowledge.worldbank.org/bitstream/handle/10986/25078/9781464809583.pdf>> accessed 25 May 2019. But the figure is only for “extreme poverty”; it does not include other categories of poverty.

³³⁸ Anguilla, ‘Law Packages’ (*Office of the Attorney General*) <www.anguillalaws.com/law.php> accessed 22 March 2018. But Anguilla, now, also has a parallel official website that has free access to its laws: ‘Laws’ (*Government of Anguilla*) <www.gov.ai/laws.php> accessed 25 May 2019.

³³⁹ Leesi Ebenezer Mitee, ‘Public Access to Legislation and Its Inherent Human Rights: A Comparative Study of the United Kingdom and Nigeria’ (LLM dissertation, University of Huddersfield 2006).

lawyers quickly find the best free or low-cost resources online and use them for their research needs.³⁴⁰ Free public access for all members of the society—irrespective of their profession or station in life—is indeed an indispensable requirement for adequate access to public legal information.

7.3.2 The Right to Participate in the Public Affairs of One's Community

The right to participate in the public affairs of one's community is a human right that is guaranteed under several international human rights instruments.³⁴¹ For example, Article 25(a) of ICCPR states: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.' According to Article 5(c) of ICERD, it is 'the right of everyone . . . to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.' The right specifically empowers the poor and the marginalised members of the society to take part in crucial decisions that affect their lives, livelihood, and well-being.³⁴²

Article 19 of UNDRIP is particularly significant for the ascertainment of indigenous customary law. It provides that '[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'

This right includes public discussions and suggestions from citizens on matters affecting their welfare and the progress of the society. It specifically includes the opportunity afforded people to take part in the activities and processes relating to

³⁴⁰ American Bar Association, 'New ABA Book Helps Lawyers Find Free Legal Research Resources Online' (*American Bar Association*, 2 June 2014) <www.americanbar.org/news/abanews/aba-news-archives/2014/06/new_aba_book_helps.html> accessed 25 May 2019.

³⁴¹ Examples, UDHR art 21; ICCPR art 25; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art 5(c); CRPD art 29.

³⁴² Emeka Polycarp Amechi, 'Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment' (2009) 5(2) *Law, Environment and Development Journal*, 107, 112–115 <www.lead-journal.org/content/09107.pdf> accessed 26 May 2019.

the laws that regulate their conduct, such as proposals for and public hearings on new laws (bills). In the case of indigenous customary law, the active participation of members of the community is essential for the compilation, adoption, amendment, and review of its laws.

From the definition of democracy as '[a] system of government by the whole population or all the eligible members of a state, typically through elected representatives',³⁴³ the concept of democracy requires that the people should govern themselves as a corporate unit: Government *by* the people. For example, each distinct *autonomous* indigenous community is at the bottom of the hierarchy of governments in the world today. The government of such community is therefore its people as a group, that is, the community itself, comprising all of its members, particularly those who are of voting age. The community can decide any matter through its local referendum or through its elected representatives.

7.3.3 The General Right to Equality and Non-Discrimination

The general right to equality and non-discrimination is one of the pillars of human rights; the other pillars include freedom and human dignity: 'All human beings are born free and equal in dignity and rights. . . .'³⁴⁴ Article 7 of UDHR states this general right thus: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' The general right to equality and non-discrimination is relevant to every human rights-based endeavour, including the provision of adequate access to public legal information.

The right of access to justice that includes equal treatment before courts and other adjudicatory bodies,³⁴⁵ the right to equal participation in cultural activities,³⁴⁶ and the right to full and equal participation in the affairs of one's community³⁴⁷ are

³⁴³ 'democracy' (Oxford Dictionaries, Oxford University Press) <<https://en.oxforddictionaries.com/definition/democracy>> accessed 1 March 2018.

³⁴⁴ UDHR art 1.

³⁴⁵ ICERD art 5(a).

³⁴⁶ ICERD art 5(e)(vi).

³⁴⁷ CEDAW art 14(2)(f).

crucial to the success of every project for ascertainment of indigenous customary law.

Therefore, any discriminatory policy, custom or practice that hinders the full participation of any segment of the society in the ascertainment process violates their human rights and derogates from the effectiveness and acceptability of the process. Specific aspects of this general right to equality before the law and non-discrimination include the rights of persons with disabilities, women's rights, and migrant workers' rights, discussed below (in this Section).

7.3.4 The Rights of Persons with Disabilities

The World Health Organization (WHO) states authoritatively that '[d]isability is part of the human condition—almost everyone will be temporarily or permanently impaired at some point in life. . .'.³⁴⁸ More than one billion people worldwide live with one form of disability or the other.³⁴⁹

Article 1 of the UN Convention on the Rights of Persons with Disabilities (CRPD) defines 'persons with disabilities' to 'include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

Persons with disabilities are fellow human beings with equal rights that include all human rights. Unfortunately, it was only recently in 2006 that the UN General Assembly adopted the CRPD as the world's first international convention for promoting, protecting, and actualising the rights of rights of persons with disabilities.

By virtue of Article 4(1)(c) of CRPD, every State Party undertakes to 'take into account the protection and promotion of the human rights of persons with

³⁴⁸ World Health Organization, 'World Report on Disability' (Summary) (*World Health Organization*, 2011) 7 <http://apps.who.int/iris/bitstream/10665/70670/1/WHO_NMH_VIP_11.01_eng.pdf> accessed 26 May 2019.

³⁴⁹ Ibid

disabilities in all policies and programmes'. Such policies and programmes include participation in the ascertainment projects of their communities.

Therefore, the processes involved in the ascertainment of indigenous customary law must accommodate persons with disabilities. Further, indigenous customary law should be published or communicated in all the alternate formats that the different categories of persons with disabilities require to know the law, using assistive technologies.³⁵⁰

7.3.5 The Right of Access to Justice (Including Fair Trial)

The term 'access to justice' is a recent usage in international conventional human rights law: it is found only in Article 13 of the CRPD (2007) among the nine core international human rights instruments³⁵¹ and the Universal Declaration of Human Rights. But its equivalent terms, including 'effective remedy', are used in the UDHR and other international human rights instruments.³⁵²

According to Article 8 of UDHR, the right of access to justice is 'the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'³⁵³ The term 'national tribunals' covers all competent adjudicatory bodies in a State's legal system.³⁵⁴ The right requires 'full equality to a fair and public hearing by an

³⁵⁰ CRPD arts 2 and 26(3).

³⁵¹ UN Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties* (United Nations 2014) <www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf> accessed 5 June 2019.

³⁵² Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 1, 24–25 <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199233083.001.0001/acprof-9780199233083-chapter-1> accessed 26 May 2019.

³⁵³ See also ICCPR art 2(3).

³⁵⁴ ICCPR art 2(3)(b). For an in-depth discussion of ramifications of the right of access to justice, see, Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 1–55 <www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199233083.001.0001/acprof-9780199233083-chapter-1> accessed 26 May 2019.

independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him,³⁵⁵ which means it is an omnibus right that includes the right to a fair trial and the rule-of-law equality before the law.

Crucial aspects of the right of access to justice depends on adequate availability of public legal information,³⁵⁶ and it affects courts, lawyers, litigants, and witnesses alike. For example, courts need it to know the exact state of the law to avoid injustice from *per incuriam* decisions in ignorance of the relevant provisions of the law. Raymond Evershed, Master of the Rolls, formulated the classic definition of *per incuriam* decisions in the English case of *Morelle Ltd v Wakeling*:³⁵⁷

As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong.

The England and Wales Court of Appeal discovered in *Regina v Chambers*³⁵⁸ that its previous judgments over a period of about seven years were given in ignorance of repealed statutory provisions, and that poor access to UK legislation caused its error. All the lawyers in the *Chambers* case and all the defendants were also ignorant of the state of the law, because of poor access.

All litigants represented by lawyers need adequate access to public legal information for the proper prosecution of their cases. Self-represented litigants also need the same access to enable them to exercise their human right to self-representation. For instance, Article 14(3)(b) and (d) of ICCPR state that in any criminal trial, ‘... everyone shall be entitled to the following minimum guarantees,

³⁵⁵ UDHR art 10.

³⁵⁶ Cody Rei-Anderson and others, ‘Access to Justice Online: Are Canadian Court Websites Accessible for Users with Visual Impairments?’ (2018) 55(3) Alberta Law Review 647, 648 <www.albertalawreview.com/index.php/ALR/article/view/2458/2444> accessed 26 May 2019.

³⁵⁷ [1955] 2 QB 379, [1955] EWCA Civ 1; [1955] 2 WLR 672; [1955] 1 All ER 708.

³⁵⁸ [2008] EWCA (Crim) 2467.

in full equality: . . . [t]o have adequate time and facilities for the preparation of his defence . . . and to defend himself in person or through legal assistance of his own choosing.’ As rightly noted by the American Bar Association, self-representation is increasingly becoming a popular option due to the inability of litigants to pay lawyers’ fees, even in a developed country such as the United States.³⁵⁹ Therein lies the need for a functioning legal aid scheme for promoting access to justice.

Article 13(1) of CRPD contains a significant provision because it extends the *general* right of access to justice—which it specifically so names—to persons with disabilities and shows that the right also applies to the witnesses in any proceeding. The particular significance of this exposition to indigenous customary law is that judicial ascertainment of its unwritten rules requires the testimony of witnesses because the existence of such rules is a matter of *fact* that requires evidentiary proof. Calling witnesses for such proof—because unwritten indigenous customary law exists only in the human mind and is therefore inaccessible and unknowable, even to the court—jeopardizes access to justice, as it is expensive and causes delays in the administration of justice. These costs and delays are *discriminatory* against indigenous peoples because the other primary sources of law (e.g. legislation and judicial decisions) do not require any witness to prove their existence: Courts simply take judicial notice of their existence in official print or digital publications.

Finally, another relevant aspect of the general right of access to justice is the right against adverse retrospective laws in several international human rights instruments.³⁶⁰ For instance, Article 11(2) of UDHR provides that ‘[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed’ The relevance of this right is that unwritten indigenous customary law exists only in the minds of some people; therefore, to those who do not know it because of its unwritten nature, it is an inaccessible law that is

³⁵⁹ American Bar Association, ‘Self-Represented Litigants’ (*American Bar Association*) <www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/litigant_resources/> accessed 26 May 2019 (‘Courts continue to see large numbers of self-represented litigants (SRLs), in most cases because they cannot afford or access legal counsel.’).

³⁶⁰ Example, ICCPR art 15(1); CRC art 40(2)(a); ICMW art 19(1).

analogous to a non-existent law.³⁶¹ Its adequate publication in a permanent form, which is readily accessible and knowable to the people, is the only guarantee against the said unintended adverse effect of the unwritten form of indigenous customary law.

7.3.6 Children's Rights

The UN Convention on the Rights of the Child (CRC), which was adopted by the UN General Assembly in 1989 and entered into force in 1989, provides the international human rights framework for the protection of the rights of children. Article 1 of CRC defines a 'child' as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

The rights of children are relevant to the right of public access to indigenous customary law because they have the same right of free access to public information—guaranteed in Article 13(1) of CRC—that encompasses the general right of free access to public legal information. Beyond that general right, children have specific need for access to public legal information because it is part of the 'information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health' in Article 17 of CRC. Further, children also have the right of access to justice in Article 40 of CRC, which depends on the right of free access to public legal information, discussed in Section 4.3 above.

7.3.7 Women's Rights

The UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women³⁶² (CEDAW) in 1979, and it entered into force in 1981. It is a specific form of the general right to equality and non-discrimination that protects the rights of women against all forms of discrimination. Article 1 of CEDAW defines 'discrimination against women' to 'mean any distinction, exclusion

³⁶¹ Section D.II.5 of Chapter Two.

³⁶² Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 <https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf> accessed 9 August 2019.

or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

One of the social problems of indigenous communities is the existence of customs and practices that clearly discriminate against women. The rights of women are violated under the patriarchal system whereby males dominate females in the conduct of the affairs of the society, which is common in indigenous communities.³⁶³ As Pradhan rightly said, ‘equality before the law is not always achieved, and women still face traditional barriers including . . . poor access to laws, legal systems and the law making process.’³⁶⁴

Colonialism contributed to indigenous patriarchy,³⁶⁵ whose injustices include the exclusive recognition of men as the paramount rulers and chiefs of indigenous communities who are the experts and custodians of indigenous customary law. Women are thereby excluded from the operation and development of their customary law, as they are denied the right to testify as experts and witnesses on the rules of indigenous customary law.³⁶⁶ This is particularly significant because of the high evidentiary value of the testimony of elders, chiefs, and community heads in cases of indigenous customary law.³⁶⁷ Such exclusion violates the general right

³⁶³ Mary E Clark, ‘Rhetoric, Patriarchy & War: Explaining the Dangers of “Leadership” in Mass Culture’ (2004) 27(2) *Women and Language* 21, 21; ‘A Naga Tribunal’ (*The Morung Express*, 20 February 2017) <<http://morungexpress.com/a-naga-tribunal/>> accessed 26 May 2019.

³⁶⁴ Rima Das Pradhan, ‘Engendering Good Governance in Practice in Development’ in *Gender and Governance*, Bulletin No 51 (Development Studies Network 2000) 6, 6 <https://openresearch-repository.anu.edu.au/bitstream/1885/112718/64/DevelopmentBulletin-51_2000.pdf> accessed 26 May 2019.

³⁶⁵ Catherine E Burnette and Lynette M Renner, ‘A Pattern of Cumulative Disadvantage: Risk Factors for Violence across Indigenous Women’s Lives’ (2017) 47(4) *The British Journal of Social Work*, 1166, 1168 <<https://doi.org/10.1093/bjsw/bcw075>> accessed 26 May 2019.

³⁶⁶ Winifred Kamau, ‘Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya’ (2015) *East African Law Journal* 140, 148.

³⁶⁷ Jean G Zorn and Jennifer Corrin Care, ‘“Barava Tru”: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific’ (2002) 51(3) *International and Comparative Law Quarterly* 611, 620, 622.

to equality and non-discrimination and the specific rights of women to ‘participate in all community activities’ and to ‘equality with men before the law’ in Articles 14(2)(f) and 15(1) of CEDAW, respectively.

7.3.8 Migrant Workers’ Rights

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) entered into force in July 2003, following its adoption by the UN General Assembly in 1990. Article 2(1) of ICMW defines the term ‘migrant worker’ to mean ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.’ ICMW specifically extends the general right to equality and non-discrimination (discussed in Section 7.3.3 above) to migrant workers and members of their families.³⁶⁸ Article 25(1) of ICMW provides that ‘[m]igrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration.’

The ICMW guarantees to migrant workers and members of their families the right of free access to public legal information that is derived from the general right of free access to public information³⁶⁹ and the right of access to justice that is relevant to it.³⁷⁰ Therefore, the interest of migrant workers and members of their families should be protected in any access to public legal information project, including the ascertainment of indigenous customary law.

7.3.9 The Omnibus Right to Self-Determination

The following definition of the term ‘self-determination’ is relevant to this discussion: ‘Self-determination denotes the legal right of people to decide their own destiny in the international order.’³⁷¹ It is ‘a core principle of international

³⁶⁸ ICMW arts 1(1) and 7.

³⁶⁹ ICMW arts 13(1) and 1(2).

³⁷⁰ ICMW arts 18(1), 18(2) and 18(3).

³⁷¹ ‘Self-determination (International Law)’ (*Wex Legal Dictionary and Encyclopedia*, Legal Information Institute)
<www.law.cornell.edu/wex/self_determination_%28international_law%29> accessed 26 May 2019.

law, arising from customary international law, but also recognized as a general principle of law, and enshrined in a number of international treaties.’³⁷²

The concept of self-determination is so important to the United Nations and international human rights law that it is among the four purposes of the United Nations enshrined in Article 1 of the UN Charter and in Article 1(1) of both ICCPR and ICESCR. The said twin Article 1(1) contains the exact twenty-seven words and punctuations: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ The only difference between the said Article 1(1) and Article 3 of UNDRIP is the replacement of ‘All’ in the former with ‘indigenous’ in the latter. From the above provisions, the right to self-determination is an omnibus right that has at least four different aspects: political, economic, social, and cultural.

The ‘right to autonomy or self-government in matters relating to their internal and local affairs’—an aspect of the right to self-determination—guaranteed in Article 4 of UNDRIP is relevant to the provision of public access to indigenous customary law. For instance, it ensures that a foreign system of indigenous customary law is not imposed on any community through any means whatever: Each community determines its own rules of indigenous customary law in the exercise of its communal sovereignty. This involves the full public participation of each community in the compilation of its indigenous customary law. The cultural aspect of self-determination is discussed in Section 7.3.10 below.

7.3.10 Cultural Rights

The term ‘culture’ has been rightly defined as ‘the way of life, especially the general customs and beliefs, of a particular group of people at a particular time’.³⁷³

³⁷² ‘Self-determination (International Law)’ (*Wex Legal Dictionary and Encyclopedia*, Legal Information Institute)
www.law.cornell.edu/wex/self_determination_%28international_law%29 accessed 26 May 2019.

³⁷³ ‘culture’ (*Cambridge Advanced Learner’s Dictionary & Thesaurus*, Cambridge University Press)
<https://dictionary.cambridge.org/dictionary/english/culture> accessed 26 May 2019.

The UDHR³⁷⁴ and the core international human rights instruments contain numerous provisions on the right to culture.³⁷⁵ Direct references to culture occur about thirty times in UNDRIP, which shows the value of culture to indigenous peoples. Culture is part of the specific rights of persons with disabilities,³⁷⁶ children,³⁷⁷ women,³⁷⁸ and migrant workers.³⁷⁹ Cultural rights include linguistic rights, because language is a vital component of culture.³⁸⁰

In addition to the general right to culture, indigenous communities have their special cultural rights³⁸¹ that include general access to cultural materials and special 'access to cultural materials in *accessible formats*'³⁸² for persons with disabilities. Indigenous customary law is the embodiment of the customs and cultural practices of any people.³⁸³ Therefore, the provision of public access to indigenous customary law through its adequate publication enhances knowledge of the people's culture, which is an important aspect of cultural preservation. Indeed, indigenous customary law may be the best source of public information on the culture of indigenous communities on diverse issues, such as marriage; inheritance; property ownership; and the different transactions involving land, ceremonies, and burial rites.

³⁷⁴ UDHR arts 22 and 27.

³⁷⁵ Examples: ICERD arts 1(1) and 5(e)(vi); ICESCR arts 1(1), 15(1).

³⁷⁶ CRPD art 30(1)(a).

³⁷⁷ CRC art 30.

³⁷⁸ CEDAW art 13.

³⁷⁹ ICMW arts 40(1) and 43(1)(g).

³⁸⁰ Wang Ping, 'Cultural Characteristics of Idiomatic Expressions and Their Approaches of Translation' (2018) 8(2) Journal of Literature and Art Studies 295, 298, 299 <www.davidpublisher.org/Public/uploads/Contribute/5a6afb42440de.pdf> accessed 26 May 2019.

³⁸¹ Indigenous and Tribal Peoples Convention 1989 arts 4, 13, 23, 30 and 31; United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 arts 8, 11, 14 and 15.

³⁸² CRPD art 30(1)(a) (emphasis added).

³⁸³ Patricia Adjei, 'What Place for Customary Law in Protecting Traditional Knowledge?' (*World Intellectual Property Organization*, August 2010) <www.wipo.int/wipo_magazine/en/2010/04/article_0007.html> accessed 24 May 2019.

Because culture changes with time,³⁸⁴ and indigenous customary law is an embodiment of the peoples' culture, it is therefore essential to review the published rules of custom as often as necessary to reflect the current state of a community's culture. This continuous review approach is crucial to preserving the adaptive nature of indigenous customary law as a living law, not the frozen or ossified customary law in legislation, books, and other types of publications.³⁸⁵

7.3.11 Linguistic Rights

Linguistic rights are human rights. Article 27 of ICCPR states: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture . . . or to use their own language.'³⁸⁶ Linguistic rights are interwoven with the right to culture³⁸⁷ because language is an integral part of one's culture.³⁸⁸ Articles 13, 14 and 16 of UNDRIP enshrine the linguistic rights of indigenous peoples. The rights of indigenous children include their linguistic rights.³⁸⁹

Indigenous communities have the right of public access to their indigenous customary law in their own languages to enable them know and understand the laws they are bound to obey, ignorance of which is no excuse. The court has described as a great evil the practice of publishing the law in a language that the

³⁸⁴ Chunsik Lee, Youngtae Choi and Junga Kim, 'Testing a Cultural Orientation Model of Electronic Word-of-Mouth Communication: A Comparative study of U.S. and Korean Social Media Users' (2018) 28(1) Asian Journal of Communication 74, 76 <www.tandfonline.com/doi/abs/10.1080/01292986.2017.1334075> accessed 26 May 2019.

³⁸⁵ Lea Mwambene, 'The Essence Vindicated? Courts and Customary Marriages in South Africa' (2017) 17 African Human Rights Law Journal 35, 52 <<http://dx.doi.org/10.17159/1996-2096/2017/v17n1a2>> accessed 9 May 2019.

³⁸⁶ See also United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 arts 13, 14, 15 and 16.

³⁸⁷ Ibid; ICESCR arts 1, 3, 6 and 15.

³⁸⁸ Wang Ping, 'Cultural Characteristics of Idiomatic Expressions and Their Approaches of Translation' (2018) 8(2) Journal of Literature and Art Studies 295, 298, 299 <www.davidpublisher.org/Public/uploads/Contribute/5a6afb42440de.pdf> accessed 26 May 2019.

³⁸⁹ CRC art 30.

people it applies to, do not understand.³⁹⁰ The reason is that every incomprehensible law—due to lack of translation or other factors—lacks legal certainty, and it is therefore inaccessible to the people it applies to. Intelligible access requires that people should be able to read, hear, and know the law—depending on their diverse circumstances—and understand its contents.

7.3.12 The Right to Indigenous Identity and Self-Identification

The right to indigenous identity is a core indigenous right, and self-identification is crucial to the indigenous concept.³⁹¹ Article 33(1) of UNDRIP states that ‘[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.’ Henrard rightly identified the right to identity as a central theme in the protection of minorities,³⁹² which also applies to indigenous peoples worldwide.

The right to indigenous identity is one of the guarantees against discrimination against indigenous peoples.³⁹³ It is a safeguard against ‘forced assimilation or destruction of their culture’.³⁹⁴ The protection of ‘cultural identity’ is one of the specific rights of children,³⁹⁵ as well as migrant workers and members of their families.³⁹⁶

³⁹⁰ *Lambert v California*, 225 U.S. 355 (1957) <<https://supreme.justia.com/cases/federal/us/355/225/case.html>> accessed 26 May 2019.

³⁹¹ John E Petrovic and Roxanne M Mitchell, ‘Philosophizing About Indigenous Philosophies of Education’ in John E Petrovic and Roxanne M Mitchell (eds), *Indigenous Philosophies of Education Around the World* (Routledge 2018) ch 1.

³⁹² Kristin Henrard, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination* (European Communities 2007) 14, 15 <<https://publications.europa.eu/en/publication-detail/-/publication/52629060-f3b7-4df2-ac64-3882c78bdef1>> accessed 26 May 2019.

³⁹³ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 art 2.

³⁹⁴ *Ibid* art 8.

³⁹⁵ CRC art 29(1)(c).

³⁹⁶ ICMW arts 17(1) and 31(1).

The right to indigenous identity is therefore interwoven with the right to culture, thus making culture an indispensable determinant of the distinct identity of indigenous communities or peoples.³⁹⁷ Culture is so fundamental to people's existence that Lemkin formulated his concept of *cultural genocide* on the destruction of custom in 1944.³⁹⁸

The right to indigenous identity has momentous implications for public access to indigenous customary law. By virtue of Article 8 of UNDRIP, governments—who are the duty-bearers under the general right of free access to public legal information—have the obligation to ensure that the provision of public access to indigenous customary law through its ascertainment does not jeopardise the people's indigenous identity. For instance, because indigenous customary law is community-specific,³⁹⁹ there should be no harmonisation, unification, or integration of the indigenous customary laws of different communities, as such approach is tantamount to using the law as an instrument of forced assimilation, destruction of indigenous culture, and integration—a violation of Articles 2; 8(1), (2)(a) & (d); and 33(1) of UNDRIP.

The forgoing argument extends the concepts of forced assimilation, destruction of indigenous culture, and integration to legal processes that cause the loss of each distinct community's sovereignty and identity through the merger of different indigenous customary laws. Each community's homogenous, autochthonous, and autonomous legal system is an aspect of *internal* indigenous identity within the larger indigenous system itself.

³⁹⁷ Janne Mende, 'The Imperative of Indigeneity: Indigenous Human Rights and their Limits' (2015) 16(3) Human Rights Review 221, 229 <<https://link.springer.com/article/10.1007%2Fs12142-015-0371-5>> accessed 26 May 2019.

³⁹⁸ Lindsey Kingston, 'The Destruction of Identity: Cultural Genocide and Indigenous Peoples' (2015) 14(1) Journal of Human Rights 63–83 <www.tandfonline.com/doi/full/10.1080/14754835.2014.886951> accessed 26 May 2019; Elisa Novic, *The Concept of Cultural Genocide* (Oxford University Press 2016) 17–49.

³⁹⁹ Section 2.2 above.

7.4 The Public Access-Adequate and Human Rights-Compliant Features of Huricompatisation

From the fifteen principles that should form the essential contents of the *United Nations Convention on the Right of Free Access to Public Legal Information* proposed in Chapter Two of this thesis, ten specific requirements for an adequate public access to indigenous customary law project or programme can be formulated. They are as follows:

1. Adequate public awareness for optimum public participation in the project—the starting point of every democratic project and subsequently throughout its life;
2. Proper compilation of the legal information with adequate public participation;
3. A comprehensive collection of all categories of the legal information so that every piece of it is readily available;
4. Translation of the collection into the required languages for intelligible access;
5. Production of alternate formats for the different categories of users, including persons with disabilities;
6. Publication of the collection in different media formats—the traditional print version as a book and the digital version online—with free access;
7. No copyright in the texts of the public legal information nor in its value-added features;
8. Currency of the collection;
9. Authoritativeness of the collection; and
10. Preservation of the collection in both physical and digital formats for present and future generations and their authentication for the integrity of the publications.

These ten public-access requirements are merged with the twelve human rights that are relevant to *huricompatisation* (discussed in Section 7.3 above) to form the public access-adequate and human rights-compliant features of *huricompatisation* discussed in Sections 7.4.1 to 7.4.10 below.

7.4.1 Adequate Public Awareness for Effective Community Participation

Optimal community participation in all *huricompatisation* activities and processes is the hallmark of this new mechanism. These include the plan towards the project,

before it commences; training of officials to execute the project; and the compilation, adoption, publication, and review of the customary law. The reasons for this emphasis are that members of every indigenous community are the bona fide owners of their customary law and such public participation in their own public affairs is their human right.⁴⁰⁰

Adequate public awareness is the starting point of every democratic project or program—and it is needed subsequently throughout its life—because it is indispensable to effective public participation. Adequate public awareness of all the requisite *huricompatisation* activities and processes is achievable by using all relevant mainstream modern media (e.g. television, radio, newspapers, and the Internet) and indigenous mass communication media (e.g. town-criers⁴⁰¹). All members of the community's proposed Community Customary Law Council (CCLC)⁴⁰² are information channels to their constituents, as their liaison service.

It should be emphasised that adequate public awareness of the *huricompatised* customary law ensures that all members of the community are aware of the existence of their published indigenous customary law. This is necessary because any published law that people are not aware of—due to poor publicity or no publicity or cannot be found because of poor information management—is technically *unavailable*.

7.4.2 Proper Compilation of Indigenous Customary Law with Adequate Public Participation

Every access to public legal information project requires proper compilation of all existing laws for publication in a permanent form as tangible and material resources in both print and digital formats. Compilation of indigenous customary law is unique and more problematic due to its oral or unwritten nature.

⁴⁰⁰ Section 7.3.2 above.

⁴⁰¹ TG Apata, 'Information Dissemination and Communication Strategy Using Town Crier in a Traditional Context in Southwestern States, Nigeria' (2015) 20(2) *Applied Tropical Agriculture* 1–8 <www.journals.futa.edu.ng/index.php/ATA/article/view/2374> accessed 2 July 2019; Axel Kroeger, 'Participatory Evaluation of Primary Health Care Programmes: An Experience with Four Indian Populations in Ecuador' (1982) 12 *Tropical Doctor* 38–43.

⁴⁰² See discussion in Section 7.5.3 below.

The right to self-governance under the omnibus right to self-determination, the right to culture, and the right to indigenous identity require that each *huricompatisation* project is for each distinct indigenous community because indigenous customary law is community-specific.⁴⁰³ *Huricompatisation* therefore forbids the harmonisation, unification, or integration of the indigenous customary laws of different communities.

7.4.2.1 *Compilation by the Community*

Unlike legislation that is *enacted* by elected representatives of the people who may be faraway strangers to sections of their constituencies, indigenous customary law—predominantly—is not made by anybody or group of persons,⁴⁰⁴ but by the acquiescence, unconscious adoption, and corporate assent of the community itself that clothe it with validity, bindingness, and enforceability.⁴⁰⁵ Like customary international law, *organic* indigenous customary law is not the product of positive stipulation, but the crystallization of an evolving normative process.⁴⁰⁶

⁴⁰³ ⁴⁰³ Daniel Korang, 'Ascertainment of Customary Law: A Question of Law or of Fact or Both?' (2015) 38 Journal of Law, Policy and Globalization 93, 94 <www.iiste.org/Journals/index.php/JLPG/article/viewFile/23519/23925> accessed 19 July 2017.

⁴⁰⁴ But some rules of indigenous customary law are positively made by designated traditional rulers and councils. For example, section 3(3)(c) of Namibia's Traditional Authorities Act 2000 empowers a Traditional Authority to make customary law. That Act is available at Parliament of Namibia, 'Traditional Authorities Act 25 of 2000' (*Parliament of Namibia*) <https://laws.parliament.na/cms_documents/traditional-authorities-38f13b9891.pdf> accessed 11 August 2019. See Manfred O Hinz, 'The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For? The experience of the Customary Law Ascertainment Project in Namibia' (2012) 2(7) Oñati Socio-legal Series 85, 91 <<http://opo.iisj.net/index.php/osls/article/view/181>> accessed 19 July 2017; Manfred O Hinz and Alexander Gairiseb (eds), *Customary Law Ascertained, Volume 2: The Customary Law of the Bakgalagari, Batswana and Damara Communities of Namibia* (University of Namibia Press 2013) 6.

⁴⁰⁵ *Eleko v Government of Nigeria* [1931] AC 662, 673; [1931] UKPC 37 <https://www.bailii.org/uk/cases/UKPC/1931/1931_37.html> accessed 10 August 2019; *Kajubi v Kabali* (1944) 11 EACA 34.

⁴⁰⁶ Philip Allott, 'The Concept of International Law' (1999) 10(1) European Journal of International Law 31, 38–39 <www.ejil.org/pdfs/10/1/577.pdf> accessed 6 August 2017; Sue Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish 2009) 168.

Therefore, members of an indigenous community themselves carry out the compilation of their community's indigenous customary law: No person who is not a member of the community participates in the actual recording process. Members of the community who have successfully completed the required capacity-building training⁴⁰⁷ record *every* rule of indigenous customary law in force in that community in strict compliance with the detailed statutory procedure under the *huricompatisation* legislative framework discussed in Section 7.5 below. This requirement is essential for quality control.⁴⁰⁸

Indigenisation of the recording process protects one cardinal underlying philosophy of *huricompatisation*: the autochthonous, evolutionary development of indigenous customary law by the community qua community. It is a gradual process that self-reforms itself, not an imposition of ideals on the community. The community will perfect the *huricompatisation* of their indigenous customary law over time. Therefore, any community that lacks the capacity to carry out its *huricompatisation* project may not yet be ready for such exercise.

No preference is given to the affluent, any professional or group of professionals in the compilation of indigenous customary law. This approach is necessary to avoid elite capture,⁴⁰⁹ the commanding influence of members of the community or outsiders, and those who belong to the professions that claim to be experts in indigenous customary law. These people include influential community leaders, politicians, academics, lawyers, folklorists, classicists, anthropologists, historians, sociologists, and philosophers.⁴¹⁰ Indigenous customary law is community-defined law, not that of professionals. However, all professionals who are members of the indigenous community have the right to participate in the compilation of their community's indigenous customary law, but on equal footing with non-professional members: Each member of the compilation committee has one vote, and all matters are decided by a simple majority of the votes cast.

⁴⁰⁷ Section 7.5.2 below.

⁴⁰⁸ Section 7.5 below.

⁴⁰⁹ Section 4.1 above.

⁴¹⁰ Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta, Volume 1* (University of Wisconsin Press 1994) xiii.

Members of the community have lived with and expressed their indigenous customary law as their way of life since the advent of their community, which may be several centuries. Therefore, they do not need any professional to tell them or 'reveal' to them what the rules of their indigenous customary law are. What members of the compilation committee require for participation in the compilation of their law is the ability to record each rule *accurately* so that it adequately represents the rule in practice. The language should be as plain, simple, and concise as the language of the community, so that it conveys the same thought and sense as its oral version. These days, even professional lawyers are wary of 'archaic legalese and long, winding sentences'⁴¹¹ that make it difficult to understand laws and legal documents. The compilation of indigenous customary law should be comprehensive, as discussed in Section 7.4.3 below.

Upon completion of the compilation process, the CCLC reviews the rules of customary law in the light of the Mandatory Model General Provisions on Human Rights Principles⁴¹² and compiles all the modifications it considers necessary to make the affected rules of indigenous customary law legal and human rights-compliant. For example, customs that discriminate against women, cause hardship to widows, deprive children of inheritance rights, and the ones that amount to inhuman treatment are discarded. Thereafter, the whole compilation is produced in all the possible formats (including the online version) for the community public hearing, discussed in Section 7.4.2.2 below.

7.4.2.2 Community Public Hearing on the Compiled Customary Law

The compiled indigenous customary law is published and publicised by the CCLC as stipulated in the prescribed manner for maximum public awareness of the proposed indigenous customary law.

Sufficient time is stipulated for expression of written opinions on the compiled law. Illiterate persons are told to seek the assistance of those who can record their opinions. All opinions are sent as memoranda to the CCLC within the stipulated period. The CCLC decides the necessary action to take on the opinions where it is

⁴¹¹ Section D.III.2.10 of Chapter Two.

⁴¹² See discussion in Section 7.5.7 below.

impracticable for the community itself to do so via referendum.⁴¹³ The CCLC produces the clean copy of the compiled indigenous customary law for its adoption by the community.

7.4.2.3 Adoption of the Compiled Customary Law

The community adopts the *huricompatised* customary law when the head of the community assents to it by signing the archival original in the manner prescribed by the *huricompatisation* legal framework.

Where the community head refuses to give the required assent, such refusal can be set aside by the vote of a simple majority of the CCLC. Where a simple majority of the CCLC is not achieved, the decision is reached through the community referendum.⁴¹⁴ The adopted customary law becomes the community's authoritative indigenous customary law, and it is *binding*.

7.4.3 Comprehensiveness of Compilation

Adequate public access to all categories of public legal information—the primary sources of law and all other types of public legal information—must be comprehensive in terms of the availability of every law and every public legal information resource. Regarding indigenous customary law, every valid rule that is binding on members of the community should be included in the first compilation, discussed in Section 7.4.2 above. Subsequently, every new rule should be added to the compiled stock of the community's customary law, on a continuous basis, to maintain its comprehensiveness and currency.

In addition, any *valid* rule that was omitted from the compilation inadvertently or for any improper reason, remains binding and must be included in the next revised edition of the published indigenous customary law, which is a *continuous process*. This way, the *living instrument interpretative approach* is not applicable, because of the emphasis on and the possibility of *constant review* of the published indigenous customary law. This is in contrast to national constitutions and treaties

⁴¹³ Community referendum is discussed in Section 7.5.4 below.

⁴¹⁴ Section 7.5.4 below.

whose rigidity and frozen nature may necessitate the judicial *evolutive interpretation* of their provisions to make them relevant to the present situation.⁴¹⁵ The European Court of Human Rights developed the living instrument doctrine in 1978 in *Tyrer v The United Kingdom* when, referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms, it held: ‘The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.’⁴¹⁶

A comprehensive stock of an indigenous community’s ascertained customary law eliminates the problems associated with the side-by-side existence of oral and written rules, which is a major defect in the self-statement method of ascertainment (discussed in Sections 4.4.2.4 and 5.1.1 above). It also creates confidence in the published rules of indigenous customary law, which is an aspect of legal certainty.

7.4.4 Translation into the Community’s Languages

Indigenous customary law should be published in the languages of the community to enable the members of that community to understand its rules to be able to obey them. Publishing the full texts of all the rules of indigenous customary law in the community’s indigenous language provides *intelligible access*, which is a crucial aspect of the right of free access to public legal information.⁴¹⁷

⁴¹⁵ For debates on the living instrument doctrine, see Geir Ulfstein, ‘Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties’ (2019) *The International Journal of Human Rights* 1-18 <<https://doi.org/10.1080/13642987.2019.1598055>> accessed 26 May 2019; Yuwen Fan, ‘Revisiting ECtHR Interpretation of the ECHR: Living Up to a Living Instrument’ (2016) 65 *FICHL Policy Brief Series* 1-4 <www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/160624_PBS_No._65__2016__FAN_Yuwen_.pdf> accessed 26 May 2019;

⁴¹⁶ *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) <<http://hudoc.echr.coe.int/eng?i=001-57587>> accessed 26 May 2019.

⁴¹⁷ Linguistic rights are human rights and are also interwoven with cultural rights. See ICCPR art 27; ICESCR arts 1, 3, 6 and 15; UNDRIP arts 2, 3, 5, 8, 13, 14, 15 and 16; *Lambert v California*, 225 US 355 (1957); Universal Declaration on Linguistic Rights (Barcelona Declaration), World Conference

It is also necessary to publish indigenous customary law in the dominant official national language for nonindigenous members of the community and for national, and even global, access. Where possible, it should be also published in English language that has become the global language⁴¹⁸ and the language of the Internet,⁴¹⁹ to achieve good global public access.

Beyond the aforementioned specific translation requirements of indigenous customary law, from the human rights perspective, there is the global need for translation of public legal information into other languages, from the general perspective. From the general perspective, '[p]ublic legal information from all countries and international institutions is part of the common heritage of humanity'.⁴²⁰ Therefore, public legal information should be translated into different languages to enable the users of those languages to understand foreign laws and law-related public information.

One major reason for translations of public legal information into foreign languages is the ever-growing globalisation that has caused unprecedented transnational interaction and activities,⁴²¹ due to breathtaking advancements in information and communications technology (ICT). The available solution to such massive and instant translation of global public legal information and other types of information is by using modern technologies, such as automatic Machine Translation (MT) and Multilingual Information Access (MLIA) systems for digital or

on Linguistic Rights (9 June 1996) <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019; Claire Kramsch, *Language and Culture* (Oxford University Press 1998) 3.

⁴¹⁸ David Crystal, *English as a Global Language* (2nd ed, Cambridge University Press 2012) 5.

⁴¹⁹ Slađana Živković and Nadežda Stojković, 'Cyberspace – Addiction or Not: A Limited Case Study of the Internet Addiction Among Student Population' (2013) 2(11) *Academic Journal of Interdisciplinary Studies* <www.mcser.org/journal/index.php/ajis/article/view/1474> accessed 5 September 2017.

⁴²⁰ Montreal Declaration on Free Access to Law 2002.

⁴²¹ Christopher Goddard, *A Voice in the Wilderness? Legal Linguistics in Search of a Place in the Curriculum* (Riga Graduate School of Law 2016) 2–3 <<https://www.rgsl.edu.lv/uploads/research-papers-list/11/goddard-christopher-final-for-print.pdf>> accessed 20 June 2019.

electronic collections.⁴²² Facebook⁴²³ and Google⁴²⁴ are among the leaders in the use of automatic language translation technologies.

Despite their awesome capabilities, automatic language translation technologies have some limitations: They do not include all languages of the world and their translations do not have official status. For example, the goal of the automatic translation of Canadian judicial decisions—using the TransLI (Translation of Legal Information) system—was to produce an unofficial version that would facilitate the certified translation by human experts,⁴²⁵ which has evidentiary value. However, past unimaginable breakthroughs in science and technology suggest that, someday, automatic language translation may be much more reliable, far beyond what it is today.

7.4.5 Availability of Alternate Formats of the Published Indigenous Customary Law for Persons with Disabilities

Adequate access to public legal information requires the production of alternate formats to meet the diverse needs of its different categories of users who include

⁴²² Jiangping Chen, *Multilingual Access and Services for Digital Collections* (Libraries Unlimited 2016); Brenda Reyes Ayala and others, 'Metadata Records Machine Translation Combining Multi-Engine Outputs with Limited Parallel Data' (2018) 69(1) *Journal of the Association for Information Science and Technology* 47–59 <<http://onlinelibrary.wiley.com/doi/10.1002/asi.23925/full>> accessed 26 May 2019.

⁴²³ Jonas Gehring and Michael Auli, 'A Novel Approach to Neural Machine Translation' (*Facebook*, 9 May 2017) <<https://code.facebook.com/posts/1978007565818999/a-novel-approach-to-neural-machine-translation/>> accessed 26 May 2019; Juan Miguel Pino, Alexander Sidorov and Necip Fazil Ayan, 'Transitioning Entirely to Neural Machine Translation' (*Facebook*, 3 August 2017) <<https://code.facebook.com/posts/289921871474277/transitioning-entirely-to-neural-machine-translation/>> accessed 26 May 2019.

⁴²⁴ Barak Turovsky, 'Found in Translation: More Accurate, Fluent Sentences in Google Translate' (*Google*, 15 November 2016) <<https://blog.google/products/translate/found-translation-more-accurate-fluent-sentences-google-translate/>> accessed 26 May 2019; Sirena Rubinoff, 'Google Translate's Deep AI Upgrade Represents the Future of Machine Translation' (*Multilingual Insights*, 1 June 2017) <<https://multilingual.com/google-translates-deep-ai-upgrade-represents-future-machine-translation/>> accessed 26 May 2019.

⁴²⁵ Atefeh Farzindar and Guy Lapalme, 'Machine Translation of Legal Information and Its Evaluation' in Yong Gao and Nathalie Japkowicz (eds), *Advances in Artificial Intelligence* (Springer Berlin Heidelberg 2009) pp. 64–73 <<https://link.springer.com/content/pdf/10.1007%2F978-3-642-01818-3.pdf>> accessed 26 May 2019.

persons with disabilities. The aim is to achieve equal access which enables all users to know and understand the contents of public legal information.

Assistive technology (AT) ‘is a general term that includes assistive, adaptive, and rehabilitative devices for people with disabilities, including the process used in selecting, locating, and using them.’⁴²⁶ AT makes it possible to produce assistive technology devices for alternate formats of information. Section 3(3) of the US Assistive Technology Act of 1998 defines the term “assistive technology device” as ‘any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.’

There are many types of AT devices that facilitate access to public legal information. For example, Braille is a tactile writing system that helps the blind to read texts. Invented by Louis Braille in 1824,⁴²⁷ Braille may be the oldest and most popular type of assistive device. It is therefore puzzling that Braille has not yet become a common alternate format in which public legal information is published worldwide. Perhaps the only explanation is that there is poor access to public legal information on a global scale, and persons with disabilities are the most affected due to discriminatory practices. It is such injustices that ultimately led to the universal recognition of disability rights as human rights under the CRPD, as recently as 2006.

Recorded audio of public legal information helps the blind and other categories of people who cannot read texts to hear them⁴²⁸ while recorded video of the sign language version aids those who depend on sign language.⁴²⁹ Other AT devices that assist people with different access needs include large print, text-to-speech,

⁴²⁶ Disabled World, ‘Assistive Technology’ (*Disabled World*, 27 September 2017) <www.disabled-world.com/assistivedevices/> accessed 26 May 2019.

⁴²⁷ ‘Braille’, *Encyclopædia Britannica* (2019) <www.britannica.com/topic/Braille-writing-system> accessed 26 May 2019.

⁴²⁸ ‘Audio Version of the Universal Declaration of Human Rights’ (*Universal Declaration of Human Rights*) <https://udhr.audio/UDHR_Video.asp?lng=eng> accessed 26 May 2019.

⁴²⁹ World Federation of the Deaf, ‘CRPD Translations in National Sign Languages’ (*World Federation of the Deaf*, 27 January 2017) <<http://wfdeaf.org/news/resources/crpd-translations-in-national-sign-languages/>> accessed 26 May 2019.

screen readers, and screen magnifiers.⁴³⁰ It is necessary to comply with *web accessibility standards* in the design of legal information websites,⁴³¹ as websites are now indispensable to every access to public legal information project. As rightly stated by Tim Berners-Lee, the inventor of the World Wide Web and Director of the World Wide Web Consortium (W3C), '[t]he power of the Web is in its universality. Access by everyone regardless of disability is an essential aspect.'⁴³²

7.4.6 Adequate Publication of the Indigenous Customary Law with Free Access

The whole collection of the indigenous customary law should be published and made available in both print and digital formats. The traditional print version may either be in the normal book format or in the loose-leaf format that provides the possibility of inserting updates in the bound volume.⁴³³ The alternate formats for persons with disabilities were discussed in Section 7.4.5 above.

The digital version should be published online on the community website. Websites have now become the must-have global information gateway for individuals, organisations, communities, and governments at all levels. It should also be published on the website of the local government to which the community belongs. It is emphasized that online access is indispensable to the provision of adequate public access to every category of public legal information, including indigenous customary law, as there is no better means of disseminating legal information for the local, national, and global audience. It is necessary for all

⁴³⁰ CRPD art 2.

⁴³¹ World Wide Web Consortium, 'How People with Disabilities Use the Web' (*World Wide Web Consortium*, 15 May 2017) <www.w3.org/WAI/people-use-web/> accessed 26 May 2019; Cody Rei-Anderson and others, 'Access to Justice Online: Are Canadian Court Websites Accessible for Users with Visual Impairments?' (2018) 55(3) 647–681 <www.albertalawreview.com/index.php/ALR/article/view/2458/2444> accessed 26 May 2019.

⁴³² World Wide Web Consortium, 'Accessibility' (*World Wide Web Consortium*) <www.w3.org/standards/webdesign/accessibility> accessed 26 May 2019.

⁴³³ Example: Government of Canada Justice Laws Website, 'Statutes of Canada Loose-Leaf Consolidation Updates Distribution Order (SI/92-158)' (*Government of Canada Justice Laws Website*, 23 May 2019) <<http://laws-lois.justice.gc.ca/eng/regulations/SI-92-158/index.html>> accessed 26 May 2019.

official public legal information websites to have the networked one-stop capability for their optimal findability and easy access.⁴³⁴

All formats of the collection of the indigenous customary law should be available with *free access* at the community hall, in the libraries of the schools in the community, and other public facilities in the community. The online version should also have free access for the global audience, published under a proper *open-access license*, such as *Creative Commons*.⁴³⁵ This approach guarantees that there is no copyright impediment to its free access, free distribution, and free re-use.

7.4.7 No Copyright in the Published Indigenous Customary Law

To satisfy the requirement of the right of free access to public legal information, there should be free access to every category of public legal information which includes the right to use and reuse it without paying any fee for such use and reuse, and without any copyright barrier. The logic behind the prohibition of copyright in public information is that the people are the owners of such information; therefore, the government that holds it in trust for them cannot deprive them of their right to use it freely.

Effective implementation of free access to public legal information requires the *express* abrogation of copyright in every category of public legal information. For instance, the copyright notice displayed on the US federal government information website that contains its public legal information states: 'Title 17, Section 105, United States Code, provides that: Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.'⁴³⁶

Similarly, the UK government official public legal information website⁴³⁷ uses its Open Government Licence which gives every user the freedom to 'copy, publish,

⁴³⁴ Discussed in Chapter Four.

⁴³⁵ Creative Commons, 'Attribution 4.0 International (CC BY 4.0)' (*Creative Commons*) <<https://creativecommons.org/licenses/by/4.0/>> accessed 26 May 2019.

⁴³⁶ United States Government Govinfo, 'Public Domain & Copyright Notice' (*United States Government Govinfo*) <www.govinfo.gov/about/policies#copyright> accessed 26 May 2019.

⁴³⁷ *Legislation.gov.uk* <www.legislation.gov.uk/> accessed 26 May 2019.

distribute and transmit the Information; adapt the Information; exploit the Information commercially and non-commercially for example, by combining it with other Information, or by including it in your own product or application.⁴³⁸

7.4.8 Currency of the Published Indigenous Customary Law

Currency of the stock of public legal information means it should be up-to-date so that people can rely on it confidently as the position of the law or any law-related public document. Regarding indigenous customary law, its currency means every rule that has been duly ascertained through the compilation process—and is still valid or in force—should be available in the community's physical and digital collections.

In addition, every rule that is no longer valid should be expunged from the said collections. However, every such rule that has become invalid by whatever reason—such as obsolescence, consequential repeal, or outright abrogation—should be preserved in the community's historical or archival collection of its customary law. An archival collection of any category of public legal information has *point-in-time* relevance for several purposes. Point-in-time reference shows the state of public legal information at the time of interest and reveals the historical or evolutionary development of the law or concept. That is the reason for the inclusion of point-in-time capability in modern public legal information management systems, such as the famous Tasmanian EnAct Legislation System.⁴³⁹

Continuous review is an essential feature of the process that preserves the inherent adaptability of indigenous customary law. The proper notion of *living customary law* relates to its ability to evolve with the society; to adapt to the

⁴³⁸ The National Archives, 'Open Government Licence for Public Sector Information' (*The National Archives*) <www.nationalarchives.gov.uk/doc/open-government-licence/version/3/> accessed 4 March 2018. For a discussion of copyright in public legal information and a list of countries that have copyright protection in their laws, see Mireille van Eechoud and Lucie Guibault, 'International Copyright Reform in Support of Open Legal Information' (Open Data Research Symposium, Madrid, Spain, 5 October 2016) 1–16 <https://www.ivir.nl/publicaties/download/OpendataCopyrightReform_ODRSdraft-WP_sep16.pdf> accessed 16 August 2019.

⁴³⁹ Tasmania, 'About EnAct' (*Tasmanian Legislation*, 8 September 2017) <www.legislation.tas.gov.au/about/enact> accessed 26 May 2019.

necessary changes that affect the welfare of the community and its members; and to provide a more humane system of justice than legislation, for instance. As stated in Section 3.1 above, the notion of living customary law as the law that must remain in its unwritten state, is a misconception.

Because *organic* indigenous customary law is not made by anybody or group of persons, the community itself is the appropriate body to review its *huricompatised* customary law. However, where it is not feasible for the community to do the review—for example, due to its large population—the CCLC should do it on behalf of the community, based on the principle of representative democracy. The community, through its *referendum*,⁴⁴⁰ reserves the power to override any decision of the CCLC on any matter whatsoever.

The community should undertake a review of its *huricompatised* customary law *whenever* it becomes necessary to amend (modify) or repeal (abrogate) any rule. This helps indigenous customary law to keep pace with the necessary changes in the community and other *applicable* changes in the broader society, such as those introduced by national laws and human rights norms.

7.4.9 Authoritativeness of the Published Indigenous Customary Law

Ascertained indigenous customary law should be authoritative, which means it is '[p]roceeding from an official source and requiring compliance or obedience.'⁴⁴¹ That means it should be *binding* as the *definitive* source of the indigenous customary law of the community. The reason is that indigenous customary law is one of the primary sources of law (as argued in this thesis), and its ascertained version in a permanent, tangible, and material form should equally be treated as such. The relegation of indigenous customary law to the background—perhaps because of its dominant unwritten form in contrast to all the other primary sources of law—should now be tossed to the wind of history. The global elevation of indigenous customary law to the status of a primary source of law is one of the goals of this article.

⁴⁴⁰ Section 7.5.4 below.

⁴⁴¹ 'authoritative' (Oxford Dictionaries, Oxford University Press 2018) <<https://en.oxforddictionaries.com/definition/authoritative>> accessed 30 June 2019.

As community-generated law, the authoritativeness of indigenous customary law should manifest through a symbol of the corporate will or assent of the community. Such corporate symbol may be the community's *insignia* or seal affixed to the publication containing the ascertained indigenous customary law. The community should decide who to empower to affix its corporate symbol, for example, the community head or the community governing council.

Because the ascertained indigenous customary law is the compilation of *existing* rules, the *huricompatised* indigenous customary law may come into effect from the moment the corporate seal is affixed to it or on any date in the future, which should be clearly so stated in the publication.

7.4.10 Preservation and Authentication of the Published Indigenous Customary Law

The need for knowledge transfer and the security of information has made preservation of documents and records for the present and future generations a necessity.⁴⁴² There are two perspectives to the preservation of a community's published indigenous customary law. First, the culture of indigenous communities is embedded in their rules of customary law. Therefore, the preservation of a community's published indigenous customary law is also the preservation of the authentic records of its culture. This is significant because the right to culture includes the need for its preservation. Second, it is necessary to preserve published indigenous customary law for its present use and also for future generations who will be interested in the development of their law that usually mirrors the developments in the society.

Published indigenous customary law can be preserved in the following ways. First, by using durable archival paper to produce the archival print sets. For example, in 2017, the UK parliament decided to use high-grade archival paper for printing the archival copies of legislation, instead of vellum that has been used for the purpose

⁴⁴² Salgo Merin Jacob, Jenifer Raseetha and Varsha Kelkar-Mane, 'Physico-Chemical Assessment of Biodeteriorated and Biodegraded Archival Paper' (2017) 8(4) International Journal of Conservation Science 607, 607–608 <www.ijcs.uaic.ro/public/IJCS-17-58_Jacob.pdf> accessed 26 May 2019.

over five centuries.⁴⁴³ Second, the digital version can be preserved by using the appropriate technologies for preservation of repositories of digital resources.

Authentication of digital documents is necessary to preserve their integrity against deliberate and accidental alterations, so that they remain intact and can be relied on as the *official* version for all purposes, for example, the laws used in court proceedings.

Authentication of a community's indigenous customary law can be achieved by using digital authentication technologies to produce its official PDF version, an example of which is the US federal information website that contains federal laws.⁴⁴⁴ Communities will benefit from the authentication technologies of their local government official website that should host the laws of all the communities under it, to provide the desired *one-stop access* to the local government's online public legal information (discussed in Chapter Four).

7.5 The Legal Framework for Huricompatisation

Indigenous customary legal system does not exist in isolation: it usually forms a plural legal system within a particular overall national legal system which, itself, operates within an international legal system. Therefore, it is simply prudent that there is adequate engagement with the national legal system and international law in the *huricompatisation* of indigenous customary law. Therein lies the indispensability of the proper national legal framework to regulate all the processes involved in the execution and administration of every *huricompatisation* project to guarantee its integrity, unlike the four existing ascertainment methods that all lack such framework.

⁴⁴³ Christopher Hope, 'Anger as MPs Bow to Peers' Pressure and End 500-Year Old Tradition of Printing New Laws on Vellum' *Telegraph* (London, 21 March 2017) <www.telegraph.co.uk/news/2017/03/21/anger-mps-bow-peers-pressure-end-500-year-old-tradition-printing/> accessed 26 May 2019.

⁴⁴⁴ 'Authentication' (*United States Government Govinfo*) www.govinfo.gov/about/authentication. See also Anne Burnett, 'From the Capitol to the West Wing: Making the Most of Federal Law and U.S. Government Information on the Web' (2018) Continuing Legal Education Presentations 2 <<http://digitalcommons.law.uga.edu/cle/2018/schedule/2>> accessed 26 May 2019.

The legal framework will provide the necessary *quality control* and establish the *requisite best practices* for transparent and effective execution of each *huricompatisation* project. The absence of such specific legal framework is one of the major defects of all the four existing methods of ascertainment of indigenous customary law. The essential contents of the legal framework for *huricompatisation* are outlined in Sections 7.5.1 to 7.5.7 below.

7.5.1 Implementation of Huricompatisation Projects

As discussed in Section 4 above, the right of public access to indigenous customary law—which is a specific version of the general right of free access to public legal information—is a human right of all indigenous communities. However, the benefits that any indigenous community will derive from recording its indigenous customary law depends on their level of *literacy*. Therefore, ascertainment of indigenous customary law through its publication may not be useful to a predominantly illiterate community.⁴⁴⁵ Therein lies the importance of the *right to education* for all human beings, especially for indigenous peoples that are the most disadvantaged group. That is the reason for inclusion of the educational empowerment of indigenous peoples to enable them enjoy their human rights—including the right of public access to their indigenous customary law—among the recommendations in the conclusion of this article.

It should be stressed that Article 19 of UNDRIP requires that ‘[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’ Therefore, no government has the right to impose any indigenous customary law ascertainment project on any community: Their *free, prior, and informed consent* is a human-rights condition for any intervention through such project.

A community’s first *huricompatisation* project may be understandably demanding and time-consuming, but it is feasible. It may take just a couple of years to accomplish such a historic, momentous, transformational indigenous legacy.

⁴⁴⁵ Daniel Poulin, ‘Open Access to Law in Developing Countries’ (2004) 9(12) First Monday <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 27 May 2019.

Ubink asserted that ‘the many variations of customary law within one ethnic group means that it could take a lifetime to complete the recording of the law of one group; not to mention that of all ethnic groups in a country.’⁴⁴⁶ Similarly, Mr. Justice Boshoff stated as follows: ‘I do not think that it would be possible for any Commission to reduce Native law to writing to a sufficient extent to embrace the whole law. . .’⁴⁴⁷ Those assertions may be valid only where the usual *wrong approach* is adopted. That wrong approach is the use of ‘a team of experts’ (including lawyers, sociologists, and anthropologists) to record the indigenous customary law of several communities. Examples of such wrong approach include the colonial Restatement of African Law Project,⁴⁴⁸ the recent Restatement of Customary Law of Nigeria project,⁴⁴⁹ and the UNDP co-sponsored 2012 Ascertainment of Customary Law in South Sudan project.⁴⁵⁰ In contrast, adequately empowering *each community* to record its indigenous customary law is one of the hallmarks of *huricompatisation*.⁴⁵¹ That way, several *huricompatisation* projects can take place simultaneously all over any country. Specific aspects of the implementation of *huricompatisation* projects are discussed in the rest of the Sections below.

⁴⁴⁶ Janine Ubink, ‘Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia’ (2011) International Development Law Organization Traditional Justice: Practitioners’ Perspectives’ Working Paper Series 1, 6.

⁴⁴⁷ AJ Kerr, ‘The Reception and Codification of Systems of Law in Southern Africa’ (1958) 2(2) Journal of African Law 82, 93 <www.jstor.org/stable/745264> accessed 11 May 2019.

⁴⁴⁸ School of Oriental and African Studies, ‘The Restatement of African Law Project’ (1959) 3(3) Journal of African Law 149–151 <<https://www.jstor.org/stable/i229873>> accessed 20 June 2019.

⁴⁴⁹ Nigerian Institute Advanced Legal Studies, *Restatement of Customary Law of Nigeria* (Safari Books 2013) <www.africanbookscollective.com/books/restatement-of-customary-law-of-nigeria> accessed 16 June 2019.

⁴⁵⁰ United Nations Development, ‘Ascertainment of Customary Laws in South Sudan: Discussion Paper’ (United Nations Development Programme) <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

⁴⁵¹ Although self-statement shares the common goal of community self-recording of the rules of indigenous customary law, self-statement’s objective and implementation strategy are inadequate, as discussed in Section 5 above.

7.5.2 Establishment of Customary Law Reform and Huricompatisation Commission

The establishment of a country's national *Customary Law Reform and Huricompatisation Commission* (CLRHC) by its national legislature, as the apex statutory body that is devoted exclusively to all indigenous customary law issues, is crucial. Such issues include the development and promotion of customary-law jurisprudence; initiation and coordination of *huricompatisation* projects; capacity building; funding; public awareness; publications; and human-rights reform of indigenous customary law. Each country determines the proper relationship between the CLRHC and the existing national Law Reform Commission. CLRHC will help to elevate and promote the deserved status of indigenous customary law as a bona fide primary source of law.

The duty to provide access to all categories of public legal information is that of the government and every intergovernmental organisation that has the power to create public legal information. Therefore, the provision of public access to indigenous customary law should be the responsibility of all tiers of government in partnership—national or federal, state or regional, and local governments—to be coordinated by the CLRHC.

The CLRHC initiates *huricompatisation* projects for any community, which is a major part of its statutory mandate. However, any indigenous community can initiate its *huricompatisation* project by submitting a proposal to the CLRHC. The CLRHC carries out its statutory oversight function to ensure that every project is executed in strict compliance with the guidelines under the *huricompatisation* legal framework.

Where it becomes necessary to seek ways of reducing the financial burden on the government, the funding of a community's *huricompatisation* project may be through community self-help and partnership arrangements. Companies and other organisations operating in a community should fund the project as part of their corporate social responsibility to their host community.⁴⁵² Individual

⁴⁵² Abubakr M Suliman, Hadil T Al-Khatib and Sumina E Thomas, 'Corporate Social Responsibility: The Evolution, Theories, and Critics' in Agata Stachowicz-Stanusch (ed), *Corporate Social Performance: Reflecting on the Past and Investing in the Future* (Information Age Publishing 2017) 15–18; Heli Wang and others, 'Corporate Social Responsibility: An Overview and New Research

members of the community can fund it as their community service. Communities may explore all local and international⁴⁵³ funding opportunities. For example, UNDP co-sponsored the 2012 Ascertainment of Customary Law in South Sudan project in partnership with the Government of the Republic of South Sudan, as one aspect of its Access to Justice and Rule of Law Project.⁴⁵⁴ The CLRHC also has the statutory responsibility to assist all projects within the limits of its resources.

The CLRHC is responsible for capacity building,⁴⁵⁵ whose focus is the training and development of *local human resources* for all the processes and procedures required for *huricompatisation* in accordance with its legal framework. The term 'local human resources' here refers to members of the indigenous community who will be involved in the community's *huricompatisation* project, irrespective of their social status, sex, or profession. The most relevant qualification for participation in the compilation of indigenous customary law, for instance, is one's ability to record the rules accurately and effectively.

7.5.3 Establishment of Community Customary Law Council

The CLRHC, pursuant to Article 18 of UNDRIP, should establish every indigenous community's *Community Customary Law Council* (CCLC)⁴⁵⁶ to coordinate all matters pertaining to the existence of its rules of indigenous customary law and

Directions' (2016) 59(2) Academy of Management Journal 534, <http://amj.aom.org/content/59/2/534.short> accessed 11 August 2017.

⁴⁵³ For example, the World Bank, the International Development Law Organization, and the United Nations Development Program; see Ronald Janse, 'A Turn to Legal Pluralism in Rule of Law Promotion?' (2013) 3–4 Erasmus Law Review 181, 181–182 <www.erasmuslawreview.nl/tijdschrift/ELR/2013/3_4/ELR-D-13-00010.pdf> accessed 17 August 2017.

⁴⁵⁴ United Nations Development Programme, 'Ascertainment of Customary Laws in South Sudan: Discussion Paper' (*United Nations Development Programme*) 3 <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

⁴⁵⁵ Natallia Yakavets, David Frost and Aidar Khoroshash, 'School Leadership and Capacity Building in Kazakhstan' (2017) 20(3) International Journal of Leadership in Education 345, 350–352 <<https://doi.org/10.1080/13603124.2015.1066869>> accessed 27 May 2019.

⁴⁵⁶ I coined this term with its abbreviation.

be responsible for its *huricompatisation* project. The successful implementation of the prohibition of the ‘widow dispossession’ custom by the self-stated customary law of Namibia’s Uukwambi Traditional Authority—in contrast to the poor implementation of its statutory prohibition in other African countries—reveals the importance of community initiatives in indigenous customary law matters.⁴⁵⁷

The CCLC decides all contentious matters by a simple majority of the votes of all of its members. Its membership comprises members of the community’s ruling council and other members elected on the basis of equal representation of every *social unit* of the community, such as family and clan. All representative members of the CCLC are a vital channel of communication between the CCLC and their constituent units.

7.5.4 Community Referendum

The community itself is the sovereign authority over all internal matters pertaining to its indigenous customary law. It can exercise its sovereign authority over all internal matters via a *referendum*, whereby it can override any decision of any of its representative bodies, including the CCLC. The referendum should involve all *adult* members of the community (irrespective of sex) based on voting age and the official registered voters list, wherever possible. Voting age—which varies from country to country—determines the age of electoral majority at which a person is deemed mature enough to make an informed choice of who can run the political affairs of the society the person belongs to. Eighteen years appears to be the typical voting age worldwide.⁴⁵⁸

A petition for a community referendum may be signed (or thumb-printed) by at least 25% (or as appropriate) of those qualified to vote at the referendum. A simple majority decides every referendum issue. The CCLC acts instead of the

⁴⁵⁷ Janine Ubink, ‘Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia’ (2011) International Development Law Organization Traditional Justice: Practitioners’ Perspectives’ Working Paper Series 1, 1.

⁴⁵⁸ Olof Rosenqvist, ‘Rising to the Occasion? Youth Political Knowledge and the Voting Age’ (2017) British Journal of Political Science 1, 1 <<https://doi.org/10.1017/S0007123417000515>> accessed 27 May 2019.

referendum whenever necessity justifies it. The Howard County⁴⁵⁹ in the United States provides an example of the use of the referendum to decide the validity of local laws. Section 211 of the Howard County Charter 1968⁴⁶⁰ provides the referendum process.

The democratic principle of referendum exists at all levels of society: Community; district; local government; state, region, or province; national or federal. Brexit—the official acronym for the referendum in which the majority of the UK people voted on 23 June 2016 to leave the EU—is a recent example of a national referendum in the world today.⁴⁶¹ Another national referendum is that of 9–15 February 2011 in which 99.57% of the people of Southern Sudan voted for independence from Sudan, and thereupon became the world’s newest country—South Sudan—on 9 July 2011.⁴⁶² Recent regional referenda include those of Catalonia (2017)⁴⁶³ and Scotland which is one of the four constituent regions of the United Kingdom (2014).⁴⁶⁴

It is emphasised that distinct communities (including indigenous communities), districts, and local governments are equally entitled to their democratic right to referendum that has been described as ‘a constitutive element of mature

⁴⁵⁹ Howard County, ‘Howard County, Maryland’ (*Maryland State Government*, 4 October 2016) <<http://msa.maryland.gov/msa/mdmanual/36loc/how/html/how.html>> accessed 27 May 2019.

⁴⁶⁰ Howard County, ‘Howard County Charter’ (*Howard County, Maryland*) <https://library.municode.com/md/howard_county/codes/code_of_ordinances?nodeId=HOCOC_H_ARTIITHLEBR_S210REPRCOLA> accessed 27 May 2019.

⁴⁶¹ United Kingdom, ‘EU Referendum’ (*Gov.uk*) <www.gov.uk/government/topical-events/eu-referendum> accessed 27 May 2019; United Kingdom, ‘Brexit’ (*Gov.uk*) <www.gov.uk/government/policies/Brexit> accessed 27 May 2019.

⁴⁶² BBC, ‘South Sudan Referendum: 99% Vote for Independence’ *BBC* (London, 30 January 2011) <www.bbc.com/news/world-africa-12317927> accessed 27 May 2019; Central Intelligence Agency, ‘Africa: South Sudan’, *The World Factbook 2016–17* (Central Intelligence Agency 2016) <www.cia.gov/library/publications/the-world-factbook/geos/od.html> accessed 27 May 2019.

⁴⁶³ BBC, ‘Catalan Referendum: Catalonia has “Won Right to Statehood”’ *BBC* (London, 2 October 2017) <www.bbc.com/news/world-europe-41463719> accessed 27 May 2019.

⁴⁶⁴ BBC, ‘Scottish Referendum: Scotland Votes “No” to Independence’ *BBC* (London, 19 September 2014) <www.bbc.com/news/uk-scotland-29270441> accessed 27 May 2019.

democracy.⁴⁶⁵ The democratic concept of *local referendum*⁴⁶⁶ now appears to enjoy some momentum, perhaps due to the global significance and popularity of the aforementioned national and regional referenda. In fact, the right to referendum is one of the ‘most important decisions of the Constitutional Court [of Ukraine].’⁴⁶⁷

However, referenda have also been known to cause both intended and unintended adverse consequences. A recent example of adverse unintended consequences is Brexit that has made the United Kingdom so polarised that the country is experiencing political upheaval, dangerous divisions, and uncertainties about its future. Bowler and Donovan’s survey of 25 countries, published in 2019, presents valuable insights into the ‘tensions between the need for representative democracy and the growing use of referendums . . . and tensions between representative democracy and the use of referendums.’⁴⁶⁸

7.5.5 Preservation of the Adaptive Capability and Justice Mechanisms of Indigenous Customary Law

The legal framework for *huricompatisation* should contain provisions to preserve the adaptive capability of indigenous customary law as a *living law* that reflects current realities and the evolutionary changes in the community to which it applies. This can be achieved through the following mechanisms. First, through

⁴⁶⁵ Fabio Ratto Trabucco, ‘The Evolution of Referendum Experience in Hungary’ (2017) 12(1) Journal of Comparative Law 173, 175 <www.academia.edu/34030542/The_Evolution_of_Referendum_Experience_in_Hungary> accessed 27 May 2019.

⁴⁶⁶ Laviniu Florin Uşvat, ‘Local Referendum – Mechanism of the Participative Democracy’ (2017) 11(2) European Journal of Social Sciences Education and Research <http://journals.euser.org/files/articles/ejser_sep_dec_17_nr_2/Lavinu.pdf> accessed 27 May 2019.

⁴⁶⁷ Victor I Muraviov, ‘Ukrainian Courts and the Protection of Human Rights’ (2016) 128 Actual Problems of International Relations 68, 72 <<http://journals.iir.kiev.ua/index.php/apmv/article/view/3035/2724>> accessed 27 May 2019.

⁴⁶⁸ Shaun Bowler and Todd Donovan, ‘Perceptions of Referendums and Democracy: The Referendum Disappointment Gap’ (2019) 7(2) Politics and Governance 227, 227 <<https://www.cogitatiopress.com/politicsandgovernance/article/view/1874>> accessed 14 July 2019.

abolition of the application of the common-law doctrine of *judicial precedent* (stare decisis) by which a court accepts the existence of any rule of indigenous customary law based on the judicial decision in a previous case, which may no longer be the current rule. 60.06% of the countries of the world (including advanced democracies) operate either a completely civil-law legal system or a plural legal system that includes civil law.⁴⁶⁹ Therefore, the doctrine of judicial precedent is not indispensable⁴⁷⁰ to the proper and equitable administration of justice. *Huricompatisation* is designed to provide the definitive source of binding indigenous customary law.

Second, through the abolition of the doctrine of *judicial notice* that courts use to establish the existence of any rule of indigenous customary law, based on its proof in previous judicial decisions. Judicial notice of rules of indigenous customary law goes beyond previous judicial decisions to books and other types of publications on the rules in question. Like judicial precedent, judicial notice may lead to the application of obsolete rules of indigenous customary law.

Third, through the underlying philosophy of *huricompatisation*. The community itself is the one and only source of its rules of indigenous customary law. Therefore, only those rules that the community records as the rules of its indigenous customary law are compiled in any *huricompatisation* project. This approach is the only way to achieve the true and living indigenous customary law of any community.

It is therefore obvious that the professionals who labour to research the rules of indigenous customary law from what they claim to be the 'sources of customary law' of any community, only succeed in compiling their own *academic version* of customary law, not the community's living customary law. Those 'sources of customary law' include

⁴⁶⁹ University of Ottawa, 'Percentage of the World Population, Civil Law and Common Law Systems' (*JuriGlobe: World Legal Systems*) <www.juriglobe.ca/eng/syst-demo/tableau-dcivil-claw.php> accessed 23 June 2019.

⁴⁷⁰ See Clarence G Shenton, 'Common-Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence' (1918) 23(2) *Dickinson Law Review* 37, 52.

textbooks, articles and other writings of lawyers; anthropological works; court reports, including published reports of superior courts and unpublished reports of superior courts and magistrates' courts; records of chiefs' courts and other traditional courts; reports of commissions of enquiry; official documents, such as departmental files and district notebooks; legislation of the central and tribal governments; and writings of missionaries and historians.⁴⁷¹

Those who look for the 'sources' of the indigenous customary law of any community are strangers to that community who are ignorant of the people's way of life. Using those obsolete, archival, and dead 'sources' to compile a community's *living* rules of indigenous customary law is an absurdity of immense proportions, and it is a major reason for the failure of customary law restatement projects.⁴⁷²

It is reiterated that in *huricompatisation*, each community records and compiles its indigenous customary law without reference to any published sources, which is achievable through the express legislative prohibition of such reference, excepting statutory provisions that are superior in hierarchy to community laws. Further, prohibition of the doctrines of judicial precedent and judicial notice should not affect the validity of any judicial decision that was based on them prior to the *huricompatisation* legal framework.

Finally, the mechanisms of administration of justice should aim to preserve the inherent flexible approaches and people-friendly justice mechanisms of indigenous customary legal system, such as alternative traditional dispute

⁴⁷¹ MW Prinsloo, 'Restatement of Indigenous Law' (1987) 20 Comparative and International Law Journal of Southern Africa 411, 411.

⁴⁷² Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 Journal of Pluralism and Unofficial Law 43, 61 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 27 May 2019.

resolution (TDR),⁴⁷³ restorative justice,⁴⁷⁴ and negotiated settlement.⁴⁷⁵ Unlike the mainstream judicial system, these local justice mechanisms simplify the adjudicatory process, eliminate inordinate delays, and are more affordable, thereby promoting the people's human right of access to justice.

7.5.6 Criminal Offences Relating to Huricompatisation

The contents of the legal framework should include criminal offences relating to the processes and activities involved in the execution of every *huricompatisation* project. They include acts prejudicial to its transparency and integrity, such as undue influence, corruption, any form of manipulation, threats of harm, intimidation, violence, and wilful distortion of the facts of any custom.⁴⁷⁶

7.5.7 Mandatory Model General Provisions on Human Rights Principles

The CLRHC compiles all general principles of human rights law and other relevant legal principles that citizens and authorities should know to guide them, their activities, and the operation of their indigenous customary law. The compilation is a vital component of *citizen legal education*. It is also necessary to guide ceremonial practices; social, cultural, and religious groups; and all types of

⁴⁷³ Mirza Satria Buana, 'Living adat Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia' (2016) 1(3) International Journal of Indonesian Studies 104, 107–108 <<http://artsonline.monash.edu.au/indonesian-studies-journal/files/2016/09/IJIS-3-PUBLISH-VERSION2-Copy.pdf#page=104>> accessed 27 May 2019.

⁴⁷⁴ Lars Waldorf, 'Local Transitional Justice: Customary Law, Healing Rituals, and Everyday Justice' in Olivera Simic (ed), *An Introduction to Transitional Justice* (Routledge 2017) 158; Lisa Owino, 'Application of African Customary Law: Tracing its Degradation and Analysing the Challenges it Confronts' (2016) 1(1) Strathmore Law Review 143, 143–144, www.press.strathmore.edu/strathmore-law-review-volume-1-number-1/ accessed 17 August 2017.

⁴⁷⁵ A Weis Bentzon, 'Negotiated Law: The Use and Study of Law Data in International Development Research' (1994) Roskilde University International Development Studies Occasional Paper No 13 92–108 <<https://rossy.ruc.dk/index.php/ocpa/article/view/4158>> accessed 21 June 2019.

⁴⁷⁶ See AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) The Modern Law Review 244, 248; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1, 3.

practices that are not part of indigenous customary law because they are not binding.⁴⁷⁷

The compilation forms mandatory model general provisions to be annexed to the *huricompatised* customary law publication of every community. Such citizen legal education will help indigenous communities to *self-reform* their indigenous customary law and thereby address the criticism of indigenous customary law as consisting of some rules that are barbaric, primitive, and contrary to human rights. It is true that there are barbaric customs, which is the reason for the repugnancy test to determine the validity of any rule of custom.⁴⁷⁸

8. Conclusion

As a response to the growing global prominence of indigenous rights and the right of every person to know the laws that regulate the person's conduct and activities, this article sought to examine how adequate public access to the unwritten rules of indigenous customary law can be achieved in such a way that the method of providing that access also complies with the general human rights and the specific rights of indigenous communities.

The theory of legal certainty provided the theoretical framework for this article, an aspect of which is the concept of ascertainment of indigenous customary law. The other specific relevant concepts are the rule of law and the doctrine of ignorance of the law is no excuse (the *ignorantium juris* doctrine). The United Nations-endorsed human rights-based approach (HRBA) provided the conceptual framework for analysing the human-rights requirements of the model ascertainment method, while the specific requirements for adequate public access to indigenous customary law were formulated from existing literature.

The findings of the study and the required action, from its aim and specific objectives, are as follows:

⁴⁷⁷ T Olawale Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 29.

⁴⁷⁸ See discussion in Section 4.4.2.1 above.

1. There are four existing methods of ascertainment of indigenous customary law: judicialization (judicial ascertainment), codification, restatement, and self-statement. They are all methods of ascertainment with ancient origins that are still in use today, which include the following examples: the Babylonian Code of Hammurabi (1792–1750 BC); the Roman Code of the XII Tables (451–450 BC); French judicialization (fifteenth century); French codification (1454); and the Natal Code of Native Law, South Africa (compiled in 1875–1878). The others are the British Restatement of African Law Project of the School of Oriental and African Studies of the University of London (started in 1959); Restatement of Customary Law of Nigeria (2013); self-statement in France (which dates back to 1454), among the barbarian Germanic tribes (5th and 6th centuries), and The Laws of Ukwangali traditional community in Namibia (1992). The latest is the ongoing UNDP co-sponsored South Sudan Customary Law Ascertainment project that started in 2012.
2. None of the four existing methods of ascertainment of indigenous customary law provides adequate public access to indigenous customary law. Specifically, they do not provide comprehensive compilation of the rules of indigenous customary law, their mode of publishing the rules of indigenous customary law hinders public access to those rules, and the deficiency in the authoritativeness of the published indigenous customary law makes their objective of achieving certainty of the law self-defeating.

They all lack the capability of continuous review which is indispensable to the currency of every category of public legal information. Their lack of currency causes varying degrees of uncertainty of the true state of the applicable rules of indigenous customary law which, in turn, causes poor access. They also have copyright protection issues that hinder access to the ascertained texts of indigenous customary law, the only exception being the UNDP co-sponsored South Sudan Customary Law Ascertainment that is available on the UNDP website.

3. None of the four existing methods of ascertainment of indigenous customary law protects the general human rights and the specific indigenous rights of indigenous communities. For example, they all lack adequate public participation, which violates the people's right to adequate participation in the public affairs of one's community.
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Judicialization, codification, and restatement violate the linguistic rights of the affected indigenous communities, as their laws are not published in their indigenous languages. Although the Namibian self-statement is published in both English and the language of each traditional authority, self-statement does not appear to have any proper legal framework to sustain it. For example, the UNDP co-sponsored self-statement of the indigenous customary laws of different communities of South Sudan is published in the English language only.

Further, none of the four methods publishes indigenous customary law in the required alternate formats for public access by persons with disabilities, thereby denying them their right of access under the Convention on the Rights of Persons with Disabilities (CRPD). It is also a violation of their right of public access to their indigenous customary law, which is an integral component of the general right of free access to public legal information.

Additionally, the assertion of publisher's copyright in the texts of the judicialized, codified, restated, and self-stated indigenous customary law violates the people's right of *free* public access to their law. Here again, the South Sudan version of self-statement is an exception. Judicialization violates the human right of women to equality and non-discrimination, as some patriarchal indigenous communities prevent them from being elders, chiefs, or expert witnesses whose testimonies are crucial in determining the existence of unwritten rules of indigenous customary law.

As all the four existing ascertainment methods are both public access-inadequate and human rights-noncompliant, from the findings above, this article has provided the solution to that global problem by developing the human rights-compliant and public access-adequate model of ascertainment of indigenous customary law, acronymed *huricompatisation*. This new ascertainment method incorporates a mix of twelve relevant general human rights and specific indigenous rights into ten essential requirements for adequate public access to indigenous customary law.

Huricompatisation satisfies the need of the members of indigenous communities to know the applicable rules of their indigenous customary law and it preserves the evolving and adaptive nature of that law. Further, *huricompatisation* protects their general human rights and their specific indigenous rights, including their omnibus right to self-determination that encompasses their rights to self-

governance in their internal affairs, their culture, and their indigenous identity. Additionally, *huricompatisation* provides the opportunity for unprecedented free public access to indigenous customary law from indigenous communities worldwide.

This article has therefore achieved its aim and its four specific objectives. The reason is that *huricompatisation* is the new model for ascertainment that can provide adequate public access to the unwritten rules of indigenous customary law and, at the same time, comply with the general human rights and the specific rights of indigenous communities.

The following law-reform and policy recommendations are necessary for the optimal effectiveness of *huricompatisation*:

1. The governments of all countries in which indigenous customary law exists as a legal system or forms part of the legal system should create the proposed national legal framework for the development and reform of indigenous customary law, like the case of legislation. The legal framework will provide, inter alia, the required best practices and quality control for the *huricompatisation* processes and establish its administrative framework through the proposed Customary Law Reform and Huricompatisation Commission and the Community Customary Law Council.
2. All governments worldwide should perform their obligation to implement the *human right to education*,⁴⁷⁹ which is a human right in itself and an *empowerment right* that enables people to enjoy other human rights through literacy.⁴⁸⁰ They should give special attention to minorities and indigenous communities who are particularly disadvantaged in literacy.⁴⁸¹ Literacy

⁴⁷⁹ ICESCR art 13.

⁴⁸⁰ UN Office of the High Commissioner for Human Rights, 'Special Rapporteur on the Right to Education' (UN Office of the High Commissioner for Human Rights) <www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx> accessed 27 May 2019.

⁴⁸¹ United Nations, *State of the World's Indigenous Peoples* (United Nations Publication 2009) 1, 8 <www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf> accessed 27 May 2019.

provides the ability to understand written law⁴⁸² and thereby helps people to enjoy their right of free access to public legal information. Members of indigenous communities will benefit optimally from the ascertainment of the oral or unwritten rules of their indigenous law when they can read and understand the written version of their law.

3. All governments have the legal and moral obligation to, and should, ratify, adopt, and implement all international human rights instruments relating to the rights of indigenous communities discussed in this article, including the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization Indigenous and Tribal Peoples Convention, 1989.
4. Codification and restatement should be *abolished* through law reform, for several reasons. For example, codification wrests the dynamic regulation of the culture and way of life of indigenous communities from their control and gives it to 'stranger legislators' that are part of the faraway bureaucratic State system. This major defect violates their *preeminent* indigenous right to self-determination that includes 'the right to autonomy or self-government in matters relating to their internal and local affairs.'⁴⁸³

As indigenous customary law is community-specific,⁴⁸⁴ the harmonisation, unification, and integration of the customary laws of different communities through codification and restatement, violate the *core* indigenous rights of *each* community to self-determination and a distinct identity. Codification and restatement destroy the evolving and adaptive nature of indigenous customary as a *living law* that reflects the dynamic nature of the society.

⁴⁸² Daniel Poulin, 'Open Access to Law in Developing Countries' (2004) 9(12) First Monday <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 27 May 2019.

⁴⁸³ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 art 4.

⁴⁸⁴ Daniel Korang, 'Ascertainment of Customary Law: A Question of Law or of Fact or Both?' (2015) 38 Journal of Law, Policy and Globalization 93, 94 <www.iiste.org/Journals/index.php/JLPG/article/viewFile/23519/23925> accessed 19 July 2017.

Restatement is probably a futile exercise because it is nonbinding and therefore self-defeating, as it perpetuates the very uncertainty of unwritten customary law it seeks to prevent. No person can depend on restatement for the definitive position of the law, because the acceptance of the mere *guide* on the rules of indigenous customary law that it provides, is at the *sole discretion* of the courts.

Transplanting the concept of restatement of *already published and accessible* primary legal information (e.g. legislation and judicial decisions) as practised in the United States, for example, to *unwritten and inaccessible* indigenous customary law, is as anomalous and incongruous as the fallacy of comparing apples and oranges. Unwritten indigenous customary law, which is *unstated*, cannot be *restated*.

Therefore, restatement projects, which are usually elaborate and expensive, appear to be a waste of taxpayers' money that could have been properly used for projects that guarantee ascertainment that is authoritative, comprehensive, public access-adequate, and human rights-compliant. Right from the beginning, restatement projects have failed for several reasons,⁴⁸⁵ and the above analysis should be part of the reasons it is unattractive and cannot achieve its objective of certainty and accessibility of indigenous customary law.

5. The application of the doctrines of judicial precedent and judicial notice in the judicialization process should be *abolished* through law reform because, like codification and restatement, they destroy the evolving and adaptive nature of indigenous customary.
6. Judicialization is a judicial process that is burdensome, time-consuming, expensive, ad hoc, piecemeal, discriminatory, and injustice-infested. However, it cannot be abolished, because the adjudicatory powers of the court should not be ousted. Therefore, judicialization should be used only as the last resort,

⁴⁸⁵ Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 *Journal of Pluralism and Unofficial Law* 43, 61 <www.tandfonline.com/doi/abs/10.1080/07329113.2010.10756649> accessed 9 May 2019.

pending a proper ascertainment or where a valid rule in dispute was omitted in any ascertainment exercise. As stated in recommendation (5) above, it is reiterated that the application of the doctrines of judicial precedent and judicial should be abolished.

7. All governments have the legal and moral obligation to, and should, ratify and implement the provisions of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Among other things, its implementation will enable women to enjoy their right to equal participation with men in the administration of indigenous customary law. This will eliminate the prevailing discrimination in some patriarchal communities where women are prevented from being community chiefs, leaders, and elders whose testimonies usually have the highest evidentiary value because they are recognised as the custodians of indigenous customary law.
8. All governments have the legal and moral obligation to, and should, ratify and implement the provisions of the Convention on the Rights of Persons with Disabilities (CRPD). This will enable persons with disabilities to enjoy their human right to participate equally in the public affairs of their community, which include the ascertainment of their indigenous customary law and other legislative processes. Additionally, persons with disabilities have equal right of free access to all categories of public legal information (including indigenous customary law) which requires that laws should be published or communicated in all the alternate formats so that the different categories of persons with disabilities can know the law, using assistive technologies.
9. Self-statement needs major reform. For example, its emphasis on the ascertainment of indigenous customary law by the community which, of course, is merely a renaissance of an ancient practice, is necessary but not sufficient for adequate public access. Like judicialization, codification, and restatement, self-statement is also human rights-noncompliant. Its policy of the side-by-side existence of unwritten and written rules of indigenous customary law is self-defeating, as it also creates uncertainty and unintended legal consequences.

In addition, like codification and restatement, its policy of harmonisation, unification, and integration of the customary laws of different communities

violates each community's rights to self-determination and indigenous identity.

The extent of the reform that self-statement needs may cause it to lose its identity as a distinct ascertainment method, as *huricompatisation* already provides the essential public-access and human rights-compliant features that can ensure adequate public access to indigenous customary law worldwide.

10. The United Nations; other international and regional bodies and organisations; national, regional, and local governments; and indigenous policymakers should adopt the much-needed human rights-based approach as the framework for the planning, implementation, and assessment of indigenous customary law ascertainment projects worldwide. The *huricompatisation* model, developed in this article, provides such framework.

The United Nations (especially UNDP that is involved in the South Sudan Customary Law Ascertainment Project), regional bodies, governments at all levels, intergovernmental and nongovernmental organisations, other policymakers who work on indigenous matters, and indigenous communities will benefit from the law-reform utility and policy relevance of this article that extends the frontiers of the right of free access to public legal information to indigenous customary law globally. *Huricompatisation* is designed to remedy some of the many injustices that indigenous communities and minorities suffer worldwide. These injustices include unjustified interference in their local affairs; imposition of indigenous-unfriendly projects and programmes on them, e.g. unfit-for-purpose indigenous customary law ascertainment projects; neglect of their unique welfare needs, e.g. public infrastructural services; neglect of their right to education; destruction of their cultural heritage; the lack of equal access to wealth creation opportunities; and violation of their indigenous rights, including their preeminent right to self-determination.

Finally, *huricompatisation* is designed to be a new mechanism for the valid expression and management of indigenous customary law as the accessible and adaptable *living law* that changes *responsibly* with the changes in the society, which must be recognised and treated equally with the other primary sources of law, e.g. legislation. As indigenous customary law is one of the categories of public legal information, the governments of all countries in which indigenous customary

law exists as a legal system or forms part of the legal system, have the moral and legal duty under the rule of law to provide adequate access to its extant rules.

The proper transmission of the nebulous oral or unwritten rules of indigenous customary law into writing should aim to provide concrete and permanent evidence of the existence of its rules, make them easily and freely accessible, transparent, knowable, and difficult to manipulate, which will thereby promote indigenous justice mechanisms. Members of indigenous communities have the right to enjoy such transmission. That right to a public access-adequate and human rights-compliant ascertainment of their indigenous customary law, which *huricompatisation* guarantees, is their human right.

Appendix

Table: The Existing Ascertainment Methods and their Sources

S/No.	Ascertainment Method	Sources
1	Judicialization	<i>Angu v Atta</i> [1916] Gold Coast Privy Council Judgments, 1874-1928; T Olawale Elias, <i>The Nature of African Customary Law</i> (Manchester University Press 1956); AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) <i>The Modern Law Review</i> 244–263; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1.
2	Codification	AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20(3) <i>The Modern Law Review</i> 244–263 (for example, the Natal Code of Native Law that was compiled in 1875–1878); Jean Maillet, 'Historical Significance of French Codifications' (1970) 44 <i>Tulane Law Review</i> 681-692; Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1.
3	Restatement	'The Restatement of African Law Project' (1959) 3(3) <i>Journal of African Law</i> 149-151; M W Prinsloo, 'Restatement of Indigenous Law' (1987) 20 <i>Comparative and International Law Journal of Southern Africa</i> 411-420; Nigerian Institute of Advanced Legal Studies, <i>Restatement of Customary Law of Nigeria</i> (Safari Books 2013); Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1.
4	Self-Statement	William Tate Olenasha and others, 'Report on the Ascertainment of the Customary Laws of 14 Communities in South Sudan', Series 1, vol 1 (<i>United Nations Development Programme</i> , 2012) 6, 14–15 (South Sudan Customary Law Ascertainment Project); Manfred O Hinz, 'The

S/No.	Ascertainment Method	Sources
		Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is it For?' in Manfred O Hinz and Alexander Gairiseb (eds), <i>Customary Law Ascertained, Volume 2: The Customary Law of the Bakgalagari, Batswana and Damara Communities of Namibia</i> (University of Namibia Press 2013) (Namibia Customary Law Ascertainment Project); Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) International Development Law Organization Traditional Justice: Practitioners' Perspectives' Working Paper Series 1.

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CHAPTER SIX

Conclusion

“What I found over the years is the most important thing is for a team to come together over a compelling vision, a comprehensive strategy for achieving that vision, and then a relentless implementation plan.” **Alan R. Mulally** (born 1945)¹

¹ Brent Snavely, ‘Q&A: Ex-Ford CEO Alan Mulally on Google, 3D Printing’ *USA Today* (Virginia, 21 July 2016) <<https://eu.usatoday.com/story/money/cars/2016/07/21/alan-mulally-ford-motor/87377594/>> accessed 15 July 2019. Alan R. Mulally is the Director of Alphabet Inc. (Google’s parent company); former Chief Executive Officer and President of Ford Motor Company; former President and Chief Executive Officer of Boeing Commercial Airplanes: Bloomberg, ‘Alan R. Mulally: Executive Profile and Biography’ (*Bloomberg*) <<https://www.bloomberg.com/research/stocks/people/person.asp?personId=370889&privcapId=29096>> accessed 15 July 2019.

1. Introduction

This thesis sought to find the effective solution to the persistent global problem of inadequate access to public legal information that denies the right of every person to know the laws that regulate the person's conduct and activities. The problem exists, to varying degrees, in both developed and developing countries; it has many adverse consequences, including violation of several human rights and indigenous rights; and it has defied all the ancient and modern attempts to solve it.

Based on the identification of the lack of political will as the primary cause of the problem,² this thesis has examined the desirability of the use of a universal legal mechanism that can impose international human rights obligations on governments worldwide to provide adequate access to their public legal information, to meet their obligation under the rule of law, and to protect the people's right of free access to public legal information. That mechanism will thereby remedy the serious injustice in the application of the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable.

As a thesis consisting of a collection of four independent but interconnected articles, this study used the theory of legal certainty as its overriding theoretical framework and several related concepts that underpin the concept of the right of free access to public legal information and the techniques for providing adequate access to all categories of public legal information in today's world of information and communications technology. The related concepts are the duty-right relationship between the State and the people under the rule of law, the *ignorantia juris* doctrine, ascertainment of indigenous customary law, the presumption of the reliability of information from official sources, and of findability. Additionally, the literature on the right of free access to public legal information as a human right was specifically reviewed, as it is the main theme of the study.

The discussion of the primary cause of the research problem, the theoretical framework, the relevant concepts, and the literature review provided a clear

² Section 2.2 of Chapter One.

direction for the aim of this thesis, the research questions, the methodology, and the research methods. The complex nature of the problem required an interdisciplinary doctrinal methodology and the use of the human rights-based approach and the new human rights-advocacy approach. The study used a central research question and four sub-questions for the discussion of the main theme and the subthemes of the thesis. The summary of the thematic findings of the study, recommendations and their implementation, limitations, directions for further research, and the overall conclusion are discussed below.

This thesis fills major gaps in the literature on the right of free access to public legal information. Specifically, it fills six gaps in the following areas: the discussion of the primary cause of the persistent global problem of inadequate access to public legal information; the proper international legal framework for the adequate protection, promotion, and actualisation of the right of free access to public legal information worldwide; and the technological mechanism to help online users worldwide to identify official public legal information websites whose resources are presumed to be reliable. The others are the solution to the global problem of the existence of a country's multiple official public legal information websites that are either totally isolated or are not properly interconnected; a model of ascertainment of indigenous customary law that provides adequate access to its rules and also complies with the general human rights and the specific indigenous rights of indigenous communities; and the discussion of the proper set of onerous criteria for the universal recognition of new human rights that can help to avoid rights inflation.

2. A Synopsis of the Thematic Findings

The findings discussed here are the answers to all the four research sub-questions that were formulated to define the specific scope of this study that comprises the main theme and the subthemes of this thesis. The central research question, which corresponds to the aim of this study, is discussed in the overall conclusion of this thesis in Section 6 below.

2.1 The Right of Free Access to Public Legal Information as a Human Right

Research sub-question 1: Does the right of free access to public legal information qualify for its universal recognition as a human right that can be part of the

international legal framework for enhancing national and global access to public legal information; and, if it does, what are its essential principles that should be part of the contents of a binding international human rights instrument for its protection, promotion, and actualisation?

On the first part of this question, this thesis has found that the right of free access to public legal information qualifies for its universal recognition as a substantive or stand-alone human right that can be part of the international legal framework for improving national and global access to public legal information. This finding has two aspects that are both relevant to this thesis: in the first place, it is a human right; in the second place, it also qualifies for its universal recognition as a stand-alone human right under its own Convention.

Firstly, the right of free access to public legal information is not just an established legal right which, of course, it is; it is indeed a human right based on the following onerous criteria of the new human rights-advocacy approach³ discussed in this thesis:

- (1) The right of free access to public legal information is so fundamental that its violation causes manifest serious injustice, deprivations, and loss to human beings that fall within the core themes of human rights protection.⁴ For instance, the denial of one's right of free access to public legal information jeopardises *human dignity*, e.g. the ordeals from violating inaccessible and thereby unknowable laws that can lead to a death sentence, life imprisonment, and adversely affect one's life, liberty, reputation, career, etc. in several ways.⁵

Lon Fuller, in his theory of legal certainty that is the overriding theoretical framework for this thesis,⁶ rightly highlighted the direct relationship between human dignity and the right of free access to public legal information. He considered the violation of one's right to know the law that governs one's

³ Section 7.2.3 of Chapter One.

⁴ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

⁵ For example, there are countries where, unlike other countries, drug trafficking carries a death penalty, not just imprisonment.

⁶ Section 4.2 of Chapter One.

conduct as ‘an affront to man’s dignity as a responsible agent’ and ‘indifference to his powers of self-determination.’⁷ Such denial, as Fuller also rightly stated in the above quote, violates the personal freedom (self-determination) that comes from one’s inability to order one’s conduct in accordance with the law. Article 3 of the Convention on the Rights of Persons with Disabilities (CRPD), for example, explicitly states this principle of ‘the freedom to make one’s own choices’.

The foundation of the concept of human rights is an effective global intervention in the aforementioned types of violation that cause serious injustice, deprivations, and loss to human beings, and the denial of a person’s right to know the law is one of such violations.

- (2) The right of free access to public legal information has *universal relevance* because all human beings of the legal age of accountability are liable for violating the law, and ignorance of the law caused by no access or inadequate access to the law is a known valid cause of its violation.⁸ Universal relevance is one of the basic characteristics of human rights.⁹ The UN Office of the High Commissioner for Human Rights states it thus: ‘The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration [of] Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.’¹⁰

Ignorance of the law leads to its violation because crimes are mere creatures of legislation, sometimes the product of the whims and caprices of legislators, and no human being is endowed with divine omnipotence to know what conduct or activity has been criminalised, without access to that law. The existence of odd, strange, or weird laws, which the human mind cannot guess,

⁷ Lon L Fuller, *The Morality of Law* (Revised edn, Yale University 1969) 162–163.

⁸ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

⁹ Section D.II.4 of Chapter Two.

¹⁰ UN Office of the High Commissioner for Human Rights, ‘What are Human Rights?’ (*UN Office of the High Commissioner for Human Rights*) <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 22 July 2019.

even worsens the situation. For example, Section 18-5810 of Idaho Statutes¹¹ (United States) contains the following provision: ‘No person, except those wholly or partially blind, shall carry or use on any street, highway, or in any other public place a cane or walking stick which is white in color, or white tipped with red.’¹²

- (3) It is a unique right, as it is a substantive or stand-alone human right, a procedural right, and an empowerment right that is intertwined with or *interrelates* with other human rights.¹³ This is significant because interrelatedness is also one of the basic characteristics of human rights.¹⁴

Although the distinction between substantive rights and procedural rights is not always clear-cut,¹⁵ Franck’s formulation that a substantive right is ‘a right against the imposition of certain kinds of policies’¹⁶ is instructive. For example, the right of free access to public legal information is a *substantive right* against the imposition of any policy that denies people the opportunity to know the law. The reason is that adequate knowledge of the law is an *end* in itself, in the first place, as it preserves the dignity of human beings to know their rights and obligations *as human beings* who live in the human society that is governed by laws. Knowledge of the law is therefore interwoven with human existence.

¹¹ Idaho State Legislature, ‘Title 18: ‘Crimes and Punishments’ (*Idaho State Legislature*) <<https://legislature.idaho.gov/statutesrules/idstat/Title18/T18CH58/SECT18-5810/>> accessed 6 August 2019.

¹² For a discussion of the odd laws of the US State of Idaho, see Pat Sutphin, ‘Did You Know that these “Odd Laws” Existed in Idaho?’ *Times-News* (Twin Falls, 17 January 2019) <https://magicvalley.com/news/local/did-you-know-that-these-odd-laws-existed-in-idaho/collection_bbc0a41e-cabc-5495-b21b-0d4c5dfdddf.html> accessed 21 May 2019.

¹³ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

¹⁴ Section D.II.4 of Chapter Two.

¹⁵ Claire E M Jervis, ‘Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law’ (2019) 30(1) *The European Journal of International Law* 105–128 <<https://doi.org/10.1093/ejil/chz009>> accessed 13 July 2019.

¹⁶ Matthew J Franck, ‘What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over “Substance” versus “Process”’ (2015) 4(1) *American Political Thought* 120, 143 <<https://www.journals.uchicago.edu/doi/full/10.1086/679325>> accessed 13 July 2019.

It is also a *procedural right* because it is absolutely required for the adjudicatory process for the settlement of disputes and the enforcement of all legal rights and human rights. The right is embedded in several human rights and constitutional guarantees on access to justice, a component of which is fair trial. Fair trial depends on access to the primary rules and principles of law that govern the conduct and activities of people and authorities, and the administration of justice. These guarantees include the right to self-representation (as a specific right), the general right to adequate facilities for one's defence, and the legality principle which is expressed in the Latin maxims *nullum crimen sine lege* (no crime without law) and *nullum poena sine lege* (no punishment without law), under which inaccessible laws are analogous to non-existent and retroactive (ex post facto) laws.¹⁷

Furthermore, it is an *empowerment right* that is necessary for the awareness, knowledge, and enjoyment of all legal and human rights, beyond its formal procedural use in adjudicatory processes. Milbrandt and Reinhardt rightly posited that 'perhaps the most fundamental human right is one's right to know and access all the other rights guaranteed to her as a human being.'¹⁸

Indeed, the tripartite existence of the right of free access to public legal information as a substantive right, a procedural right, and an empowerment right endows it with a special status as arguably the most unique human right. What is the essence of the concept of law, if people do not have the opportunity to know what its provisions, rules, and principles are?

- (4) It belongs to the genre of the primary sources of international law,¹⁹ as it is a major component of the human right to freedom of expression and the press (which includes the right of free access to public information) that enjoys the protection of United Nations Conventions, from which it currently exists with its *derivative human-right status*.²⁰

¹⁷ Section 4.3.2 of Chapter One.

¹⁸ Jay Milbrandt and Mark Reinhardt, 'Access Denied: Does Inaccessible Law Violate Human Rights' (2012) 9 Regent Journal of International Law 55, 59.

¹⁹ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

²⁰ Section C.I of Chapter Two.

- (5) It satisfies the international consensus criterion for the recognition of new human rights²¹ because it is a popular right that already enjoys international support, as all governments make varying degrees of efforts to provide access to their laws by publishing them. Further, the freedom of information laws already in existence in not less than 127 countries²² is an obvious expression of the global recognition of the need for access to government-held information, a major component of which is public legal information.²³

The famous Free Access to Law Movement (that has more than sixty member organisations from different countries),²⁴ other free-access organisations, and individuals make efforts globally to publish laws and have thereby brought global awareness of the need for free access to laws.

- (6) As stated in the immediately preceding paragraph, the right is compatible with the usual practice of governments worldwide²⁵ because they all make varying degrees of efforts to provide access to their public legal information, as this study found from its review of the official public legal information websites of 60 English-speaking countries.²⁶
- (7) Its principles as a human right are precise and the obligations of its duty-bearers are also precisely identifiable,²⁷ as discussed elaborately in this thesis. Its beneficiaries are all human beings, especially of the legal age of accountability, and all legal persons and authorities worldwide.²⁸

²¹ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

²² Open Society Justice Initiative, 'States that Guarantee a Right of Access to Information (RTI) in National/Federal Laws or Decrees' (*Open Society Justice Initiative*, May 2019) <www.right2info.org/resources/publications/countries-with-ati-laws-1/at_download/file> accessed 31 July 2019.

²³ *Deaton v Kidd*, 932 S.W.2d 804 (Mo. Ct. App. 1996) (United States).

²⁴ Free Access to Law Movement, 'Members of the Free Access to Law Movement (FALM)' (*Free Access to Law Movement*) <<http://falm.info/members/current/>> accessed 6 August 2019.

²⁵ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

²⁶ Section 2 of Chapter Four.

²⁷ A criterion for the recognition of new human rights in Section 7.2.3.4 of Chapter One.

²⁸ Section C.IV of Chapter Two.

Secondly, in addition to being a human right, based on the onerous criteria of the new human rights-advocacy approach summarised above in the first part of this discussion, the right of free access to public legal information also qualifies for its *formal universal recognition* as a stand-alone or substantive human right under the framework of a new UN Convention. The reasons for such recognition and its specific Convention include the following:

1. There are normative gaps associated with its existing derivative status, as it acquires its status from its parent human right, which is the right to freedom of expression and the press in Article 19 of the Universal Declaration of Human Rights (UDHR)²⁹ and also Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Its derivative existence causes an inherent defect that makes the right ineffectual.³⁰
2. The need for an adequate, definitive international human rights framework for its global protection, promotion, and actualisation to remedy the defect in its existing derivative status requires its formal universal recognition as a human right.³¹ The situation is analogous to that of the right of persons with disabilities that was not adequately protected, which necessitated its formal recognition and the accompanying Convention. As the United Nations explained, 'A universal, legally binding standard is needed to ensure that the rights of persons with disabilities are guaranteed everywhere.'³²
3. It should be recognised as a human right under the framework of its own UN Convention based on the precedent of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

²⁹ Universal Declaration of Human Rights, UNGA Res 217 (III) (adopted 10 December 1948) (UDHR) <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed 9 August 2019.

³⁰ Section D.II.1 of Chapter Two.

³¹ Section D.II.2 of Chapter Two.

³² United Nations, 'Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities: What About Existing Legislation? Is it not Working?' (*United Nations*) <<https://static.un.org/esa/socdev/enable/convinfofaq.htm>> accessed 23 May 2019.

Environmental Matters³³ (Aarhus Convention). The Aarhus Convention protects the right of public access to legal information relating to the environment, which is just one aspect of the right of free access to all categories of public legal information.³⁴

4. Its formal recognition as a human right is necessary to give global legal effect to the numerous principles, declarations, and statements on free access to public legal information that express the common aspiration of the international community. They include The Hague Guiding Principles to be Considered in Developing a Future Instrument 2008; Law.Gov Principles and Declaration 2010; and The Hague Conference and the European Commission Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters 2012. The others are the Johannesburg Outcome Statement of the International Conference on Access to African Supranational and Regional Law 2012 and the IFLA Statement on Government Provision of Public Legal Information in the Digital Age 2016.³⁵
5. The eventual substantially enhanced national and global access from its global protection, promotion and actualisation will produce numerous benefits for the whole world. For instance, it will enhance sustainable development and facilitate effective law reform, including the remedy for the injustice in applying the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable. It will also provide the opportunity for people worldwide to have better knowledge of the law and facilitate effective legal research for various purposes, e.g. by the judiciary, the legislature, lawyers, academics, students, authors, and all those who are interested in knowing the current position of the law on any subject.³⁶ Additionally, it will promote the omnibus right of access to justice that encompasses various aspects of fair trial, and reduce instances of needless and wrong prosecutions and the injustice from *per*

³³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 <https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf> accessed 8 August 2019.

³⁴ Section D.II.3 of Chapter Two.

³⁵ Listed with their sources in Section 1 of Chapter One.

³⁶ Section D.II.6 of Chapter Two.

incuriam judgments due to ignorance of the current state of the law. Examples of such large-scale *per incuriam* judgments include those of the United Kingdom where thousands of defendants were affected (as revealed in *Regina v Chambers*) and Uganda.³⁷ A similar *per incuriam* judgment of the Supreme Court of Ghana in *Mensah v The Chairman Electoral Commission and Another*³⁸ led to the postponement of Ghana's scheduled nationwide District Assembly Elections. Ghana's Electoral Commission estimated the cost of the postponement to be 90 million Ghanaian Cedi³⁹ (the equivalent of about 13.35 million Euros today).⁴⁰

6. As the right of free access to public legal information is an indispensable aspect of the rule of law, its universal recognition as a human right will promote the rule of law globally.⁴¹ This will lead to improved transparency and accountability, and promote peace and order in the society, as good access to law usually leads to better knowledge of the law which, in turn, eventually leads to better compliance with and obedience to the law.⁴²
7. Its formal recognition as a human right is the only way the United Nations can carry out its fundamental responsibility under Article 1(4) of its Charter to solve the persistent global problem of inadequate access to public legal information which has profound adverse human rights implications. The reason is that such recognition will eventually provide the proper solution that can impose international human rights obligations on all governments to perform their existing rule-of-law duty to provide adequate access to their laws. The United Nations has a fundamental responsibility to implement a genuine proposal for the universal recognition of an existing right as a human right, such as the proposal in this thesis.

³⁷ Discussed in Section 2.1 of Chapter One.

³⁸ *Mensah v The Chairman Electoral Commission and Another* (J1/11/2015) [2015] GHASC 10, 3 (27 February 2015) <<https://ghalii.org/gh/judgment/supreme-court/2015/10-6>> accessed 2 August 2019.

³⁹ Ibid

⁴⁰ Discussed in Section 2.1 of Chapter One.

⁴¹ Section D.II.8 of Chapter Two.

⁴² Dennis Alan Olson, 'The Swedish Ban of Corporal Punishment' (1984) *Brigham Young University Law Review* 447, 452.

Second part of research sub-question 1: What are the essential principles that should be part of the contents of a binding international human rights instrument for the protection, promotion, and actualisation of the right of free access to public legal information?

The fifteen essential principles outlined in the proposal in this thesis for the universal recognition of the right of free access to public legal information as a human right (Section D.III.2 of Chapter Two), which should form the contents of the proposed *United Nations Convention on the Right of Free Access to Public Legal Information*,⁴³ are as follows:

1. Free access to all categories of public legal information via public libraries and online. Free access is not an option; it is a compulsory aspect of the right of *free* access to public legal information. That is the reason it is expressly included in the title of the right.
2. No copyright in the texts of public legal information nor in their value-added features or publications produced with public funds.
3. Integrity and authoritativeness of published public legal information, including the online version, so that they are authentic and have official status and evidentiary value. The peculiar vulnerability problems with online information has made it necessary to use authentication technologies, such as digital signatures and public key infrastructure (PKI), for preserving its integrity.
4. Preservation of public legal information for present and future generations, e.g. through the use of high-quality, durable archival paper for the archival version of print legal information and ISO 16363 which is the recommended International Standard on best practices for determining the trustworthiness of digital repositories in the case of online legal information.
5. The use of open formats, metadata and knowledge-based systems to enhance the usability of, and different levels of access to, published public legal information, for example.

⁴³ Section D.III.2 of Chapter Two.

6. Protection of personal data in accordance with privacy laws, including anonymization best practices in the case of judicial decisions. According to the United Nations Conference on Trade and Development, '107 countries (of which 66 were developing or transition economies) have put in place legislation to secure the protection of data and privacy. In this area, Asia and Africa show a similar level of adoption, with less than 40 per cent of countries having a law in place.'⁴⁴
7. The use of neutral methods of citation of laws, including methods that are medium-neutral, provider-neutral and internationally consistent.
8. Translation of the laws of any jurisdiction into at least all the official languages of that jurisdiction as part of intelligible access and to protect linguistic rights globally.⁴⁵
9. The support and cooperation of State parties and all those involved in all the necessary processes for access to public legal information.
10. Use of best practices in legal drafting to ensure that every type of public legal information is intelligible and thereby effective.
11. Provision of alternate formats of public legal information for equal access by persons with disabilities.
12. Adequate public access to indigenous customary law, using a human rights-compliant ascertainment method, such as *huricompatisation* that is developed in this thesis.

⁴⁴ United Nations Conference on Trade and Development, 'Data Protection and Privacy Legislation Worldwide Data Protection and Privacy Legislation Worldwide' (*United Nations Conference on Trade and Development*, 27 March 2019) <https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx> accessed 19 July 2019.

⁴⁵ Linguistic rights are human rights and are also interwoven with cultural rights. See ICCPR art 27; ICESCR arts 1, 3, 6, 15; UNDRIP arts 2, 3, 5, 8, 13, 14, 15, 16; *Lambert v California*, 225 U.S. 355 (1957); Universal Declaration on Linguistic Rights (Barcelona Declaration), World Conference on Linguistic Rights (9 June 1996) <https://culturalrights.net/descargas/drets_culturals389.pdf> accessed 10 August 2019; Claire Kramsch, *Language and Culture* (Oxford University Press 1998) 3.

13. Effective public legal information awareness programmes to help the people to know the current development of the law: the extant laws (in force), proposed laws (bills), the legislative process for every law, the enactment of every new law and its commencement date, changes to the extant laws via amendment and repeal, etc.
14. The obligation of every government to formulate and implement policies and programmes that will create the enabling environment for free or affordable access to the Internet, as online public legal information is indispensable to the provision of adequate national and global access.
15. The universal *defence of ignorance of inaccessible law is an excuse*, which is the direct remedy for the serious injustice in the application of the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable.

2.2 Easy Identification of Official Public Legal Information Websites

Research sub-question 2: As websites are now indispensable to the provision of adequate access to public legal information, if there are unreliable third-party public legal information websites, how can easy identification of official public legal information websites be achieved to enable users worldwide to avoid such third-party websites?

This study found that websites are now indispensable to the provision of adequate access to public legal information at all levels (international, regional, national, state, local, and community).⁴⁶ It also found that there are genuine global concerns about unreliable online information that affects virtually all categories of online resources due to the *freedom of the Web*, whereby any person can publish anything online. For example, it has been reported that the founder of *Wikipedia*, Jimmy Wales, once 'said that he gets about 10 e-mail messages a week from students who complain that Wikipedia has earned them fail grades' because they relied on and cited wrong information on the *Wikipedia* website.⁴⁷ That revelation

⁴⁶ Section 1 of Chapter One; Section B of Chapter Two; Section 2 of Chapter Three; Section 2.1 of Chapter Four.

⁴⁷ Andrew Orlowski, 'Avoid Wikipedia, Warns Wikipedia Chief: It can Seriously Damage your Grades' *The Register* (London, 15 June 2006)

is particularly worrisome because *Wikipedia*, as unreliable as it has always been from its beginning (because its resources are unregulated and merely user-generated), is the world's largest online encyclopaedia.⁴⁸ More troubling is the practice, by some authors and even scholars, of citing *Wikipedia* in scholarly works,⁴⁹ just because its resources dominate the Web and often appear at the top of Internet search engine results.⁵⁰ Further, viral online fake news is now a global nightmare.⁵¹ Unreliable online health information exists with dangerous consequences for health globally,⁵² including death.⁵³

Similarly, there are unreliable third-party public legal information websites. No category of information is exempt from the real, potent danger of the Web as a free-for-all global junkyard that contains reliable, unreliable, and dangerous information caused by the ignorance of the authors of such information, accidental error, digitisation error from the process of scanning print documents into publishable texts, and deliberate falsification.

<www.theregister.co.uk/2006/06/15/wikipedia_can_damage_your_grades/> accessed 1 May 2019.

⁴⁸ Alex Bateman and Darren W Logan, 'Time to Underpin Wikipedia Wisdom' (2010) 468 *Nature* 765 <<https://doi.org/10.1038/468765c>> accessed 1 May 2019.

⁴⁹ Example, Kinaz Al Aytouni and Kinan M Naddeh, 'Thinking Out of the Box: Non-Typical Research Methods in Business' in Jorge Marx Gómez & Sulaiman Mouselli (eds), *Modernizing the Academic Teaching and Research Environment: Methodologies and Cases in Business Research* (Springer International Publishing AG 2018) 127, 128. Wikipedia cited as references in footnotes 1 to 4 (page 157).

⁵⁰ Alex Bateman and Darren W Logan, 'Time to Underpin Wikipedia Wisdom' (2010) 468 *Nature* 765 <<https://doi.org/10.1038/468765c>> accessed 1 May 2019. Andrew Orłowski, 'Avoid Wikipedia, Warns Wikipedia Chief: It can Seriously Damage your Grades' *The Register* (London, 15 June 2006) <www.theregister.co.uk/2006/06/15/wikipedia_can_damage_your_grades/> accessed 1 May 2019).

⁵¹ Soroush Vosoughi, Deb Roy and Sinan Aral, 'The spread of True and False News Online' (2018) 359(6380) *Science* 1146-1151 <<https://science.sciencemag.org/content/359/6380/1146.full>> accessed 1 May 2019.

⁵² Linda Keslar, 'The Rise of Fake Medical News' *Proto Magazine* (Boston, 18 June 2018) <<http://protomag.com/articles/rise-fake-medical-news>> accessed 2 May 2019.

⁵³ Tim K Mackey and Gaurvika Nayyar, 'Digital Danger: A Review of the Global Public Health, Patient Safety and Cybersecurity Threats Posed by Illicit Online Pharmacies' (2016) 118(1) *British Medical Bulletin* 110-126 <<https://doi.org/10.1093/bmb/ldw016>> accessed 21 May 2019.

One glaring example of unofficial public legal information websites with numerous digitisation or reproduction errors⁵⁴ is that of the International Centre for Nigerian Law (ICNL),⁵⁵ which is a website that is highly ranked among the first 260,000⁵⁶ out of the more than one billion websites in the world.⁵⁷ The website misrepresents the correct version of Nigerian laws. For example, it omits marginal notes (or headnotes) that are a part of all those laws. Examples of reprographic errors in its scanned version of the Legal Education (Consolidation, etc.) Act and the Constitution of the Federal Republic of Nigeria are mentioned in Section 3.3 of Chapter Three above. Yet, its faulty version of the Nigerian Constitution 1999 is the most popular version worldwide which is linked to or republished by many reputed global organisations, including the World Bank, US Library of Congress (*Guide to Law Online*), Stanford University, New York University School of Law, and World Intellectual Property Organization (WIPO).⁵⁸ Surprisingly, its unreliable public legal information resources are among the databases of the World Legal Information Institute (WorldLII) and Commonwealth Legal Information Institute (CommonLII).⁵⁹ Perhaps more surprising is the US Library of Congress' claim that its *Guide to Law Online* 'includes selected links to useful and *reliable* sites for legal information',⁶⁰ which is similar to the *Encyclopædia Britannica's* *The Web's Best Sites* certification of the same error-filled ICNL website.⁶¹

The problem of unreliable public legal information on third-party websites is indeed real. Concern about the problem generated discussion right from the early years of the online existence of public legal information. For example, it was one of the issues that Tom Bruce, co-pioneer of global free access to online legal

⁵⁴ Mentioned in Section 3.3 of Chapter Three.

⁵⁵ International Centre for Nigerian Law, 'The Law Library' (*International Centre for Nigerian Law*) <<http://nigeria-law.org/LawLibrary.htm>> accessed 2 May 2019.

⁵⁶ Alexa, 'Alexa Rank: Nigeria-law.org Traffic Statistics' (*Alexa*, 2 May 2019) <www.alexa.com/siteinfo/nigeria-law.org> accessed 2 May 2019. Alexa, a company owned by Amazon, provides reputed online traffic statistics on the ranking of the world's websites.

⁵⁷ Netcraft, 'April 2019 Web Server Survey' (*Netcraft*, 22 April 2019) <<https://news.netcraft.com/archives/category/web-server-survey/>> accessed 2 May 2019.

⁵⁸ Sources provided in Section 3.3 of Chapter Three.

⁵⁹ Section 3.3 of Chapter Three.

⁶⁰ Library of Congress, 'Guide to Law Online' (*Library of Congress*, 22 June 2015) <www.loc.gov/law/help/guide.php> accessed 23 May 2019 (emphasis added).

⁶¹ Section 3.3 of Chapter Three.

information, raised at the 2000 conference of the British and Irish Law Education and Technology Association (BILETA),⁶² which is examined below in the second part of this sub-question.

How easy identification of official public legal information websites can be achieved to enable users worldwide to avoid unreliable third-party websites is the second part of this question. The solution to this problem, discussed and proposed in this thesis, is the technological mechanism of a *regulated official legal information generic top-level domain* (gTLD) that should be used exclusively for the official public legal information websites of governments who are the creators or makers of the information. The reason is that such government websites benefit from the presumption of the reliability and genuineness of information from official sources.⁶³

At the 2000 BILETA conference,⁶⁴ mentioned in the first part of this question, Tom Bruce revealed that an ‘informal and hasty survey’ of the websites of public libraries showed their preference for *government websites* for public information resources because they were the *official sources* of such information. He noted the ‘horse’s mouth persuasive argument that ‘who is a more reliable provider of government information than the government itself?’⁶⁵ The basis of that argument is the said presumption of the reliability and genuineness of information from *official* sources.

⁶² British and Irish Law Education Technology Association, ‘15th BILETA Annual Conference: Electronic Datasets and Access to Legal Information’ (University of Warwick, Coventry, England, 14 April 2000) <<http://www.bileta.ac.uk/Conference%20Papers/15th%20Annual%20Conference%202000>> accessed 23 June 2019.

⁶³ Section 4.3.4 of Chapter One.

⁶⁴ British and Irish Law Education Technology Association, ‘15th BILETA Annual Conference: Electronic Datasets and Access to Legal Information’ (University of Warwick, Coventry, England, 14 April 2000) <<http://www.bileta.ac.uk/Conference%20Papers/15th%20Annual%20Conference%202000>> accessed 23 June 2019.

⁶⁵ Thomas R Bruce, ‘Tears Shed Over Peer Gynt’s Onion: Some Thoughts on the Constitution of Public Legal Information Providers’ (2000) 2 The Journal of Information, Law and Technology <https://warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/bruce/> accessed 7 April 2019.

After examining the exhaustive database of gTLDs that the Internet Corporation for Assigned Names and Numbers (ICANN) maintains,⁶⁶ this study found that there is no regulated official legal information gTLD in existence. The following existing law-related gTLDs are not reserved exclusively for official public legal information: <.attorney>, <.law>,⁶⁷ <.lawyer>, and <.legal>.⁶⁸ Therefore, they are unsuited for the purpose of providing the required identification of official public legal information websites.

From existing literature, including case studies by registries,⁶⁹ regulated gTLDs (e.g. <.edu>, <.gov>, <.ac>, <.organic>) have already established themselves as an effective mechanism for identifying official websites that are presumed to contain reliable information. This revolutionary development in online information, which is an aspect of Internet governance, is already charting a new course for all online brands, professions, organisations, and governments worldwide. And that is the basis for the proposal of this thesis for the creation of <.officiallaws> *regulated official legal information* gTLD to be used *exclusively* for the official legal information websites of all governments and intergovernmental organisations.

The proposed <.officiallaws> gTLD has three major unique advantages. First, it will help people worldwide to identify official legal information websites easily, so that they can avoid unreliable third-party websites. Second, it will also help them to access such official websites with greater ease, using the direct method of visiting websites. The direct method involves entering the *easy-to-remember* address or uniform resource locator (URL) of the website in the Web browser's address bar (e.g. *www.us.officiallaws* or *www.unitedstates.officiallaws*) instead of wasting one's time searching for the website with an Internet search engine (e.g. Google), with no guarantee of finding it because of the problems with online search

⁶⁶ Internet Assigned Numbers Authority, 'Root Zone Database' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root/db> accessed 19 April 2019.

⁶⁷ Karen Hayne, 'Domain Name System Revolution: Generic Top Level Domain Names' (2010) Addisons Focus Papers <www.mondaq.com/article.asp?article_id=114336> accessed 19 April 2019.

⁶⁸ Internet Assigned Numbers Authority, 'Root Zone Database' (*Internet Assigned Numbers Authority*) <www.iana.org/domains/root/db> accessed 19 April 2019.

⁶⁹ Internet Corporation for Assigned Names and Numbers, 'Case Studies' (*New Generic Top-Level Domains*) <<https://newgtlds.icann.org/en/announcements-and-media/case-studies>> accessed 6 May 2019.

(discussed in Section 3.3 of Chapter Three above). Third, it will enhance access to the websites when people use the search engine option, as the new regime of official legal information websites worldwide will become more prominent and enjoy the search engine optimisation benefits of a robust online visibility.⁷⁰

The findability utility of this system is particularly significant because '[m]ost users do not know how to search Google with any expertise even though they use it frequently.'⁷¹ Therefore, an alternative method of easily accessing official public legal information websites will gain prominence with time, as people become aware of it worldwide.

2.3 Organisation of a Country's Official Public Legal Information Websites for their Optimal Findability

Research sub-question 3: As websites are now indispensable to the provision of adequate access to public legal information, if there are multiple official public legal information websites of any country's different tiers of government (i.e. national or federal, state or regional, and local) and those websites exist in isolation or are not properly interconnected, how can all the websites be organised to achieve their optimal findability that will enhance national and transnational public access to that country's stock of official online public legal information?

The fact of the indispensability of websites to the provision of adequate access to public legal information is now beyond controversy, as mentioned in the immediately preceding Section 2.2 above. To investigate the first part of this question, this study examined the official public legal information websites of 60 English-speaking countries and territories (6 developed countries⁷² and 54

⁷⁰ Section 3.3 of Chapter Three.

⁷¹ Graham Greenleaf, Philip Chung and Andrew Mowbray, 'Emerging Global Networks for Free Access to Law: WorldLII's Strategies 2002–2005' (2007) 4(4) SCRIPT-ed 319, 361 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 16 May 2018.

⁷² The six English-speaking developed countries are Australia, Canada, Ireland, New Zealand, United Kingdom, and the United States.

developing countries and territories⁷³). The study found that there are multiple official public legal information websites of the different tiers of government (i.e. national or federal, state or regional, and local) that exist in isolation or are not properly interconnected. It also found that it is a global problem that exists in all the 60 countries and territories, to varying degrees.⁷⁴

This finding confirms the continued existence of this problem that previous studies by Graham and others had identified in 2005⁷⁵ and 2011.⁷⁶ From their study on India, published in 2011, they found that ‘information on legislation and judicial decisions is scattered and often buried in a maze of websites run by ministries at central, state and territory levels.’⁷⁷

On the second part of this question, this study devised the new system of *official networked one-stop legal information websites* (‘the ONOLIWs system’) as the solution to the global problem of the existence of multiple official public legal information websites of any country’s different tiers of government (i.e. national or federal, state or regional, and local) which exist in isolation or are not properly interconnected.

The ONOLIWs system guarantees that once a person finds or accesses any official public legal information website (OPLIW) of a country by any means (e.g. through direct access or search), that person can access all the OPLIWs of that country via the exhaustive network of external links just with mouse clicks, without any need to perform any further search whatsoever or to use the direct access method. The ONOLIWs system has the potential to achieve the optimal findability of OPLIWs

⁷³ The Appendix to Chapter Four of this thesis contains the list of all the developed and developing countries selected for the study.

⁷⁴ Sections 2.4 to 2.6 of Chapter Four.

⁷⁵ Graham Greenleaf, Philip Chung and Andrew Mowbray, ‘Emerging Global Networks for Free Access to Law: WorldLII’s Strategies 2002–2005’ (2007) 4(4) SCRIPT-ed 319, 323 <<https://script-ed.org/wp-content/uploads/2016/07/4-4-Greenleafetal.pdf>> accessed 20 April 2019.

⁷⁶ Graham Greenleaf and others, ‘Challenges for Free Access to Law in a Multi-Jurisdictional Developing Country: Building the Legal Information Institute of India’ (2011) 8(3) SCRIPTed 292, 296 <<https://script-ed.org/wp-content/uploads/2011/12/greenleaf.pdf>> accessed 11 April 2019.

⁷⁷ Ibid

and thereby enhance national and transnational public access to every country's stock of its official public legal information.

2.4 Human Rights-Compliant Adequate Public Access to Indigenous Customary Law

Research sub-question 4: With the growing global prominence of indigenous rights and the right of every person to know the laws that regulate the person's conduct and activities, how can adequate public access to the unwritten rules of indigenous customary law be achieved in such a way that the method of providing that access also complies with the general human rights and the specific rights of indigenous communities?

To be able to answer this question, it was necessary to find out the existing methods of ascertainment of indigenous customary law and thereafter determine if they provide adequate public access to the unwritten rules of indigenous customary law in a way that also complies with the general human rights and the specific rights of indigenous communities.

The study found that there are four existing methods of ascertainment of indigenous customary law: judicialization, codification, restatement, and self-statement. Judicialization refers to judicial ascertainment whereby the court determines both the existence of any oral or unwritten rule of indigenous customary law and its validity before it can apply that rule in its decision or judgment. Codification is the formal legislative enactment of any rule of indigenous customary law as statute law. Restatement refers to the process of recording or transmitting rules of indigenous customary law into writing to produce a *non-binding* guide on the existence of those rules. Self-statement is a version of restatement, but with two distinguishing differences: the community *itself* (not outsiders) undertakes the recording of its unwritten rules of indigenous customary law and those recorded rules are *binding*.

The existing ascertainment methods do not provide adequate access to indigenous customary law because they are not designed to meet that requirement. Their public-access defects include non-comprehensive compilation and poor publication of the rules of indigenous customary law. The result is that none of the methods guarantees the opportunity for good knowledge of the rules of indigenous customary law, as the rules are still not accessible to even members

of the communities. For example, self-statement only ascertains rules selected indiscriminately, thereby creating a strange mixture of unwritten and written rules. The ascertained rules are also deficient in authoritativeness and currency.

The existing methods also do not comply with the general human rights and the specific rights of indigenous communities. For example, they are not compliant, to varying degrees, with the right to participate in the public affairs of one's community; the general right to equality and non-discrimination; the rights of persons with disabilities; women's rights; the omnibus right to self-determination that encompasses the protection of their autonomy, self-governance over their internal affairs (including their laws), and their indigenous identity; cultural rights; and linguistic rights.

Adequate public access to indigenous customary law, which also complies with the general human rights and the specific rights of indigenous communities, can be achieved via *huricompatisation* that is the new model for the ascertainment of indigenous customary law that this thesis has developed. *Huricompatisation* integrates a combination of twelve relevant general human rights and indigenous rights into the ten criteria for adequate access to form the human rights-compliant and public access-adequate model of ascertainment. The model applies the United Nations-endorsed human rights-based approach (HRBA)⁷⁸ to the ascertainment of indigenous customary law.

3. Recommendations and their Implementation

This thesis is a practical, problem-solving, law reform-oriented, and policy-relevant endeavour. That is the reason these recommendations and their implementation guide are all necessary for achieving the crucial proposals of this thesis that have profound implications for the protection of human rights, indigenous rights, the promotion of justice, and as remedies for serious injustices that the world can no longer overlook.

The comprehensive implementation strategies outlined here will help this thesis to achieve its aim to find the solution to the persistent global problem of

⁷⁸ Section 7.2.2 of Chapter One; Section 6 of Chapter Five.

inadequate access to public legal information and thereby actualise its academic and societal relevance.⁷⁹

This thesis makes sixteen major practical recommendations, which are all viable and feasible, for implementation by the responsible authorities, organisations, and governments at all levels (national or federal, state or regional, and local) worldwide. These recommendations and their implementation strategies are as follows:

1. The UN General Assembly should, as a matter of urgency and for the sake of global justice that drives its commitment, commence its process for the formal universal recognition of the right of free access to public legal information as a human right under the framework of the proposed *United Nations Convention on the Right of Free Access to Public Legal Information*.

This proposal is made pursuant to Article 7 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms⁸⁰ which states: 'Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.' The United Nations has the responsibility to implement the proposal under Article 1(3)–(4) of the Charter of the United Nations⁸¹ (UN Charter).

In addition to the discussion of the right of free access to public legal information throughout this thesis, the specific proposal for its formal universal recognition as a human right is in the open-access article, *The Right of Public Access to Legal Information: A Proposal for its Universal Recognition*

⁷⁹ Section 8 of Chapter One.

⁸⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Res 53/144 (8 March 1999) UN Doc A/RES/53/144 <<https://www.un.org/ruleoflaw/files/N9977089.pdf>> accessed 9 August 2019.

⁸¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> accessed 6 July 2019.

as a Human Right, that the *German Law Journal* published in 2017.⁸² The article is reproduced as Chapter Two of this thesis.

The United Nations' procedure for receiving proposals is stated as follows: 'Proposals can only be taken up by the United Nations when presented by an official representative of a Member State and after being duly inscribed on the agenda of the Organization and voted on by its members.'⁸³ Therefore, as a proposal from a Dutch university, the Permanent Representative of the Kingdom of The Netherlands at the UN Headquarters in New York, United States of America, is in the position to submit this proposal *directly* to the United Nations.⁸⁴

Further, the UN Economic and Social Council (one of the principal organs of the United Nations) will be instrumental in implementing the proposal for the new Convention. The Council has the special mandate under Article 62 of the UN Charter to 'make or initiate studies and reports' on matters that include human rights, 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all', and 'prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.'

⁸² Leesi Ebenezer Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right' (2017) 18(6) *German Law Journal* 429–1496 (68 pages) <<https://doi.org/10.1017/S2071832200022392>> accessed 14 April 2019. Published on 1 November 2017 and available with free or open access on the Cambridge Core (Cambridge University Press) website.

⁸³ United Nations, 'Frequently Asked Questions' (*United Nations*) <www.un.org/en/sections/about-un/frequently-asked-questions/index.html> accessed 5 May 2019.

⁸⁴ The Netherlands' current Permanent Representative is His Excellency Mr. Karel J. G. van Oosterom. See Kingdom of The Netherlands Permanent Representation to the United Nations, 'The Permanent Representative' (*Kingdom of The Netherlands Permanent Representation to the United Nations*) <www.permanentrepresentations.nl/permanent-representations/pr-un-new-york/the-permanent-representative> accessed 5 May 2019. The official email address of the office of the Permanent Representative is <nyv@minbuza.nl>; see Kingdom of The Netherlands Permanent Representation to the United Nations, 'Contact' (*Kingdom of The Netherlands Permanent Representation to the United Nations*) <www.permanentrepresentations.nl/permanent-representations/pr-un-new-york/contact> accessed 5 May 2019.

This thesis is now *a comprehensive existing study* for purposes of the study that the UN General Assembly should have initiated for ‘assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’ under Article 13 of the UN Charter, with regard to the right of free access to public legal information as a human right. This thesis therefore makes the work of the United Nations much easier, with respect to the initial study stage of the process for the formal recognition of the right as a human right.

2. Regional intergovernmental organisations and governments at all levels (national or federal, state or regional, and local) should enact the fifteen essential principles that form the contents of the proposed *United Nations Convention on the Right of Free Access to Public Legal Information*⁸⁵ as part of their laws and policy guidelines on the provision of adequate access to their public legal information.

This strategy guarantees immediate benefits of the proposal, even before the proposed Convention is eventually made, as the United Nations’ process for making binding international legal instruments usually takes many years to complete. For instance, the Convention on the Rights of Persons with Disabilities (CRPD) took a period of nearly seven years between the setting up of its Ad Hoc Committee by the General Assembly on 19 December 2001, its adoption by the General Assembly on 13 December 2006, and when it entered into force on 3 May 2008.⁸⁶

3. The United Nations should establish the proposed *United Nations World Legal Information Organization* (UNWLIO) as the UN agency of intergovernmental character responsible for promoting, regulating, and monitoring free access to public legal information worldwide. It will also function as the proper organisation to apply for the proposed <.officiallaws> official legal information gTLD and manage it for the public benefit of the whole world.

⁸⁵ Section 2.2.1 above; Section D.III.2 of Chapter Two.

⁸⁶ United Nations, ‘Convention on the Rights of Persons with Disabilities’ (*United Nations*) <<http://legal.un.org/avl/ha/crpd/crpd.html>> accessed 30 April 2019.

The existence of the United Nations World Tourism Organization (UNWTO) for *tourism* that does not directly affect the life of every human being, justifies the establishment of the proposed UNWLIO. The reason is that access to public legal information directly affects every person's life, as people need to know their rights, duties, and possible liabilities to be able to order their conduct and activities properly. Otherwise avoidable mistakes due to poor access to public legal information can have serious consequences for individuals, groups, organisations, and the government itself, as revealed in this thesis.⁸⁷ Additionally, access to justice (which is one of the highest ideals in life) depends on free access to public legal information. Public legal information deserves *global governance* as part of the mechanism that can enforce, within the limits of international human rights law, the duty of every tier of government to provide adequate access to their laws.⁸⁸

Alternatively, the UN Economic and Social Council (ECOSOC) can perform the functions of the proposed UNWLIO, if the United Nations considers that to be a better or *ready* option, e.g. to save costs. As one of the principal organs of the United Nations, the specific human rights mandate of ECOSOC under Articles 62 and 68 of the UN Charter makes it better suited to perform the said functions than the UN Human Rights Council (earlier suggested in the published article that forms Chapter Three of this thesis⁸⁹).

4. The proposed United Nations World Legal Information Organization (or the existing UN Economic and Social Council, as a ready alternative) should apply for the proposed <.officiallaws> official legal information gTLD and manage it for the public benefit of the whole world. It will be possible to do so when the Internet Corporation for Assigned Names and Numbers (ICANN) commences another application round of its *New gTLD Program*. The current round, which commenced in 2012, is in its last stages of completion. Details of the implementation of this proposal are discussed in Section 3.4 of Chapter Three of this thesis.

⁸⁷ Section 2.1 of Chapter One.

⁸⁸ More details on the proposed UNWLIO in Section 3.4 of Chapter Three.

⁸⁹ The earlier suggestion is in Section 3.4 of Chapter Three.

5. Governments at all levels and all professionals involved in the design and development of official public legal information websites should adopt the concept of *official networked one-stop public legal information websites* proposed in this thesis to solve the global problem of the existence of multiple official public legal information websites of any country's different tiers of government (i.e. national or federal, state or regional, and local) that are either totally isolated or not properly connected to the other official public legal information websites of that country. Each country's national (or federal) government can implement the concept (as a national policy for all the tiers of government) through legislation that, among other things, stipulates appropriate penalties for noncompliance. Details of the implementation of the concept are discussed in Section 3.3 of Chapter Four of this thesis.
6. The United Nations and its agencies, especially the United Nations Development Programme (UNDP) and the United Nations Educational, Scientific and Cultural Organization (UNESCO); governments; research institutions; and all other organisations and individuals involved in any project for ascertainment of indigenous customary law should adopt the human rights-compliant and public access-adequate *huricompatisation* model formulated in this thesis for such ascertainment projects.

The role of UNDP in the implementation of this proposal is particularly important, as support for ascertainment of indigenous customary law is one aspect of its Access to Justice and Rule of Law Project. For example, under that Project, UNDP co-sponsored the 2012 Ascertainment of Customary Law in South Sudan project in partnership with the Government of the Republic of South Sudan.⁹⁰ UNDP has been recruiting consultants for that project.⁹¹ This

⁹⁰ United Nations Development Programme, 'Ascertainment of Customary Laws in South Sudan: Discussion Paper' (*United Nations Development Programme*) 3 <www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/reports-ascertainment-of-customary-laws-in-south-sudan/_jcr_content/rightpar/developmentreport_3/file.res/Ascertainment%20Review%20Discussion%20Paper%20-%20FINAL.pdf> accessed 5 May 2019.

⁹¹ For example, United Nations Development Programme, 'International Consultant – Ascertainment of Customary Law' (*United Nations Development Programme*) <https://jobs.undp.org/cj_view_job.cfm?cur_lang=fr&cur_job_id=57061> accessed 6 May 2019.

laudable development shows the interest of the United Nations in the ascertainment of indigenous customary law.

7. The United Nations, governments at all levels, and all organisations that regulate matters relating to indigenous customary law should *abolish codification and restatement* as methods of ascertainment. One reason for this law-reform recommendation is that those methods destroy the evolving and adaptive nature of indigenous customary as a *living law* that reflects the dynamic nature of the society. Another reason is that they violate general human rights and specific indigenous rights, including their omnibus preeminent right to self-determination. The nonbinding nature of restatement makes it a waste of taxpayers' money, as its so-called *restated* indigenous customary law lacks authoritativeness and certainty. Self-statement also shares some of the defects of codification and restatement, and its strange policy of side-by-side existence of oral (unwritten) and written rules of indigenous customary law creates unintended legal consequences and makes its goal of achieving certainty self-defeating.
 8. Judicialization, as a method of ascertainment of indigenous customary law, is a judicial process that is burdensome, time-consuming, expensive, ad hoc, piecemeal, discriminatory, and injustice-infested. But, unlike codification and restatement, it cannot be abolished because the adjudicatory powers of the court should not be ousted. Therefore, judicialization should be used only as the last resort, pending a proper ascertainment. However, as in the immediately preceding paragraph and for the same reasons, the United Nations, governments at all levels, and all organisations that regulate matters relating to indigenous customary law should *abolish the application of the doctrines of judicial precedent and judicial notice* in judicialization.
 9. The UN General Assembly and the UN Economic and Social Council that are responsible for studies on human rights should consider the adoption of the comprehensive concept of *new human rights-advocacy approach* (NHRAA) developed in this thesis as part of its framework for proposals for the universal recognition of any legal right as a human right, as it is designed to facilitate genuine proposals and prevent rights inflation and frivolous claims.
 10. There should be worldwide adoption, through law reform of criminal law, of the proposed universal *defence of ignorance of inaccessible law is an excuse*,
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which is the direct remedy for the serious injustice in the application of the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable.⁹²

11. The United Nations, all governments at all levels (national or federal, state or regional, and local), and all intergovernmental organisations (IGOs) with law-making powers should proactively (through law reform) abolish copyright in the *texts* of all categories of public legal information.⁹³ Specifically, all provisions in policies, laws, and instruments that contain copyright protection; support copyright protection; or are indifferent to copyright protection (sympathetic provisions) in public legal information should be repealed and replaced with outright prohibition of such copyright. They should also abolish copyright in all official value-added features or publications that facilitate or enhance people's knowledge and understanding of the law (such as annotations, summaries, indexes, and digests) produced with public funds.

In the recent 2018 landmark judgment of the United States Court of Appeals for the Eleventh Circuit in *Code Revision Commissioner v Public.Resource.Org*,⁹⁴ the Court rightly held that the Government of the State of Georgia has neither copyright in the texts of its laws nor in their value-added features.

An example of *sympathetic* copyright provisions that should be repealed and replaced with outright copyright prohibition is Article 2(4) of the Berne Convention for the Protection of Literary and Artistic Works⁹⁵ (Berne Convention) that states: 'It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a

⁹² Details of the application of this defence are discussed in Section 4.3.2 of Chapter One and Section D.III.2.15 of Chapter Two.

⁹³ The term 'public legal information' is defined in Section 3.2 of Chapter One.

⁹⁴ *Code Revision Commissioner v Public.Resource.Org*, No. 17-11589 (11th Cir. 2018) (United States) <<http://media.ca11.uscourts.gov/opinions/pub/files/201711589.pdf>> accessed 13 May 2019.

⁹⁵ Berne Convention for the Protection of Literary and Artistic Works (signed 9 September 1886, concluded 24 July 1971) 1161 UNTS 3 <<https://treaties.un.org/doc/Publication/UNTS/Volume%201161/volume-1161-I-18338-English.pdf>> accessed 13 May 2019.

legislative, administrative and legal nature, and to official translations of such texts.’

12. All governments have the legal and moral obligation to, and should, ratify, adopt, and implement all international human rights instruments relating to the rights of indigenous communities discussed in this article, including the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization Indigenous and Tribal Peoples Convention, 1989.
13. All governments have the legal and moral obligation to, and should, ratify and implement the provisions of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Among other things, its implementation will enable women to enjoy their right to equal participation with men in the administration of indigenous customary law. This will eliminate the prevailing discrimination in some patriarchal communities where women are prevented from being community chiefs, leaders, and elders whose testimonies usually have the highest evidentiary value because they are recognised as the custodians of indigenous customary law.⁹⁶
14. All governments have the legal and moral obligation to, and should, ratify and implement the provisions of the Convention on the Rights of Persons with Disabilities (CRPD). This will enable persons with disabilities to enjoy their human right to participate equally in the public affairs of their community, which include the ascertainment of their indigenous customary law and other legislative processes. Additionally, persons with disabilities have equal right of free access to all categories of public legal information (including indigenous customary law) which requires that laws should be published or communicated in all the required alternate formats so that the different categories of persons with disabilities can know the law, using assistive technologies.⁹⁷
15. Every government should formulate and implement policies and programmes that will create the enabling environment for free or affordable access to the

⁹⁶ Section 7.3.7 of Chapter Five.

⁹⁷ CRPD arts 2, 26(3). Discussed in Section 7.3.4 of Chapter Five.

Internet, as online access via websites is indisputably indispensable to the provision of adequate access to public legal information at both national and global levels (which is one of the findings of this thesis).

This public service of providing access to the Internet has now become a *fundamental obligation* of every government worldwide. The right of access to the Internet is so indispensable to the enjoyment of the right of free access to public information, the right to education, and other human rights that it is now being claimed to be a human right itself.⁹⁸ The European Court of Human Rights upheld the right of access to the Internet in *Ahmet Yildirim v Turkey*.⁹⁹

Governments all over the world can partner with the World Wide Web Foundation (established in 2009 by Sir Tim Berners-Lee who invented the World Wide Web) to achieve affordable access to the Internet. The Foundation sponsored the world's first *bill of rights for the Internet* by the Government of Brazil,¹⁰⁰ known as *Marco Civil da Internet 2014* (translated as 'Civil Rights Framework for the Internet'¹⁰¹).

16. All governments worldwide should perform their obligation to implement the *human right to education*,¹⁰² which is a human right in itself and an *empowerment right* that enables people to enjoy other human rights through literacy,¹⁰³ including the right of free access to all categories of public legal

⁹⁸ Section D.III.2.14 of Chapter Two; Stephen Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14(2) Human Rights Law Review 175–195 <<https://doi.org/10.1093/hrlr/ngu011>> accessed 14 May 2019.

⁹⁹ *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012).

¹⁰⁰ World Wide Web Foundation, 'Our Impact' (*World Wide Web Foundation*) <<https://webfoundation.org/impact/>> accessed 7 May 2019. The World Wide Web Foundation 'believe[s] that everyone has the right to access the internet and use it freely and fully.' See World Wide Web Foundation, 'About Us' (*World Wide Web Foundation*) <<https://webfoundation.org/about/>> accessed 7 May 2019.

¹⁰¹ Maria Medrano, 'Brazil's Internet Bill of Rights' (*Americas Quarterly*) <www.americasquarterly.org/content/brazils-internet-bill-rights> accessed 13 May 2019.

¹⁰² ICESCR art 13.

¹⁰³ UN Office of the High Commissioner for Human Rights, 'Special Rapporteur on the Right to Education' (*UN Office of the High Commissioner for Human Rights*) <www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx> accessed 23 May 2019.

information. Governments should give special attention to minorities and indigenous communities who are particularly disadvantaged in literacy.¹⁰⁴ Literacy provides the ability to understand written law¹⁰⁵ so that people can enjoy their right to know the law. Concerning indigenous customary law, members of indigenous communities will benefit optimally from the ascertainment of the oral or unwritten rules of their indigenous law when they can read and understand the written version of their law.

4. Limitations

All the proposals and recommendations of this thesis are practical, viable, feasible, and implementable. However, the achievement of their goals depends on the extent of their implementation by the responsible authorities. Implementation gaps that hinder the achievement of sound policy objectives are a common problem, especially in the case of governments, public authorities, and intergovernmental organisations. For instance, it takes several years for the United Nations to adopt and enforce international legal instruments, such as this thesis' proposal for the universal recognition of the right of free access to public legal information as a human right under its own *United Nations Convention on the Right of Free Access to Public Legal Information*. However, that is the reason for Recommendation No. 2 in the immediately preceding Section 3 above: to achieve the immediate implementation of the principles of the proposed Convention even before it is eventually made, adopted, and enforced.

Not all the recommendations of this thesis have a rapid-results capability, in which case, achieving their optimal potential may be time-dependent, e.g. as it usually takes time to unlearn old habits. One example of such time-dependent situations is linked to the pervasive influence of Google and other Internet search engines that has caused arguably most online users to use the search option as their only method of accessing even *known* websites, not just for *finding* information online.

¹⁰⁴ United Nations, *State of the World's Indigenous Peoples* (United Nations Publication 2009) 1, 8 <www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf> accessed 23 May 2019.

¹⁰⁵ Daniel Poulin, 'Open Access to Law in Developing Countries' (2004) 9(12) *First Monday* <<http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113>> accessed 23 May 2019.

Therefore, the shift to the preference for use of the *direct method* for accessing official public legal information websites via their URLs is likely to take some time to achieve. It is significant to note that the direct method is the original web-access method and the rationale behind the Domain Name System (DNS) that Paul Mockapetris invented in 1983.¹⁰⁶ Hopefully, it is expected that the recent online information revolution that ICANN's 2012 New gLTD Program has introduced, will promote online information literacy that will eventually help online users, including those looking for official public legal information, to use the direct method to access reliable websites. It will also help them to select websites with regulated gTLDs (e.g. the proposed <.officiallaws> official legal information gTLD) when using the Internet search option.

The constraints of time and human and financial resources available for this research limited the study in Chapter Four of this thesis to only all the 60 English-speaking countries and territories of the world. However, the exclusion of non-English-speaking countries does not affect the validity of the findings. The reason is that the aim of the study was simply to assess the situation in *some* countries that may be sufficient to reveal the existence, nature, and global extent of the problem. Its aim did not include, for instance, investigation of any possible differences due to language or legal traditions (e.g. common law, civil law, or religious law), for example. Additionally, statistical significance (e.g. the proportion of the countries of the world affected) is not even the determinant factor for global intervention in cases of human rights violations: evidence of such violations in 60 countries, as noted in this study, is sufficient for the appropriate remedial and preventative interventions. Therefore, the number of countries selected for the study is sufficient for the purpose of this research.

5. Directions for Further Research

The subject of the right of free access to public legal information, which includes all aspects of the provision of adequate access to public legal information, is complex and multidisciplinary, as demonstrated by this thesis. This thesis has examined only four thematic aspects of the subject, but their individual scope is

¹⁰⁶ David C Hay, *UML and Data Modeling: A Reconciliation* (Technics Publications 2011) 181.

by no means exhaustive. The following directions for further research are some of the matters arising from this thesis:

1. A study of the national (or federal) official public legal information websites of non-English-speaking countries to evaluate their *networked one-stop access feature*,¹⁰⁷ similar to the study of English-speaking countries in Chapter Four of this thesis. Such a study could generate comparative insights into the situation in both groups of countries.
2. A comparative study of the provision of access to public legal information in common-law and civil-law countries, for insights into whether there is any relationship between the type of legal system and the provision of free access to public legal information.
3. A comparative study of the four existing methods of ascertainment of indigenous customary law (namely judicialization, codification, restatement, and self-statement) using the ten features of the *huricompatisation* model developed in this article as the common criteria for their assessment (the *tertium comparationis*). Such study should examine their similarities and differences and, among others, suggest reasons for those similarities and differences beyond their discussion in this thesis.
4. An individual or a stand-alone study of the present state of access to all the categories of the public legal information of every country of the world by interested researchers, preferably those who are resident in their study countries. Such a study should include the use of the empirical approach to provide information and statistics on the awareness of the laws of each country, the cost of access, and availability of official and non-official public legal information databases. It should also include an assessment of the adequacy of the official public legal information websites of the different tiers of the government of each country (national, state or provincial, and local). The study of each country could form a book chapter in a series or different volumes. There should be a common format for the presentation of each country's study so that uniformity in approach will make it easy for readers to compare the situation in the different countries. The series or volumes of the

¹⁰⁷ Section 2.2 of Chapter Four.

book could be arranged according to the different continents of the world and perhaps numbered according to the alphabetical order of the continents.

5. Online information literacy and the search behaviour of users of public legal information websites. Such a study, which must be empirical, will provide useful insights into online search skills for specialised contents (here, public legal information). It will help public legal information architects in their design and organisation of public legal information websites to enhance their findability.
6. The role of social media (especially Facebook, Twitter, Instagram, and WhatsApp) in promoting free access to public legal information globally.
7. The global availability of adequate access to the Internet as an indispensable requirement for the realisation of the access to justice component of Goal 16 of the UN 2030 Agenda for Sustainable Development.

6. Overall Conclusion

This thesis came to the major conclusions in its findings on the four research sub-questions (discussed in Section 2 above) that fill the six gaps which the study identified, as outlined here. First, the primary cause of the persistent global problem of inadequate access to public legal information is the lack of the political will of governments who alone have the duty under the rule of law to provide adequate access to their laws. Second, the right of free access to public legal information exists as a legal right; it is a major component of the right of access to public information which is embedded in the human right of freedom of expression; and there is no adequate international legal framework for its global protection, promotion, and actualisation due to the current deficient nature of its derivative existence. Third, the <.officiallaws> strictly regulated generic top-level domain proposed in this thesis can help people worldwide to easily identify official public legal information websites that are presumed to be reliable, and thereby address the problem of the existence of unreliable third-party websites. Fourth, all of any country's official public legal information websites can be managed efficiently for their optimal findability through the system of official networked one-stop legal information websites developed in this thesis. Fifth, *huricompatisation*, which is the proposed new ascertainment model, can help to

facilitate the provision of adequate access to indigenous customary law in a way that also complies with the relevant human rights and indigenous rights, as all the four existing ascertainment methods are deficient in both aspects. Sixth, the new human rights-advocacy approach, formulated in this thesis, has provided the proper set of onerous criteria for the formal universal recognition of new human rights. This thesis used those criteria in its discussion of the effective solution to the research problem, as summarised below.

The overall conclusion of this thesis is the answer to the following central research question (the core of which is italicised): As the lack of the political will of governments is the primary cause of the persistent global problem of inadequate access to public legal information, *what legal mechanism can specifically require governments worldwide to perform their rule-of-law duty to provide adequate access to their public legal information and protect the people's right of free access to public legal information*, which will thereby enhance global access and remedy the serious injustice in the application of the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable?

The legal mechanism that can enhance access to public legal information worldwide and protect, promote, and actualise the right of free access to public legal information is the formal universal recognition of that right as a human right under the proper international human rights legal framework of a new *United Nations Convention on the Right of Free Access to Public Legal Information*, as proposed in this thesis. One of the major reasons for that conclusion is that the existing international human rights legal framework is insufficient and therefore the proposed Convention is the only effectual mechanism that can create human rights obligations which can cause governments worldwide to perform their rule-of-law duty to provide adequate access to their public legal information. It is so because the global nature of the problem requires a global solution and the principle of the sovereignty and equality of States necessitates the intervention of the international human rights legal framework. It is reiterated that it is a global problem because citizens around the world, in both developed and developing countries, are faced with injustice because they do not always have access to public legal information. What is worse is that longstanding principles of law aggravate this injustice by punishing people even in genuine cases of excusable ignorance of the law due to its inaccessibility.

Further, the proposed international human rights legal framework will also provide the veritable tool for the United Nations, regional intergovernmental organisations, civil society, human rights advocates and defenders, and individuals to draw global attention to the right and use all the available coercive powers under international human rights law and national laws to enforce the right.¹⁰⁸ The coercive powers include the conventional and charter-based human rights protection mechanisms of the United Nations; sanctions; enforcement by courts of human rights; shaming; global human rights advocacy that has become a powerful tool to influence political will worldwide; and enforcement by national courts of States Parties.¹⁰⁹

Wasserstrom's conclusion that human rights 'constitute the strongest of all moral claims that all men can assert'¹¹⁰ is valid and germane to this study. Lohman and Amon found in their study that a human rights-based advocacy approach increased political will which led to the application of 'the technical solutions required, and the protection of the rights of millions of people suffering unnecessary pain worldwide.'¹¹¹ Indeed, there is no alternative legal mechanism that can influence or compel governments worldwide to perform their rule-of-law duty to provide adequate access to their public legal information.

Finally, the proposed formal universal recognition of the right of free access to public legal information as a human right is also the proper way to remedy the serious injustice in applying the *ignorantia juris* doctrine where the law is inaccessible and thereby unknowable, as discussed extensively in this thesis. It is reiterated that only a universal human rights legal framework can provide an

¹⁰⁸ Section 2.1 above; Section 6.1 of Chapter One; Section D.II.2 of Chapter Two; Damilola S Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press 2016) 180.

¹⁰⁹ Sources listed in Section 6.1 of Chapter One.

¹¹⁰ R Wasserstrom, 'Rights, Human Rights and Racial Discrimination' in D. Lyons (ed), *Rights* (Wadsworth Publishing Co. 1979) 49–50.

¹¹¹ Diederik Lohman and Joseph Amon, 'Evaluating a Human Rights-Based Advocacy Approach to Expanding Access to Pain Medicines and Palliative Care: Global Advocacy and Case Studies from India, Kenya, and Ukraine' (2015) 17(2) *Health and Human Rights* <www.hhrjournal.org/2015/12/evaluating-a-human-rights-based-advocacy-approach-to-expanding-access-to-pain-medicines-and-palliative-care-global-advocacy-and-case-studies-from-india-kenya-and-ukraine/> accessed 24 April 2019.

effectual remedy for that injustice because of the global nature of the problem. The remedy is expected to be achieved in two ways. First, better access to the law, which the proposed formal recognition as a human right will provide, usually leads to better knowledge of the law; and better knowledge of the law eventually leads to better compliance with or obedience to the law.¹¹² Second, this thesis has formulated the equally universal defence of inaccessible law as the direct remedy for the said injustice.¹¹³ That defence, which is one of the fifteen essential principles of the proposed *United Nations Convention on the Right of Free Access to Public Legal Information*,¹¹⁴ is couched in the following seven potent, hope-bringing, justice-based, closing words of this thesis:

Ignorance of inaccessible law is an excuse.

¹¹² Dennis Alan Olson, 'The Swedish Ban of Corporal Punishment' (1984) Brigham Young University Law Review 447, 452.

¹¹³ Frederick G McKean Jr, 'The Presumption of Legal Knowledge' (1927) 12 St Louis Law Review 96, 97 <https://openscholarship.wustl.edu/law_lawreview/vol12/iss2/2> accessed 12 July 2019.

¹¹⁴ Discussed in Section D.III of Chapter Two.

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