

Resolution of the African Commission on Human and Peoples' Rights on the Protection of Sacred Natural Sites and Territories: a critical overview

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ABSTRACT: Sacred natural sites and territories are naturally occurring areas of land or water that are held to have spiritual significance by certain communities. They form part of a broader set of cultural values or traditional ways of life for given societies or communities. With the ever-mounting pressure for economic development, industrial activities, infrastructure development and demographic changes, sacred places are on the brink of permanent destruction. Yet these are focal points for cultural identity and diversity as well as strong biodiversity conservation. Africa as a region, through the African Commission on Human and Peoples' Rights, adopted Resolution 372 of 2017 to preserve and protect Sacred Natural Sites and territories (SNST). The Resolution provides for protection to be achieved through entrenching customary governance systems into laws to protect SNST. This article analyses the resolution and how African countries can fit such customary governance systems into current legal regimes that are remnants of a colonial epoch. The article relies on case studies of how SNST have been recognised in certain African jurisdictions such as Benin and Ethiopia. It also relies on case studies of countries such as Uganda and Kenya where the author participated in promulgation of laws to protect these sites. It is the author's argument that the Resolution is a means of achieving African cultural renaissance by advocating for recognition of African cultural rights and the revival of culture-based conservation mechanisms.

TITRE ET RÉSUMÉ EN FRANCAIS:

La Résolution de la Commission africaine des droits de l'homme et des peuples sur la protection des sites et territoires naturels sacrés: un aperçu critique

RÉSUMÉ: Les sites et territoires naturels sacrés sont des zones naturelles de terre ou d'eau qui sont considérées comme ayant une signification spirituelle par certaines communautés. Ils font partie d'un ensemble plus large de valeurs culturelles ou de modes de vie traditionnels pour des sociétés ou des communautés données. Avec la pression toujours croissante pour le développement économique, les activités industrielles, le développement des infrastructures et les changements démographiques, les lieux sacrés sont au bord de la destruction permanente. Pourtant, ce sont des points focaux pour l'identité et la diversité culturelles ainsi qu'une forte conservation de la biodiversité. L'Afrique en tant que région, à travers la Commission africaine des droits de l'homme et des peuples, a adopté la résolution n° 372 de 2017 pour préserver et protéger les sites naturels et territoires sacrés (SNST). La résolution prévoit que la protection doit être assurée par l'enchâssement des systèmes de gouvernance coutumiers dans les lois pour protéger la SNST. Cet article analyse la résolution et comment les pays africains peuvent intégrer de tels systèmes

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de gouvernance coutumiers dans les régimes juridiques actuels qui sont des vestiges d'une époque coloniale. Le document s'appuie sur des études de cas sur la façon dont la SNST a été reconnue dans certaines juridictions africaines telles que le Bénin et l'Éthiopie. Il s'appuie également sur des études de cas de pays comme l'Ouganda et le Kenya où l'auteur a participé à la promulgation de lois pour protéger ces sites. L'argument de l'auteur est que la résolution est un moyen de parvenir à une renaissance culturelle africaine en plaidant pour la reconnaissance des droits culturels africains et la relance des mécanismes de conservation basés sur la culture.

KEY WORDS: sacred natural sites and territories, earth jurisprudence, customary governance systems, rights of nature and cultural renaissance

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1 INTRODUCTION

Sacred natural sites and territories (SNST) are areas of land or water having special spiritual significance to peoples and communities. They often harbour rich biodiversity thus contributing to connectivity and resilience of valuable landscapes and ecosystems.¹ SNST can be important places of reference for cultural identity or places that link communities to their deity.² SNST consist of various types of natural features including forests, groves, mountains, rivers, lakes, wells, caves and other features of ecological, cultural and spiritual importance.

Globally, examples of such sites include the sacred groves of the Western Ghats (India), the sacred mountains of Sagarmatha/Chomolongma (Mt Everest, Nepal, Tibet – and China), the Golden Mountains of Altai (Russia) and the Holy Island of Lindisfarne (UK). In Africa, these include the sacred lakes of Esiribi and Adigbe in the Niger Delta (Nigeria),³ sacred forests of Benin, Kaya forests in Kenya,⁴ sacred waterfalls in Amber mountain national park, Madagascar,⁵ sacred

1 African Commission Resolution 372 on the protection of sacred natural sites and territories ACHPR/Res.372(LX)2017.

2 R Wild & C McLeod (eds) *Sacred natural sites: guidelines for protected area managers* (2008) 5.

3 B Verschuuren et al (eds) *Sacred natural sites, conserving nature and culture* (2010) 131 <https://www.iucn.org/content/sacred-natural-sites-conserving-nature-and-culture> (accessed 30 May 2021).

4 Wild & McLeod (n 2) 5.

5 Verschuuren et al (n 3) 267.

groves of Ghana,⁶ sacred forests of Burkina Faso,⁷ sacred natural forests in the Bandjoun Kingdom of Western Cameroon⁸ and the sacred sites of Bagungu clans in Uganda.

These places are not sufficiently recognised and not adequately protected in the current system of natural resource governance. While there have been calculated efforts to recognise and protect these sites, success has been limited. However, there is growing international recognition of the important role of SNST in strengthening cultural identity, conserving biodiversity and improving climate change resilience. These efforts have been largely individual country efforts or isolated efforts by civil society organisations.

For Africa, Resolution 372 adopted by the African Commission on Human Peoples' Rights (African Commission) in 2017 recognises and calls for the protection of SNST. The Resolution came against the backdrop of outcries from various communities protecting SNST over the worrying rate at which such sites were damaged, destroyed or desecrated. At a meeting in Ethiopia in 2015, custodian communities of Tharaka, Meru, Kamba, Kikuyu and Maasai in Kenya; Buganda and Bunyoro in Uganda; Bale and Sheka in Ethiopia; Venda in South Africa; and Adjara, Avrankou and Adjohoun in Benin generated a report to the African Commission demanding recognition of these SNST all across the continent, embracing customary governance systems and legally protecting them from damage or destruction.⁹ It was a persuasive effort to draw onto a core aspect of the African Union objectives, which is the preservation of African traditions that were lost to the colonial regimes.¹⁰

The African Commission meeting at its 60th Ordinary Session in May 2017 in Niamey, Niger taking on the recommendations of the report adopted a resolution calling on member states to protect SNST through customary governance systems, an avenue through which African culture and tradition can be revitalised. This Resolution comes as a necessary backing for the renaissance of African tradition, culture and heritage.

This article analyses the jurisprudential basis of the Resolution looking at earth jurisprudence as the driving philosophy of preservation of SNST. It then examines the context of the Resolution in regard to human rights standards at international, regional and national level. A discussion then ensues regarding the substitutive and practical issues that may arise in making national laws to put into effect the Resolution. This is in a bid to ascertain how the Resolution can valorise the African culture and tradition to promote human rights and sustainable development in Africa.

6 Verschuuren et al (n 3) 267.

7 Verschuuren et al (n 3) 131.

8 Verschuuren et al (n 3) 121.

9 R Chennells & The Gaia Foundation 'Submission to the African Commission: a call for legal recognition of sacred natural sites and territories, and their customary governance systems' (2015) 9.

10 Chennells & The Gaia Foundation (n 9) 2.

2 RESOLUTION OF THE AFRICAN COMMISSION ON THE PROTECTION OF SACRED NATURAL SITES AND TERRITORIES

2.1 Understanding the Resolution

The Resolution acknowledges the centrality of SNST to protecting and supporting the relationship between peoples, land and culture. In particular it acknowledges the relationship between SNST and indigenous people. SNST are not only part of the culture of the dwellers, but they are the source of culture to the people and therefore form part of the body fabric of these peoples. This ushers in issues of rights of African peoples to culture, religious freedom, land rights and family rights. The African Commission highlights two major issues facing SNST, which are industrial activity and development activities, which are the main causes for desecrating these sites necessitating the need for protection.

The African Commission recognises that there is a dearth of laws on protection of SNST in individual countries. African nations lack these laws and as such leave SNST to the whims of various parties involved and the unaided protection by traditional structures. In this, the African Commission welcomes the efforts by state parties such as Benin and Ethiopia, to recognise SNST. This is particularly important for it represents the efforts undertaken until 2017 while this article reveals that much more has since been realised with various societies embracing this age-old means of preservation of the environment while maintaining cultural identity.

The resolution brings to the fore customary governance systems and their role in protecting SNST. These systems are embedded in the traditional values of Africa and are vital in continuity of culture, customs and ways of African descent. The Resolution not only recognises these systems but encourages states parties to entrench such systems and SNST in laws as a strategy of ensuring their continuity. As a major aspect, custodian communities, who maintain customary governance systems, are recognised as essential actors in preservation of SNST. Each sacred site or territory has custodians chosen by the deity or spirits who act as a necessary link between earth and the spiritual realm.¹¹ They are possessed of unique traditional knowledge of cultural and spiritual practices necessary to keep the relationship between humanity and nature. This is in consonance with the recognition afforded to elders and traditional leaders in the communities as major stakeholders in promoting African culture and heritage.¹²

11 Chennells & The Gaia Foundation (n 9) 9.

12 Charter for African Cultural Renaissance art 14.

The Resolution calls upon state parties to recognise SNST, and their customary governance systems, as contributors to the protection of human and peoples' rights. It encourages state parties to uphold their obligations and commitments under regional and international law on SNST, their customary governance systems, and the rights of custodian communities.¹³ Additionally, it requires civil society, businesses and other relevant stakeholders to recognise and respect the value of SNST.

Resolutions of the African Commission form part of soft law and are not, strictly speaking, binding against states parties. However, the Resolution makes reference to various other international instruments that create binding obligations on signatories. These include the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003)¹⁴ and the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions (2005). The Resolution, therefore, provides an overarching direction that African states must take.

Bringing the Resolution into context, this was not the first time that the African Commission interfaced with matters of preservation of SNST. It had made various pronouncements through Reports and other Resolutions that indirectly protected and preserved the integrity of SNST. For instance, the assertion that indigenous people have a special attachment to their ancestral lands which has spiritual significance; that deprivation or dispossession of their ancestral land threatens their livelihood, culture and religion; and that such deprivation leads to degradation of the environment.¹⁵ The Resolution is a fundamental step towards preserving the SNST on the African continent, the rights and freedom of custodian clans, promoting 'real' environmental conservation and the restoration of African culture and tradition in an era of globalisation.

13 These include the UNESCO Universal Declaration on Cultural Diversity (2001), the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003), the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions (2005) and the UN Declaration on the Rights of Indigenous Peoples (2007).

14 There are 49 African states parties to this convention <https://ich.unesco.org/en/states-parties-00024> (accessed 10 September 2021).

15 ACHPR report of the country visit of the working group on indigenous populations/communities, research and information visit to Kenya 1-19 March 2010 50th Ordinary Session (2011) 48.

2.2 Understanding the conceptual and theoretical basis of the Resolution

Recognition, protection and preservation of SNST can be traced to principles of earth jurisprudence which embody customary governance systems as well as rights of nature.¹⁶

2.2.1 *Earth jurisprudence*

Earth jurisprudence is a nascent theory promulgated by Thomas Berry in the late twentieth century. The theory places at its centre the earth. It states that, earth is the primary source of law and that all other laws governing humans are derived from it and must duly comply with its laws for the integrity and well-being of all present and future generations.¹⁷ Berry recognised that the two sources of inspiration for Earth jurisprudence are earth itself, and indigenous and local communities who directly derive their governance systems from earth's laws.¹⁸

Earth jurisprudence presents an ecocentric approach towards environmental conservation as opposed to an anthropocentric approach that seeks to put human beings at the centre of rights. Other writers have expounded on this to provide that earth jurisprudence challenges human beings to transform their destructive presence on earth by modifying human-centred governance including policies, laws, practices, religion and economics, into earth-centred governance.¹⁹ This is because the earth, just as human beings, is considered to be a subject of the law that has rights which are duly protected and not merely an object of the law (commodity).

An approach where the environment unlike humans is the centre of the law is a radical paradigm shift that will find difficulty to be embraced by various jurisdictions. Many laws, more so laws of protection of environment, look at environment as a tool to be used upon regulation and supervision by government agencies or institutions.²⁰ Recognition of SNST, however, requires that this current status quo be challenged and that laws are made or practices encouraged while considering the integrity and health of the earth

16 A Hussein 'Recognising sacred natural sites and territories in Kenya: an analysis of how the Kenyan Constitution, national and international laws can support the recognition of sacred natural sites and their community governance system' (2012) Nairobi: Institute for Culture and Ecology; African Biodiversity Network & the Gaia Foundation 13-19.

17 T Berry *The great work: our way into the future* (1999) 56-57, 80-81.

18 Berry (n 17) 81.

19 C Cullinan 'A history of wild law' in P Burdon (ed) *Exploring wild law: the philosophy of Earth jurisprudence* (2011) 12-23.

20 Laws on environment management that provide for environment and social impact assessments but then go ahead to permit activities in sensitive ecosystems.

because this provides better legal protection for mother earth, its systems plus non-human elements of the environment.²¹ Earth jurisprudence considers the desires of human beings not to be superior to those of other beings but to constitute part of a broader context of the earth system as a whole.

Therefore, preservation of SNST requires a meaningful human-nature relationship that is rooted in spiritual, traditional and customary way of life of a community. As nations continue to destroy these areas of great traditional significance due to ignorance, over consumption and exploitation, the entire fabric of our traditional well-being is in turn affected.

2.2.2 *Rights of nature*

As postulated by earth jurisprudence jurists, every element of the earth has the right to be, the right to habitat and the right to fulfil its role in the cycle of the earth community.²² Nature has its own rights. Rights of nature laws advance the principle of intrinsic value of nature further developing the idea that humans should consider themselves as well as nature to be part of an entire ecosystem and that the two must live in harmony with one another.²³ Intrinsic value of nature 'stands on the premise that all beings, systems, and entities in nature warrant legal consideration and should be given legal recognition'.²⁴

On the international scene, the Universal Declaration of Rights of Mother Earth, 2010 recognises the fact that mother earth (nature) is a living being entitled to inherent rights and the rights to exist, regenerate capacity and to maintain its integrity. Human beings are enjoined, through their own cultures, traditions and customs, to respect mother earth.²⁵ Countries are increasingly recognising rights of nature to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.²⁶ The argument is that if un-natural persons such as companies have rights and are recognised in law, so should nature which is considered to be the source of law.

The Resolution relies on the rights accorded to nature to preserve and protect SNST for present and future African generations. This is because the said areas are maintained as a matter of right and not merely as objects of environment management plans.

21 A Jack et al 'Utilising principles of Earth jurisprudence to prevent environmental harm: applying a case study of unconventional hydraulic fracturing for shale gas in the United Kingdom' (2020) 28 *Critical Criminology* 508.

22 T Berry *Evening thoughts: reflecting on Earth as sacred community* (2006) 149.

23 CM Kauffman & L Sheehan 'The rights of nature: guiding our responsibilities through standards' in S Turner et al (eds) *Environmental rights: the development of standards* (2018) 2.

24 JE Koons; 'What is Earth jurisprudence? key principles to transform law for the health of the planet' (2009) 47 *Penn State Environmental Law Review* 418.

25 Arts 1, 2 & 3 of the Universal Declaration of Rights of Mother Earth, 2010.

26 Sec 4 of the Uganda National Environment Act 2019; art 71 of the Ecuador Constitution 2008.

2.2.3 Customary governance

SNST are preserved and managed according to culture-based systems of governance.²⁷ These are equally termed as customary governance systems. Customs, spiritual practices and taboos regulate the relationship between humans and SNST. These vary from society to society. Customary governance is a decentralised system that allows individual communities to govern their SNST in accordance with their peculiar laws or ways of life. Earth jurisprudence emphasises customary governance. It is the residents and dwellers of these areas that understand the dynamic of nature in these places, the well-being of the flora and fauna, seasons, ecosystems, and processes of the earth.²⁸ Decisions, therefore, are made at the most appropriate level- the lower level.

This input by the Resolution is an avenue for enhancing African cultural renaissance as it allows for exercise of customary law in administering SNST. It is worth noting that customary law is applicable in various jurisdictions of African nations.²⁹ The African Commission has recognised customary law and customary governance systems in various cases. In the *Endorois* case, it ruled that African states have a duty to sustain African culture by protecting and preserving the art, law, morals, customs, and any other habits of a given community.³⁰

Customary governance, more so in matters of environmental conservation, is bolstered by the Durban Accord and Plan of Action arising from the World Parks Congress in 2003. It called for modification of conservation initiatives by allowing for inclusion of innovative and traditional or customary governance types practised in indigenous communities.³¹ At a national level, various laws provide for the role of traditional communities in environment conservation and management, however, they do not empower the traditional systems with the power or duty of governing their own sites or resources in accordance with customs.

Custodians of SNST in their report to the African Commission clearly identified that customary governance systems are the bed rock

27 A Godbole et al 'Culture-based conservation of sacred groves: experiences from the North Western Ghats, India' in B Verschuuren et al (eds) *Sacred natural sites conserving nature and culture* (2010) 192.

28 Koons (n 20) 7.

29 See, for example, the South African Constitution art 30 & 31; In Uganda sec 14 & 15 of the Judicature Act Cap 13 provides for customary law as part of the legal system.

30 *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois welfare council) v Kenya* (2009) AHRLR 75 (ACHPR 2009) Para 241; also see the African Court on Human and Peoples' Rights case of the *Ogiek* People preventing the Kenyan government from evicting the Ogiek, a marginalised forest-dwelling community from the Mau forest denying them the right to practice their customs. (*African Commission on Human and Peoples' Rights v Kenya* ActHPR, Application 006/2012 (2017)).

31 J Sunde 'Customary governance and expressions of living customary law at Dwesa-Cwebe: contributions to small-scale fisheries governance in South Africa' PhD Thesis University of Cape Town (2014) 8.

of preservation of SNST and that these systems are directly based on their ancestral law of origin. They, additionally, requested that the systems be recognised and legally protected to allow for continuity.³²

Despite the intention of the Resolution to bring forth exercise of customary law, this body of law has its pitfalls. The law is mostly uncodified and incompatible either directly or by necessary implication with written law.³³ The Resolution postulates that these governance systems must be legally protected to alleviate the challenges that customary law faces in application and enforcement today. The implications of this are examined in detail later in the paper.

3 A HUMAN RIGHTS PERSPECTIVE

This part brings the idea of preservation of sacred natural sites and territories into the context of human rights. It is a discussion of the international, regional and national legal instruments that support or influence the recognition and protection of these sacred places and how it all fits into the objective of reviving African culture and heritage. Recognition of SNST has been in place through protection, fulfilment and realisation of other rights including the right to culture, freedom of conscience and religion, right to a clean and healthy environment and rights of indigenous peoples. However, recent trends reveal a growing pace on a national as on an international level particularly providing for recognition and protection of SNST and is already starting to show in the emergence of rights of nature and wild law.³⁴

3.1 International instruments

International instruments are useful in strengthening and supporting the efforts of recognising and protecting SNST at the regional and national level. They can additionally act as model laws for states in crafting legal protection of SNST.

3.1.1 International Bill of Rights

The International Bill of Rights provides a foundational basis for advocating for protection and preservation of SNST. The instruments within the international bill of rights provide for the freedom of conscience and religion, which allows for freedom to manifest one's beliefs in teaching, practice, worship and observance either alone or in community with others.³⁵ SNST are places of spiritual significance,

32 Chennells & The Gaia Foundation (n 9) 12.

33 Sec 15 of the Judicature Act of Uganda Cap 13.

34 N Rühls & A Jones 'The implementation of Earth jurisprudence through substantive constitutional rights of nature' (2016) 8 174 *Sustainability* 19.

35 Art 18 of the Universal Declaration of Human Rights 1948; art 18 of the International Covenant on Civil and Political Rights 1966.

akin places of worship or temples, where custodians act as a link between the deity and the communities,³⁶ and this right is adequately protected by the international bill of rights.

The International Bill of Rights, additionally, provides for the right to culture allowing individuals to freely participate in the cultural life of the community.³⁷ Under article 27 of the International Covenant on Civil and Political Rights, 1966 (ICCPR), the instrument goes further to recognise the rights of indigenous people or ethnic minorities to enjoy their own culture and to profess and practise their own religion. The International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR) additionally charges state parties to progressively take steps necessary for conservation, development and diffusion of culture.³⁸ As an African continent, progressive realisation of cultural rights entails entrenching customary governance systems into our laws to allow for adequate protection of these rights.

3.1.2 *United Nations Convention on Biological Diversity (1992)*

This Convention requires state parties under article 8(j) to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity. Additionally, under article 10(c) it enjoins states to protect and encourage customary use of biodiversity in accordance with traditional cultural practices. This is a major aspect that fosters use of traditional mechanism of conservation of environment that are effective and more practical in addressing environmental degradation.

In a May 2010, the secretariat of the UN Convention on Biological Diversity, and the UN Environmental Programme (UNEP) carried out a major assessment of the prevailing state of biodiversity. It was recommended that there is need for urgent action to curb biodiversity loss. The team among its recommendations advocated for protection of SNST highlighting the role played by indigenous and local communities in protecting and preserving areas of crucial biodiversity concentration.³⁹

3.1.3 *United Nations Declaration on the Rights of Indigenous Peoples (2007)*

This landmark Declaration recognises the rights of communities to cultural practice, customary governance systems and self-determination. This includes the right to revitalise their culture in

36 Chennells & The Gaia Foundation (n 9) 2.

37 Art 27 of the Universal Declaration; art 27 of the ICCPR.

38 Art 15 of the ICESCR.

39 Secretariat of the Convention on Biological Diversity (2010) *Global Biodiversity Outlook 3* <http://gbo3.cbd.int/> (accessed 24 May 2021).

accordance with the traditions and customs of the community including their spiritual and religious lives. This can equally be interpreted to advocate for respect for SNST that form part of the cultural sites and spiritual lives of the communities.

There are various other international instruments, resolutions and statements from international institutions as well as reports to the United Nations that speak to protection of cultural heritage and the preservation of the earth and often include preservation of mother earth.⁴⁰

3.1.4 Sustainable Development Goals

The Resolution is a step towards achieving sustainable development goals by Africa in particular; SDG 9 which attributes great biodiversity loss to industry, innovation and infrastructure activities; SDG 15 on preservation of life on land; as well as SDG 14 on life under water which requires taking a more ecocentric approach that looks at nature as having rights and allows for laws to protect sacred natural sites and territories. Of particular importance, SNST in preserving biodiversity build climate change resilience upon which African nations promote climate action as per SDG 13.⁴¹

Many of the international instruments refer to sustainable development but have failed to deliver the required optimum relationship between humans and society or environment that ensures survival of both subjects.⁴² It is time to rethink the approach and generate a more cross-sector coordination and coherent policy and law.⁴³ Preservation of SNST represents a move from the 'weak sustainability' principle to the 'strong sustainability' principle.⁴⁴

40 For example, UNESCO Universal Declaration on Cultural Diversity (2001), the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003); the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions (2005); Anchorage Declaration (2009); IUCN 4th world conservation congress resolution 4.038; Recognition and conservation of sacred natural sites in protected areas; IUCN and UNESCO best practice protected area guidelines 16; Sacred natural sites: Guidelines for protected area managers (2008); IUCN World conservation congress statement of custodians of sacred natural sites and territories (2008); Harmony with nature: report of the Secretary-General, A/74/236, of 2017.

41 Chennells & The Gaia Foundation (n 9) 2.

42 Rühls & Jones (n 30) 5.

43 Rühls & Jones (n 30) 1.

44 K Bakulumpagi 'Biodiversity offsetting as a tool for environmental conservation: the need for a legal framework in Uganda' Unpublished Master's Thesis, University of Dar es Salaam (2019) 19.

3.2 Regional instruments

3.2.1 African Charter on Human and Peoples' Rights 1981

The African Charter on Human and Peoples' Rights (African Charter) in its Preamble reaffirms the commitment to eradicate all forms of colonialism from Africa, and to consider the virtues of African tradition and values of African civilisation to guide its conception of human and peoples' rights. Furthermore, under article 17, it allows for every individual to freely take part in the cultural life of their community and charges state parties with a duty to promote morals and traditional values recognised by communities.

Articles 22 and 24 are recognised in the resolution on SNST as they provide for the right of all Africans to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. As is the normative text of the African Charter, individuals have duties imposed on them such as the duty to preserve and strengthen positive African cultural values in their relations with other members of the society and to promote the moral well-being of society.⁴⁵

The African Charter sets up the African Commission⁴⁶ which is charged with a duty to ensure the protection of human and peoples' rights under conditions laid down by the Charter.⁴⁷ The African Commission in exercising its mandate may consider African practices consistent with international norms on human and peoples' rights plus customs generally accepted as law.⁴⁸ It is on this basis that in passing the Resolution, the Commission drew upon customary governance systems and the need to promote African culture as a basis for such a method of culture-based conservation.

3.2.2 Charter for African Cultural Renaissance (2006)

This Charter is of particular importance to the preservation of SNST. It affirms that any human community is governed by rules and principles based on culture; and that culture encompasses, lifestyles, ways of living together, value systems, traditions and beliefs.⁴⁹ It encourages state parties to integrate cultural objectives in development strategies⁵⁰ and also to assert the dignity of African men and women as well as the popular foundations of their culture.⁵¹ The Charter is a regional instrument that acknowledges the importance of culture including spiritual value systems and traditions in promoting African identity

45 Art 29 of the African Charter on Human and Peoples' Rights.

46 African Charter art 30.

47 African Charter art 45.

48 African Charter art 61.

49 Preamble to the Charter for African Cultural Renaissance (2006).

50 Charter for African Cultural Renaissance art 3(g).

51 Charter for African Cultural Renaissance art 3(a).

and good governance, and the protection of tangible and intangible cultural heritage.⁵²

This Charter has so far been ratified by only fourteen countries and as such is not yet into force. This may be attributed to the limited popularisation and sensitisation around this charter or the need for support of grass root institutions that can advocate for ratification as opposed to a top-bottom approach where the African bodies call onto states to ratify the Charter.

The Resolution on protection of SNST provides such an approach by encouraging recognition of customary systems of governance at the grassroots as a means of promoting culture-based conservation mechanisms and in the end appreciate the African culture.

3.3 National instruments

States have the essential task of creating an enabling environment for cultural innovation and development.⁵³ Under this, states must take measures to respect and protect SNS as a method of cultural-based conservation in the face of development. This is done through constitutions, primary legislation (Acts of Parliaments), other subsidiary legislation and policy.

The article, in this section, discusses national legislation of select countries, Uganda, Benin and Kenya in relation to the development of legislation to protect and preserve SNST. The discussion also borrows from other jurisdictions that have documented efforts to recognise SNST such as Ecuador.

3.3.1 Constitutions

Various constitutions of African states provide for rights to a clean and healthy environment, right to culture, freedom of conscience and freedom of religion. It comes against the backdrop of environmental constitutionalism. This entails recognising the environment as a subject for protection in constitutional texts and the same to be enforced as a right in courts of law.⁵⁴ This provides better consolidation and safeguard for realising the right in question, though it does little to protect SNST. This is because protection of SNST necessitates legal protection that envisages the earth as having her own inherent rights to exist and flourish, and not merely the right to a clean and healthy environment.

The Constitution of Kenya 2010, however, comes out strong on rights of culture and indigenous communities. The Constitution expressly states that culture is the foundation of the nation⁵⁵ and

52 Chennells & The Gaia Foundation (n 9) 33.

53 Charter for African Cultural Renaissance art 9.

54 JR May & E Daly *Global environmental constitutionalism* (2015).

55 Art 11 of the Kenya Constitution 2010.

provides for the right to participate in any culture.⁵⁶ It recognises indigenous peoples as part of minority and marginalised communities, acknowledges their cultural norms and supports community self-governance.⁵⁷ The supreme law further requires government to involve communities in its efforts to conserve and manage lands and ecosystems. It provides for the right to a clean and healthy environment, duties of protecting the environment.⁵⁸

Though many countries have provisions in their constitution providing for the right to a clean and healthy environment, no country in Africa has a constitution recognising protection of SNST or rights of nature. At the present, the best alternative is, therefore, to look towards the provisions of rights to a clean and healthy environment, right culture and freedom of religion as a basis to encourage states to enact laws to protect SNST.

3.3.2 National legislation

There are various SNST all over Africa.⁵⁹ However, the score card of laws protecting SNST is quite poor. Almost all African countries have national legislation providing for environmental protection and conservation. But these laws fail to provide the required protection to sacred natural sites and do not envisage the principles of earth jurisprudence or customary governance. This is because the laws are bent on how to use the environment for human benefit allowing for supervised destruction (anthropocentric approach) as opposed to an ecocentric approach.⁶⁰ Control is also centralised in government agencies such as environment agencies.

Other nations have come close by drafting rights of nature clauses in environmental legislation. The principle that nature, having intrinsic value, is worthy of legal consideration and codification. As per this, the SNST are meant to be protected and granted status equivalent to that of human beings which provides better protection.

Uganda is the only country in Africa, which provides for rights of nature in her National Environment Act 2019. Section 4 provides that the nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution rights. It allows any individual to enforce such a right and this is a good avenue through which an individual may enforce the duty of the state to make laws that protect and preserve SNST.

In some cases, however, we have nations that have drafted national legislation providing for recognition of SNST. These are the countries embarking on jurisprudential changes. For instance, in Benin, a

56 Kenya Constitution art 44.

57 Kenya Constitution art 56.

58 Kenyan Constitution art part II.

59 See page 3 above.

60 The laws that provide for environment and social impact assessment such as the Tanzania National Environment Management Act 2004.

national Sacred Forest law (Inter-ministerial Order No 121, 2012) provides for the legal recognition of sacred forests and forests of gods and spirits as protected areas.⁶¹ The law goes ahead to provide for customary leaders such as kings to govern the preservation of SNST and prohibits activities that affect protected sacred forests.⁶²

For the case of Uganda, legal recognition and preservation of SNST is an ongoing process through subsidiary legislation (district ordinance) in western Uganda, Buliisa District. The District Council passed a resolution recognising the customary laws of the Bagungu People pertaining to preservation of sacred natural sites; detailing the role of Bagungu custodians and expressly recognising the rights of the SNST to exist and thrive.⁶³ The District Council and the Bagungu Custodian Clans are currently developing an ordinance, which will demonstrate how pluri-legal systems comprising state and customary law can be implemented at district level.⁶⁴

4 ANALYSIS OF THE RECOMMENDATION OF THE RESOLUTION TO MAKE LAWS AND POLICIES FOR THE PROTECTION OF SNST

Various societies in Africa today are recognising SNST, embracing their traditional knowledge and practices, and reviving customary governance systems deriving from earth jurisprudence.⁶⁵ The systems derive from the *a priori* laws that existed before colonialism in Africa. The African Commission resolution on SNST argues that countries should make laws or codify these customary systems as a means of protecting sacred natural sites.⁶⁶

This then introduces a balancing act that looks to codification of practices that are often treated as values and not meant to become law. This part analyses the substantive and practical issues that must be examined by various societies and countries to embrace the notion of enacting laws to protect sacred natural sites.

61 Art 3 of the Inter-ministerial Order 0121 (2012) Setting the conditions for the sustainable management of sacred forests in the Republic of Benin, <https://www.gaiafoundation.org/benins-historic-sacred-forest-law-translated-into-english/> (accessed 24 May 2021).

62 Inter-ministerial Order article 21.

63 C Byrne 'The emergence of Earth jurisprudence in Africa' (2020) 5 *Conscious Lawyer* 5

64 Byrne (n 63) 1.

65 Byrne (n 63) 1.

66 Para 14 of the African Commission Resolution on Protection of SNST.

4.1 Substantive issues

4.1.1 Legal pluralism

Legal pluralism is the existence of multiple legal systems within one geographic area or alternatively, when a country has more than one source of law in its legal system.⁶⁷ Africa is a plural-legal continent.

The Resolution calls for legalising customary governance systems, which rely on customary law. This includes reliance on cultural values, morals and traditions meant to protect SNST. This is because recognition of customary governance systems as part of plural-legal systems takes into consideration the virtues of African historical tradition and the values of African civilization in realising human and peoples' rights as set out in the African Charter.⁶⁸

In the report submitted to the African Commission, the communities called for recognition of *a priori* legal systems to foster renaissance of African identity in the process of development.⁶⁹ Many African states are today following the legal systems put in place by their colonial masters, that is the civil law system or common law. This is coupled with statutory law formulated by the legislative arms of government.

Reviving customary governance systems raises questions about the nature and status of customary law in relation to statutory law, common law and civil law. In many African jurisdictions, customary law is recognised as law and is applicable in courts of law and other dispute resolution mechanisms.⁷⁰ The African Commission for instance acknowledges and recognises customary land rights resulting from occupation and use since time immemorial.⁷¹

But these are clothed with the repugnancy clause. A clause that requires that the customs can only be applied if they are consistent with or not contrary to public policy, natural justice, equity and good conscience; and not incompatible either directly or by necessary implication with any written law.⁷² This reduces customary laws to a lower hierarchy. Indeed, the African Commission's working group of experts on indigenous populations in their report on their visit to Kenya in 2010 acknowledged that customary laws are often treated as

67 AWB Simpson *Invitation to law* (1988) 53-82.

68 Preamble to the African Charter.

69 Preamble to the African Charter para 7.

70 Sec 14 & 15 of the Judicature Act Cap 13 of Uganda; sec 39 of the South African Constitution 1996.

71 ACHPR report of the country visit of the working group on indigenous populations/communities and information visit to the Central African Republic 15- 28 January 2007 43rd Ordinary Session (2007) 50.

72 See for Nigeria sec 34(1) of the High Court Cap 49 1963 Law of Northern Region of Nigeria. Similarly, sec 12(1) of the High Court Laws of Western Region of Nigeria 1959 and 6 High Court Law of Lagos State Cap 65 1973. For South Africa see sec 27(1) of the Southern Cameroon's High Court Law 1955.

subordinate to a nation's laws since they are qualified against written laws.

One method to cure this is by making sure the codified laws are in consonance with the Constitution and principal Acts of Parliament by engaging with the law makers to ascertain consistency. Additionally, the Courts must interpret the repugnancy clause in a restrictive manner to allow for the rebirth of the African cultural systems especially in matters of biodiversity preservation.

4.1.2 Conflict of laws

Another substantive hurdle is the conflict of laws, more so in the field of environmental management. Countries have a multitude of laws regulating environment. These for instance set up various management structures such as district committees, local government committees that have mandates like those, which the Resolution grants to customary governance structures. Matters of access to sacred areas are very contentious. A situation such as in the development of the ordinance on SNST in Buliisa district, Uganda, where the district committee on environment and natural resources has the mandate to implement any ordinance yet the Earth jurisprudence which is meant to be entrenched on the ordinance dictates that such mandate should be left to the customary leaders who are the custodians of SNST in this case.⁷³

As a solution, various laws concerning SNST establish bodies that are a hybrid of the customary leadership and a local government leadership to be the governing body. These are usually termed as customary law boards,⁷⁴ stewardship councils,⁷⁵ or guardian bodies. In the event of the SNST of *Whanganui River (Te Awa Tupua)* in New Zealand, there is established a Guardian body comprised of one *iwi* representative and one government official to protect the interests of the river.⁷⁶ It then ceases to be customary governance system largely because of the lack of desire by government to relinquish power over such SNST.

Though this is a fair compromise, it leaves a lot to the political systems which, as observed in the case of Uganda, may fail to appreciate the intrinsic value that society accords to these sites.

4.1.3 Gender considerations

The African Charter is clear on equality of all persons and the need for respect of rights of women⁷⁷ yet in many cultural settings and

73 Sec 28(1)(e) & (f) of the Uganda National Environment Act 2019.

74 The draft Buliisa district (preservation of sacred natural sites) ordinance of 2021, Uganda.

75 Sacred Forest Stewardship Council of India.

76 Kauffman & Sheehan (n 19) 3.

77 Art 3 & 18(3) of the African Charter.

customary governance systems, we find that women are not treated equally with men. The question that arises is whether entrenching these customary systems into law will not result into an affront to rights of women.

Preservation of SNST allows for equal treatment of women. Earth Jurisprudence brings in the element of all beings including women, children, youth, vulnerable and local dwellers directly engaging with nature to be considered when undertaking any decision affecting nature. This is because all beings are objects of the law and form part of a complex eco-system that must be duly respected. More so, women in most of the African societies interface with nature more than the men through agriculture. Through this, we can ably state that women become part of the decision makers. Additionally, women are accorded duties strictly performed by them in preservation of SNST such as cleansing the site for rituals,⁷⁸ and planting seeds.

4.1.4 Dispute resolution

The method of resolving disputes is problematic with many of the potential violators of laws protecting SNST being users of adversarial systems such as courts of law as opposed to the traditional systems of amicable settlement of issues. Under customary systems of governance disputes are usually addressed at the neighbourhood level or at the level of elders,⁷⁹ whereas in other systems the matter is decided by established courts of law. The question would be whether the codified law on protection of SNS would advocate for adversarial or customary systems of resolving disputes.

The other issue regards penalties for violation of the laws governing SNST. Whereas the customary governance system leans more towards restorative justice for instance rituals to rectify any act of desecration such as animal sacrifice, subjecting offenders to sessions of traditional knowledge imparting, the statutory law, civil or common law looks to custodial sentence or financial penalty. It is argued that customary punishment are too uncertain and cannot be easily codified at the same time the law cannot grant wide discretion to the customary leaders as they may misuse their power.⁸⁰ However, the customary governance regime argues that the custody or fine does not restore the environment or appease the spirits of the sacred places. Such disparity generates a large impasse that affects effective implementation of the resolution.

78 SL Kamga-Kamdem 'Ancestral beliefs and conservation: The case of sacred sites in Bandjoun West Cameroon' in B Verschuuren et al (eds) (n 3) 125.

79 Sunde (n 27) 186.

80 EA Taiwo 'Repugnancy clause and its impact on customary law: comparing the South African and Nigerian positions: some lessons for Nigeria' (2009) 34 1 *Journal for Juridical Science* 96-99.

4.1.5 The land question

Most of the SNST are housed in areas that are under customary land tenure. Many of the occupants of SNST do not have title to the land since it is used for the benefit of the community. Such land presents many challenges when it comes to enforcement of the right to land especially where outsiders obtain title to land through the land laws of the country. The custodians of SNST and the clans are left without a legally recognised claim to land. Evictions from such land as in the Kenyan *Endorois* case are always imminent especially where all the land is in the hands of government as is in the United Republic Tanzania or in Suriname (South America).⁸¹

But as a means of safeguarding these spaces, the land should be clearly identified as non-transferrable and not to be converted to any other tenure so as to secure it. Certain countries, such as Kenya, provide better safeguards to communally owned land. The 2010 Kenya Constitution provides that ‘all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals’⁸² and recognises community land and that such land can be held by the community and at the same time be titled/registered.⁸³ This is a more robust safe-guard to traditional communities and nations must provide for similar provisions to allow for security of tenure of land in which SNST are situated.

4.1.6 Enforceability of earth jurisprudence and rights of nature

Aside from the governance system, the philosophy of earth jurisprudence, though potent, has many challenges when it comes to implementation. Much more needs to be done especially the legal intricacies to better breakdown how Earth jurisprudence and rights of nature laws are to be implemented in practice.⁸⁴ The issue of *locus standi* in matters of advocating for rights of nature is of great concern, whether the community or management bodies represents the SNST in court. But the said bodies may not be recognised in law. The other is the matter of reparations or compensation for destroying SNST and how they are to be assessed and awarded. Whether the assessment be by the customary governance structures or civil jurisdiction.

81 TV Andel ‘How African-based Winti belief helps to protect forests in Suriname’ in B Verschuuren et al (eds) (n 3) 144.

82 Art 61 of the 2010 Kenya Constitution.

83 Kenya Constitution art 63.

84 Jack et al (n 17) 512.

4.2 Practical issues

SNST play a critical role in protecting biodiversity and are essential for building climate change resilience for the ecosystems.⁸⁵ Despite such clear benefits, there is an evident hurdle to introduce a cultural, jurisprudential as well as intellectual shift that looks at the value of nature as part of the cultural systems of Africans and that preserving the same saves the entire ecosystem. This new jurisprudence that embraces customary law and desires that it be codified is difficult to fit into the practical day to day lives of Africans especially those outside the custodian communities. This article discusses some of the practical challenges to making laws protecting SNST as recommended by the Resolution. These practical challenges are based on experience of the author while generating laws on protection of sacred natural sites as well as personal insights.

Many African cultural practices, ways of life or customary governance systems are looked at as barbaric, backward, and out of touch with reality. For many custodian communities, it is difficult to overcome the stigma and embrace their African traditional ways or *a priori* laws to protect SNST.⁸⁶ Indeed, The African Commission's Working Group of Experts on Indigenous Populations (WGIP) has previously taken note of the fact that customary laws are usually treated as subordinate to the national laws which makes it difficult to enforce the rights accruing.⁸⁷ This is coupled with religious intolerance from what is referred to as conventional or mainstream religion. In a continent predominantly Muslim or Christian, it is always difficult to justify a place for African traditional religion.

Change of attitude and lifestyle is also a challenge to reckon with. Due to urbanisation, many people are short of conviction when it comes to customary governance and reverence for SNST. The younger population lacks interest in traditional African ways, are individualistic and materialistic.⁸⁸ Many people have abandoned their traditional African values and as such, it is hard to come by dedicated custodians. Children now have less time to learn or practise the rituals as they are occupied with school.⁸⁹ This fosters an intergenerational loss in traditional African customs and values which may lengthen the period of renaissance of African culture.

The influx of other people into SNST is a practical aspect that affects realisation of the objectives of the Resolution. Due to search for jobs, population growth, job mobility, migration due to political instability or climate change effects, many people are now shifting to custodian

85 Chennells & The Gaia Foundation (n 9) 24.

86 Interview with Margaret Kagole, custodian of sacred natural site in Buliisa district on 20 May 2021. Most of the custodians required a lot of convincing to return and claim their duties of preservation of SNS since many were mistaken for traditional witch doctors.

87 ACHPR (n 10) 56.

88 Kamga-Kamdem (n 78) 125.

89 Kamga-Kamdem (n 78) 125.

communities and with them arrive new cultures and the lack of respect for SNST. A case in point is the Niger Delta which is home to oil activities. Many people have flocked the area and do not have the same regard for SNST as the locals.⁹⁰ Against this background, even codification may not conjure the respect for SNST envisaged by the Resolution. Custodian clans for SNST are not familiar with the rigours and requirements for making written laws to protect their sites and territories. There is need for external support to actualise these rights. Capacity development and support is needed in developing policy and law, mapping out SNST, setting up management structures, documenting the practises among many others. It is almost impossible to revive such African cultural practice without financial, technical, and psychological support. However, this area has been ventured into by few organisations.⁹¹

Many SNST are already taken up as property belonging either to individuals or to government as protected areas. Many sacred sites are located in areas gazetted as national parks, such as Shai Hills National Park in Ghana and Mount Kenya National Park in Kenya,⁹² and Murchison Falls National Park in Uganda. Areas such as wildlife parks, forests, and wetlands plus lakeshores are managed and supervised by the government and it is difficult to transfer such supervision to customary governance institutions as is the intention of the Resolution by the Commission. They are usually areas of great economic interest or endowed with resources such as oil and gas and it is difficult to hand these over.⁹³ Moreover, the small size of many SNST makes it hard to recognise them as protected areas meant to contribute to protection of human and peoples' rights.⁹⁴

The other challenge is the limited muscle of customary governance systems to withstand the impact of globalisation, economic development, infrastructure construction and industry development.⁹⁵ Customary leaders have not received formal education, have no financial backing and rely on goodwill of the community members, which is not the pace at which government, companies or other individuals pushing development operate. Codification of protection of SNST as well as customary governance systems is frustrated in that sense.

90 RA Anwana et al 'The crocodile is our brother: sacred lakes of the Niger Delta, implications for conservation management' in B Verschuuren et al (eds) (n 3) 135.

91 Organisations such as the Gaia Foundation, Advocates for Natural Resources and Development (ANARDE) and African Institute for Culture and Ecology (AFRICE) are some of the few organisations that have ventured into this field.

92 EGC Barrow 'Falling between the 'cracks' of conservation and religion: the role of stewardship for sacred trees and groves' in B Verschuuren et al (eds) (n 3).

93 The SNST in Uganda are in the Albertine Graben which is an area with oil and gas deposits. The same goes for SNST in Niger Delta region which is home to Nigeria's oil deposits.

94 Verschuuren et al (eds) (n 3) 266.

95 Barrow (n 93).

5 CONCLUSION AND RECOMMENDATIONS

The Resolution of the African Commission on protection of SNST is a landmark instrument in revitalising African culture, tradition, and heritage. The Resolution is a means of ensuring African states commit themselves to work for the African Renaissance necessitating both positive and negative obligations from member states. Implied in this is the acknowledgement of *a priori* laws, systems, and traditions, that governed Africans prior to the colonial era and that these laws and traditions form part of a plural-legal system in Africa.⁹⁶

The primary thrust of the Resolution is to provide corroborated protection, preservation, and conservation of SNST. Despite the challenges envisaged in bringing to life the provisions of the Resolution, the following recommendations are provided to ensure that state parties achieve the intended objectives.

As a first step, member states should make laws that recognise SNST, provide for adequate protection and allow for sustainability of such protection. Countries should make laws with the consultation and involvement of local communities who are the practitioners of the customary governance systems.⁹⁷

Changing attitudes. Africans must experience an attitudinal change if the law on SNST is to take shape. Negative attitude towards African traditional culture must end to allow for its revival. This attitude is influenced by religion, attainment of education, change in status among many things. Africans should embrace their culture and not demonise it as was done by the colonialists upon arrival on the continent.

Recognition and protection of SNST can only be arrived at with support of various stakeholders. The Charter on African Cultural Renaissance recognises, under article 10, that other actors such as private developers, associations, local governments, and private sector are key to achieving the goal of African cultural renaissance.

There is need for massive sensitisation of all stakeholders including local communities, outsiders (non-community members), government and business fraternity on the purpose and benefit of protection of SNST. The sensitisation should focus on the role of SNST in environmental conservation, enhancing climate change resilience, preservation of culture plus promotion of cultural identity and diversity. The African Commission equally has a wide mandate that allows for sensitisation.⁹⁸

There should be substantive as well as procedural marrying of customary law and other forms of law such as written law and common law. This is to elevate the status of customary law through codification. One method is by ensuring that codified laws are legitimate by engaging

96 Chennells & The Gaia Foundation (n 9) 12.

97 Sunde (n 27) 153.

98 Art 45(1)(c) of the African Charter.

law makers (legislature) to ascertain consistency with national constitutions or national legislation.

At the time of passing the Resolution, the African Commission acknowledged only SNST in Benin and Ethiopia. Today, many more SNST have been recognised in various African states as revealed in the discussion above. The African Commission should proceed to adopt an African model law to implement Resolution 372, on protection of SNST. This will assist member states to generate national laws whilst basing on this regional document.

This article calls for the recognition of Earth jurisprudence law and principles, which underpin customary governance systems and rights of nature. This new jurisprudence, though requiring some degree of fine-tuning, is necessary not only for the purpose of preservation of nature but ultimately for the survival of the human race.

The local communities must personally claim responsibility for reviving and strengthening their customary governance systems to protect SNST. The custodians, elders and society members must equally nurture new young leadership in community ecological governance. This is to transfer this traditional knowledge to the future generations and allow for sustainability of the SNST over the ages. The young people, as part of their duty under the African Charter, must ensure that tradition is carried forward.

State parties should ratify the Charter for African Cultural Renaissance, 2006 to hasten the process. So far, only fourteen African states have ratified it and the Charter is not yet into force. Partner states of regional economic communities may adopt the resolution at a regional level.⁹⁹ As stated by the Charter for African Cultural Renaissance, culture is meaningless if it does not help in socio-economic transformation.¹⁰⁰ Integrating culture in development is key for a sustainable African solution to environmental challenges. Preservation of SNST is a means to achieve sustainable development and assist in alleviation of impacts of climate change amidst various failed non-organic methods. The continent could use a new approach!

99 EALA, 'It is time we encourages the African cultural renaissance – EALA says' <https://www.eala.org/index.php/media/view/it-is-time-we-encourages-the-african-cultural-renaissance-eala-says> (accessed 29 June 2021).

100 Preamble to the Charter for African Cultural Renaissance.