African Human Rights Yearbook
Volume 8 (2024)

The three institutions making up the African regional human rights system, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child, decided to jointly publish the *African Human Rights Yearbook*, to spearhead studies on the promotion and protection of human rights, and to provide a forum for constructive engagement about the African human rights system with academics and other human rights commentators on the continent. Volume 8 of the *Yearbook*, published in 2024, contains 23 contributions by scholars from Africa and beyond.

Annuaire africain des droits de l'homme
Volume 8 (2024)

Les trois institutions qui composent le système régional africain des droits de l'homme, la Cour africaine des droits de l'homme et des peuples, la Commission africaine des droits de l'homme et des peuples et le Comité africain d'experts sur les droits et le bien-être de l'enfant ont décidé de publier conjointement *l'Annuaire africain des droits de l'homme* pour encourager les études sur la promotion et la protection des droits de l'homme et offrir un forum d'interaction constructive sur le système avec les universitaires et observateurs du continent. Le Volume 8 de *l'Annuaire*, publié en 2024, contient 23 contributions de chercheurs du continent et d'ailleurs.

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Anuário Africano dos Direitos Humanos
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The *African Human Rights Yearbook* publishes peer-reviewed contributions dealing with the aspects of the African human rights system covering its norms, the operation of its institutions, and the connection between human rights and the theme of the African Union for the year of publication, which in 2024 is 'Educate an African fit for the 21st Century'.

The *Yearbook* appears annually under the aegis of the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The *Yearbook* is an open access online publication, see www.ahry.up.ac.za

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L'*Annuaire* paraît une fois par an sous l'égide de la Commission africaine des droits de l'homme et des peuples, de la Cour africaine des droits de l'homme et des peuples et du Comité africain d'experts sur les droits et le bien-être de l'enfant. L'*Annuaire* est une publication d'accès libre en ligne, veuillez consulter www.ahry.up.ac.za

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Editorial
Éditorial

On 21 October 2024, the African Union celebrated African Human Rights Day, marking 34 years since the entry into force of the first African human rights treaty, which was adopted in 1981 and entered into force in 1987. The treaty is the African Charter on Human and Peoples' Rights (African Charter), whose implementation mechanism is the African Commission on Human and Peoples' Rights (African Commission).

Additional human rights treaties followed. These include the African Charter on the Rights and Welfare of the Child, which entered into force on 29 November 1999, establishing an African Committee of Experts on the Rights and Welfare of the Child (Committee), and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou Protocol), in force since 25 January 2004, establishing the African Court on Human and Peoples' Rights (Court).

This normative-institutional architecture is proof of continental adherence to the ideals of human rights, which was to materialise in the alignment of national laws and legal systems.

The underlying idea was that adherence to human rights would facilitate good governance and the advent of democracy, and that once established everywhere, the latter would help political leaders to limit the concentration, or even confiscation, of power, and would qualitatively and positively change the destiny of our continent.

Since its inception, the African Commission has worked to advance adherence to human rights principles and the enjoyment of the rights guaranteed by the African Charter. It has set up 12 subsidiary or special mechanisms, held 81 ordinary sessions that have created platforms for deliberation on relevant human rights issues with states, human rights stakeholders and human rights defenders.

It has adopted several legal instruments, which may not be legally binding, but whose 'recommendatory value' nonetheless obliges governments to accept a certain form of 'implementation obligation' to guide the decisions and choices they make in the management of public affairs. States have a legal obligation, a binding obligation, so to speak, to apply the Charter. The Commission makes recommendations for implementing these legal obligations. Herein lies the small but salvific nuance, imperceptible to many.

In 2022, the Commission facilitated the adoption by the African Union of the Protocol on Citizens' Rights to Social Protection and Social Security. In 2024, it did the same for the Protocol to the African Charter on Human and Peoples' Rights on Statelessness and Nationality. It also contributed to the drafting of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (which

came into force on 6 November 2024). It is also behind the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, which has entered into force in 2024.

In addition, the three human rights institutions – the Commission, the Committee and the Court – working together with other human rights key players in the African Union, have continued to convene under the African Governance Architecture (AGA), on various human rights issues, and have made much progress in synergising and collaborating in various activities that sensitise and encourage human rights stakeholders, especially states, on their obligations to protect and promote human rights in the continent. The *African Human Rights Yearbook* project is a central element in the collaborative efforts of the three institutions.

Although the debate on human and peoples' rights continues to progress, stakeholders at the national level are concerned about socio-economic inequalities, the persistence of harmful cultural practices, gender discrimination, the ongoing criminalisation of vulnerable groups and the insufficient integration of human rights principles into national development plans on the continent.

It is also a concern that armed conflicts involving child soldiers, civilian deaths, enforced disappearances and gender-based violence are on the increase. In addition, restrictions on freedom of expression through harassment of national and international human rights organisations, corruption, harsh prison conditions, the food crisis and climate change continue to have a devastating impact on human rights. In this context, we must not forget the widespread restriction of the civic space, as well as threats and reprisals against human rights defenders.

All these challenges show how important it is for Africa to integrate human rights into its education systems, and to strengthen its mechanisms for protecting and promoting human rights by providing them with sufficient resources and adhering to their recommendations. We are still a long way from achieving this.

This edition of the *Yearbook* addresses various aspects of the journey so far in the protection of human and peoples' rights, such as the legal protection of boys and men against terrorism and banditry in Africa, the integration of a gender perspective in the teleological interpretation of socio-economic rights in the Maputo Protocol, the right to adequate housing under African regional human rights legislation, the African specificity of international investment law. The protection of women's and children's rights, analysis and commentary on the human rights implications of selected African Court rulings, and much more.

It also reflects on the African Union Theme for 2024 which focuses on 'Building resilient education systems for increased access to inclusive, lifelong, quality, and relevant learning in Africa'. Papers on this theme include the human rights implications to learners, educators, parents and guardians, and the right to education for people with disabilities in the light of the Protocol to the African Charter on

Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.

We are confident that the ideas expressed here will not go unheeded. They should inspire readers, decision-makers and researchers to formulate further thoughts that will improve the quality of life within communities, to the great benefit of individuals.

Very few people are aware that there is now a veritable 'human rights economy' on the continent, which the *African Human Rights Yearbook* is helping to establish. It has done so in four ways. In the first, that of human rights savings, by revealing year after year the essentials of the rights preserved, conserved, saved and protected through these instruments. In the second, that of the production of thoughts related to human rights. In the third, the distribution of human rights by conveying these thoughts throughout the continent in both soft and hard formats. The fourth, and final, path is that of consumption, when national laws and practices are aligned with African standards and communities or individuals demand the materialisation of the ideas expressed therein. I fundamentally believe in this.

Rémy Ngoy Lumbu
Chairperson, African Commission on Human and Peoples' Rights

Le 21 octobre 2024, l'Union africaine a célébré la Journée africaine des droits de l'homme, marquant les 34 ans de l'entrée en vigueur du premier traité africain relatif aux droits de l'homme adopté en 1981, et entré en vigueur en 1987. Il s'agit de la Charte africaine des droits de l'homme et des peuples (Charte africaine), dont le mécanisme de mise en œuvre institué est la Commission africaine des droits de l'homme et des peuples (Commission africaine).

D'autres traités relatifs aux droits de l'homme ont suivi. Il s'agit de la Charte africaine des droits et du bien-être de l'enfant, devenue opérationnelle le 29 novembre 1999 instituant un Comité africain d'experts sur les droits et le bien-être de l'enfant (Comité), et le Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples, en vigueur depuis le 25 janvier 2004 mettant en place la Cour africaine des droits de l'homme et des peuples (Cour).

Cette architecture normativo-institutionnelle est la preuve d'une adhésion continentale aux idéaux des droits de l'homme qui devait se matérialiser par un alignement des lois nationales et systèmes juridiques nationaux.

L'idée à la base était que l'adhésion aux droits de l'homme faciliterait la bonne gouvernance et l'avènement de la démocratie, et qu'une fois installée partout, cette dernière aiderait les dirigeants politiques à limiter la concentration, voire la confiscation, du pouvoir et changerait qualitativement et positivement le destin de notre continent.

Depuis sa création, la Commission africaine a déployé des efforts pour faire progresser l'adhésion aux principes des droits de l'homme et la jouissance des droits garantis par la Charte africaine. Elle a mis en place 12 mécanismes subsidiaires ou mécanismes spéciaux, a tenu 81 sessions ordinaires qui ont créé des plateformes de délibération sur des questions pertinentes relatives aux droits de l'homme avec les États, les parties prenantes aux droits de l'homme et les défenseurs des droits de l'homme.

Elle a adopté de nombreux instruments juridiques, non juridiquement contraignants certes, mais dont la «valeur *recommendatoire*» oblige tout de même à une certaine forme d'«obligation *implementationnelle*» consentie et voulue par les gouvernements en vue d'orienter les décisions et les choix que prennent les Etats dans la gestion de la chose publique. Le Etats ont l'obligation juridique, l'obligation contraignante pour ainsi dire, indubitable d'appliquer la Charte. La Commission formule des recommandations pour mettre en œuvre ces obligations juridiques. C'est là que loge la petite nuance salvatrice imperceptible pour plusieurs.

En 2022, la Commission a facilité l'adoption par l'Union africaine du Protocole sur les droits des citoyens à la protection sociale et à la sécurité sociale En 2024, elle a fait de même pour le Protocole à la Charte africaine des droits de l'homme et des peuples sur l'apatridie et la nationalité. Elle a également contribué à l'élaboration du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des personnes âgées (entrée en vigueur le 6 novembre 2024). Elle

est aussi à l'origine du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des personnes handicapées, qui est entré en vigueur en 2024.

En outre, les trois institutions des droits de l'homme de l'Union africaine (UA) – la Commission, le Comité et la Cour – en collaboration avec d'autres acteurs clés de l'UA, ont continué à se réunir dans le cadre de l'architecture africaine de gouvernance (AGA), sur diverses questions relatives aux droits de l'homme, et ont réalisé des progrès considérables en matière de synergie et de collaboration dans le cadre de diverses activités visant à sensibiliser et à encourager les acteurs des droits de l'homme, en particulier les États, sur leurs obligations de protéger et de promouvoir les droits de l'homme sur le continent. Le projet d'*Annuaire africain des droits de l'homme* est un élément central qui matérialise les efforts de collaboration des trois institutions.

Bien que le débat sur les droits de l'homme et des peuples continue de progresser, les parties prenantes au niveau national s'inquiètent des inégalités socio-économiques, de la persistance de pratiques culturelles néfastes, de la discrimination fondée sur le genre, de la criminalisation continue des groupes vulnérables et de l'intégration insuffisante des principes des droits de l'homme dans les plans de développement nationaux sur le continent.

Il est également préoccupant de constater que les conflits armés impliquant des enfants soldats, la mort de civils, des disparitions forcées et des violences basées sur le genre sont en hausse. En outre, les restrictions à la liberté d'expression par le harcèlement des organisations nationales et internationales de défense des droits de l'homme, la corruption, les conditions de détention difficiles, la crise alimentaire et le changement climatique continuent d'avoir un impact dévastateur sur les droits de l'homme. Dans ce contexte, il convient de ne pas oublier la restriction partout de l'espace civique, ainsi que les menaces et les représailles qui pèsent sur les défenseurs des droits de l'homme.

Tous ces défis montrent à quel point il est important que l'Afrique intègre les droits de l'homme dans ses systèmes éducatifs et renforce ses mécanismes de protection et de promotion des droits de l'homme en les dotant de ressources suffisantes et en adhérant aux recommandations qu'elles formulent. Nous en sommes encore loin.

Cette édition de l'*Annuaire* aborde divers aspects du chemin parcouru jusqu'à présent dans la protection des droits de l'homme et des peuples, tels que la protection juridique des garçons et des hommes contre le terrorisme et le banditisme en Afrique, l'intégration d'une perspective de genre dans l'interprétation téléologique des droits socio-économiques dans le protocole de Maputo, le droit à un logement adéquat en vertu de la législation régionale africaine sur les droits de l'homme, la spécificité africaine de la législation internationale sur l'investissement : la protection des droits des femmes et des enfants, l'analyse et les commentaires sur les implications en matière de droits de l'homme de certains arrêts de la Cour africaine, et bien d'autres choses encore.

Il réfléchit également sur le thème de l'Union africaine pour 2024 à savoir «Construire des systèmes éducatifs résilients pour un accès accru à un apprentissage inclusif, tout au long de la vie, de qualité et pertinent en Afrique», en regard des implications du thème en matière de droits de l'homme pour les apprenants, les éducateurs, les parents et les tuteurs, en particulier le droit à l'éducation pour les personnes handicapées à la lumière du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des personnes handicapées en Afrique.

Nous osons espérer que les idées y exprimées ne resteront pas lettre morte. Elles ne doivent en aucun cas être considérées comme de la matière inerte. Elles devraient inspirer les lecteurs, les décideurs, les chercheurs à formuler d'autres pensées qui permettront d'améliorer la qualité de vie au sein des communautés, au grand bénéfice des particuliers.

Très peu le savent, il existe désormais une véritable «économie des droits de l'homme» sur le continent que l'*Annuaire africain des droits de l'homme* contribue à mettre en place. Ce, par quatre voies. En la première, celle de l'épargne des droits de l'homme, en dévoilant année après année l'essentiel des droits préservés, conservés, épargnés et protégés au travers de ces instruments. En la seconde, celle de la production des pensées en rapport avec les droits de l'homme. En troisième, celle de la distribution des droits de l'homme en véhiculant ces pensées partout sur le continent sous les formats soft et hard. En quatrième, et dernière voie, celle de la consommation lorsque les lois et les pratiques nationales sont alignées aux standards africains et les communautés ou particuliers réclament la matérialisation des idées y exprimées. J'y crois fondamentalement.

Rémy Ngoy Lumbu
Président de la Commission Africaine des Droits de l'Homme et des Peuples

I

ARTICLES FOCUSED ON ASPECTS OF THE AFRICAN HUMAN RIGHTS SYSTEM AND AFRICAN UNION HUMAN RIGHTS STANDARDS

ARTICLES PORTANT SUR LES ASPECTS DU SYSTEME AFRICAIN DES DROITS DE L'HOMME ET LES NORMES DES DROITS DE L'HOMME DE L'UNION AFRICAINE

The legal protection of boys and men against terrorism and banditry in Africa

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ABSTRACT: Terrorism and banditry are two closely related crimes that involve the engagement of arms in violent attacks calculated to threaten, kill, destroy and annihilate a part or unit of a population with the intent to create a general atmosphere of fear and insecurity. There could be intimidation to achieve economic, religious and or political objectives. These violent crimes have resulted in the death of millions across the globe and caused untold hardship and instability in affected countries especially in Africa. The number of refugees arising from terrorism and banditry in Africa is taking astronomical dimensions even as governments are increasingly helpless. It would appear that the more commonly discussed victims of terrorism and banditry have been the girls and women considered the most and disproportionately vulnerable. Utilising the doctrinal research methodology, this article examines how these violent crimes affect boys and men in Africa by way of physical harms, psychological trauma and other life disruptions. It investigates the adequacy or otherwise of the legal protection in the hope of suggesting a sustainable and inclusive legal framework that factors the peculiarity of vulnerabilities of boys and men, especially in conflict-prone parts of Africa and ensuring their access to justice, rehabilitation and empowerment.

TITRE ET RÉSUMÉ EN FRANÇAIS

La protection juridique des garçons et des hommes contre le terrorisme et le banditisme en Afrique

RÉSUMÉ: Le terrorisme et le banditisme, deux formes de criminalité intrinsèquement liées, se caractérisent par l'usage d'armes et d'actes de violence systématiques visant à intimider, tuer, détruire ou anéantir des segments de population. Ces crimes, souvent motivés par des objectifs économiques, religieux ou politiques, génèrent une atmosphère de peur et d'insécurité généralisée. En Afrique, leur impact est particulièrement dévastateur, ayant entraîné des millions de décès, d'importants déplacements de populations, et une instabilité socio-économique accrue. Alors que les filles et les femmes sont fréquemment identifiées comme les principales victimes en raison de leur vulnérabilité perçue, les garçons et les hommes, souvent négligés dans les discours sur les conséquences de ces crimes, subissent également des

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préjudices graves. Ceux-ci incluent des blessures physiques, des traumatismes psychologiques, la conscription forcée, et des perturbations de leur rôle familial et social. En adoptant une méthodologie fondée sur le positivisme juridique, cet article examine l'impact spécifique du terrorisme et du banditisme sur les garçons et les hommes en Afrique. Il évalue l'efficacité des dispositifs juridiques actuels pour répondre à leurs besoins particuliers et explore les insuffisances d'un cadre de protection trop souvent focalisé sur d'autres catégories de victimes. L'étude propose des recommandations en vue d'un cadre juridique inclusif et durable, prenant en compte les vulnérabilités propres aux garçons et aux hommes, notamment dans les zones de conflit. Elle plaide pour des mesures qui garantissent leur accès à la justice, leur réhabilitation, et leur autonomisation, tout en renforçant les obligations des États africains à travers des réformes législatives, des mécanismes de protection spécifiques, et une meilleure prise en charge psychosociale des victimes masculines de ces crimes.

KEY WORDS: terrorism and banditry; insecurity; hostage; kidnapping; armed violence; forced recruitment; sexual violence; economic crimes; access to justice; Africa

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1 INTRODUCTION

The word 'terrorism' was noticeably used in the early 1790s to describe the terror approach employed by the French revolutionaries against their perceived enemies.[1] The word has been associated with all kinds of negative references and meanings.[2] Many times, even freedom fighters like Nelson Mandela have been tagged terrorists by the political class. While the United States of America had witnessed a series of domestic and international terrorism attacks, the commitment to

1 JP Jenkins 'Terrorism' Britannica on politics, governance and law https://www.britannica.com/topic/terrorism (accessed 27 August 2022).

2 A Silke, 'The study of terrorism and counter terrorism' available at https://www.researchgate.net/publication/326849404_The_Study_of_Terrorism_and_Counterterrorism/link/5b6968f9a6fdcc87df6d6a52/download (accessed 8 August 2022).

prevent such re-occurrence did not emerge until after the 11 September 2001 attack.[3]

Not all African countries suffer from terrorism and banditry, but many countries on the continent are affected. The affected countries include Nigeria, Burkina Faso,[4] Algeria, Tunisia, Libya, Egypt, Somalia, Kenya and Mali.[5] Others are Niger, Cameroon, Chad, Democratic Republic of Congo, Tanzania, Burundi, Uganda, Togo, Rwanda, Morocco, Ethiopia, Rwanda, Benin, Sudan, South Africa, Mauritania, Angola, Gabon and Côte d'Ivoire.[6] Sudan, Gabon and Angola are the least affected countries.[7] It is important to mention that countries such as Ghana, Malawi, Madagascar, Guinea, Sierra Leone, Zambia, South Sudan, Botswana, Liberia, Namibia, Lesotho, The Gambia, Zimbabwe, and Equatorial Guinea are currently free from terrorism.[8] This article aims to provide a comprehensive analysis of the legal frameworks and protections available to boys and men in Africa who are affected by terrorism and banditry. It will delve into the specific challenges and vulnerabilities faced by this demographic, examining how existing laws and policies address their needs. It is structured into perceptions of terrorism and banditry.

1.1 Perspectives of terrorism and banditry in Africa

Several definitions have been propounded on terrorism. James Poland stated that the confusion over an acceptable definition is 'the most confounding problem in the study of terrorism'.[9] According to Shafritz, Gibbons and Scott in the early 1990s, 'it is unlikely that any definition will ever be generally agreed upon'.[10]

3 JW Maze 'With liberty and justice for all: An examination of the United States' compliance with rule of law as it relates to domestic and international terrorism' Masters thesis, Wright State University (2018) 36.

4 Studies have shown that Burkina Faso's government only controls 60% of the country's territory and the rest 40% is under the control of terrorists and bandits. See Mahamadou Issoufou, former president of Niger who was appointed by ECOWAS as a mediator to Burkina Faso, Al Jazeera news of 18 June 2022. Reutershttps://www.aljazeera.com/news/2022/6/18/state-controls-only-60-per cent-of-burkina-faso-mediator (accessed 14 September 2022).

5 Africa Centre for Strategic Studies referred to by Bridget Boakye, 'Terrorism in Africa: 21 active militant groups on the continent in 2018' https://face2 faceafrica.com/article/terrorism-in-africa-21-active-militant-groups-on-the-conti nent-in-2018 (accessed 30 August 2022).

6 Satista 'Terrorism index in African countries as of 2021' https://www.statista. com/statistics/1197802/terrorism-index-in-africa-by-country/(accessed 13 September 2022).

7 As above.

8 As above.

9 J Poland *Understanding terrorism: groups, strategies, and responses* (1988).

10 JM Shafritz, E Gibbons & G Scott (eds) *Almanac of modern terrorism* (1991).

Many researchers indicated to have accepted the assessment by Shafritz.[11] While the debate rages on, researchers have learnt to by-pass the definition problem and focus their attention on other topics other than definition. Notwithstanding the inability of researchers of this topic to reach an acceptable definition, researchers have agreed that they cannot totally ignore the definition question. Adams Roberts agreed with this position when he stated:[12]

> I do not share the academic addiction to definitions. This is partly because there are many words that we know and use without benefit of definition. 'Left' and 'right' are good examples, at least in their physical meaning. I sympathise with the dictionary editor who defines 'left' as 'the opposite of right' and then obliges by defining 'right' as 'the opposite of left'. A more basic reason for aversion to definitions is that in the subject I teach, international relations, you have to accept that infinite varieties of meaning attach to the same term in different countries, cultures and epochs. It is only worth entering into definitions if something hangs on them. In this case (terrorism), something does.

Roberts's position was right. The definition of terrorism is important to the entire study of the topic. An acceptable definition will allow researchers to develop shared views, methods, and approaches to the study and will help them to make recommendations on curbing the crime. In the absence of an agreeable definition, the study of the topic will be uncoordinated, fragmented, and unrealistic.[13]

Legally speaking, not all jurisdictions have definitions for terrorism. There are across jurisdictions what is referred to as shared features on the subject some of which are: the use of or threat of violence, creation of fear that is not limited or restricted to the immediate victims, but a larger population, use of arms et cetera. The extent to which it employs fear as a tool distinguishes banditry and terrorism from historically known war. However, this article considers terrorism from a legal perspective. It perceives terrorism strictly as a crime against the sovereignty of the state or states.

Terrorism can be said to be a violent crime involving the use of arms calculated to kill, destroy and annihilate a marked set or portions of a population of a state with the intention of creating a general climate of

11 The assessment and or position is to the effect that rather than dissipate energies on the seemingly unresolvable issue of definition, researchers should pay more attention to the other issues involved in the study of terrorism and how the crime affects humanity. This way, they can make recommendations on how to stop the menace. It is taken that certainly within each society people have an idea of conducts or acts that are categorised as terrorism. The sense often is that while one might not be able to define the term terrorism absolutely, he/she has an idea of what it is and can recognise it when seen.

12 As quoted in A Roberts, 'Can we define terrorism?' *Oxford Today*, http://www.oxfordtoday.ox.ac.uk/archive/0102/14_2/04.shtml (accessed 29 August 2022

13 A Merari 'Academic research and government policy on terrorism' (1991) 3 *Terrorism and Political Violence* 88-102. She argued that repeated occurrences of the same phenomenon are the basis of scientific research. In the case of terrorism, however, there is hardly a pattern which allows generalizations. Clearly, the heterogeneity of the terroristic phenomena makes descriptive, explanatory and predictive generalizations, which are the ultimate products of scientific research, inherently questionable

fear, insecurity, intimidation and failure in governance in an attempt to achieve economic, religious and or political objectives. Where it is for political objectives, it includes an attempt to topple the incumbent government or a radical change in the type or form of government.

Terrorism may mean the act of perpetuating violent crime either by an individual or a group of persons usually bonded by an ideology of the general public with the intention to create fear and send a message to the government.[14] As stated earlier, the general aim of terrorists when they attack is to show not just their presence but their capacity and seriousness to the government. This accounts for why they usually will claim responsibility for their attacks afterwards.[15]

According to the Terrorism Act of the United Kingdom,[16] terrorism is defined as '[t]he use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public for political, religious or ideological ends'. This definition is similar to that of the US. The US Federal Bureau of Investigation (FBI) defines terrorism as '[t]he unlawful use of force or violence against persons or property to intimidate or coerce a government or civilian population in furtherance of political or social objectives'.

The Nigerian Terrorism (Prevention) Act,[17] as amended by the Terrorism (Prevention) Amendment Act,[18] defines terrorism as an act committed with malice and intent to cause serious harm or damage to a country or international organisation. Such intent includes actions aimed at pressuring governments or international bodies to take or refrain from certain actions, intimidating populations, destabilizing or destroying fundamental structures, or influencing governments through intimidation or coercion. It also specifies that terrorism involves or causes attacks on people's lives or kidnappings.[19]

Somalia's 'Terrorist Act' adopted the 1999 International Convention for the Suppression of the Financing of Terrorism and its annexure. Terrorism in Somalia therefore means any act which constitutes an offence as involving any actions detailed in the treaties included in its annex. It also encompasses any acts intended to injure or kill civilians or non-combatants during armed conflict, with the aim of instilling fear in the populace or coercing a government or international organisation to either take a specific action or abstain from one.[20]

In like manner, Burkina Faso's Repression of Acts of Terrorism 2015 shared the definitive view of the Nigerian Legislation. From the above definitions, it is clear that globally, there is an increasing

14 https://byjus.com/free-ias-prep/terrorism/ (accessed 30 August 2022).
15 As above.
16 See secs 1 & 2 of the UK Terrorism Act 2000.
17 Terrorism (Prevention) Act 2011.
18 Terrorism (Prevention) Amendment Act 2022.
19 See sec 1(2) of the Act.
20 See Part 1 Anti-Money Laundering and Countering the Financing of Terrorism Act, 2016.

awareness on what terrorism means. This position is buttressed by the fact that the UK, USA, Somalia, Burkina Faso, Nigeria and a host of other states have all proscribed virtually the same class of conducts and groups.[21]

The Global Terrorist index (GTI) report released towards the end of 2019 ranked Nigeria, for the fifth time running, since 2015, as the third most impacted by terrorism, globally and the most terrorised African country. However, Nigeria moved from being the most terrorised state followed by Somalia and Egypt in 2019,[22] to being the third in 2021 and 2022 respectively.[23] The implication of this is that Africa is terribly terrorised.

1.2 Banditry

On its part, Banditry can be said to mean the 'actual or threatened use of arms (any instrument of force/coercion/violence) to dispossess people of their material belongings'.[24] According to Ahmed, Tanimu Mahmoud, it means:

> The occurrence or prevalence of armed robbery or violent crime. It involves the use of force, or threat to that effect, to intimidate a person with the intent to rob rape or kill. Banditry is a crime against persons. It has been a common genre of crime, as well as cause violence in contemporary African societies.[25]

Banditry in Africa has metamorphosed into an advanced continental security.[26] Some organised criminals have seen banditry as a means of livelihood. In the same vein, terrorists often resort to banditry in an attempt to raise funds for their operations to gain advantageous bargaining positions. Kidnapping has become the usual and regular acts of bandits in modern day Africa.[27]

21 See sec 2 of the Nigerian Terrorism (Prevention) Act, sec 3 and Schedule 2 of the UK Terrorism Act, American Domestic Terrorism Prevention Act of 2022

22 Global Terrorism Index: 'Top 20 most terrorised countries in Africa, 2018' available at https://talkafricana.com/global-terrorism-index-top-20-most-terrorised-countries-in-africa-2018/ (accessed 29 August 2022).

23 Global Terrorism Index available at https://moroccantelegraph.com/news/global-terrorism-index-2022-morocco-among-the-least-affected (accessed 29 August 2022).

24 AC Okoli & A Ugwu 'Of marauders and brigands: scoping the threat of rural banditry in Nigeria's North West' (2019) 4(8) *Brazilian Journal of African Studies* 201-222.

25 See AT Mahmoud 'Banditry dynamism and operating pattern of crime in northwest Nigeria: a threat to national security' available at https://www.researchgate.net/publication/358398187_Of_Banditry_and_Human_Rustling_The_Scourge_of_Kidnapping_in_Northern_Nigeria/link/62006375702c892cefoba4db/download (accessed 29 August 2022). See also IM Abbas 'No retreat no surrender conflict for survival between Fulani pastoralists and farmers in Northern Nigeria' (2013) 8 *European Scientific Journal* 17-18.

26 Goodluck Jonathan Foundation (2021). Terrorism and banditry in Northern Nigeria: the nexus (Katsina, Niger, and Zamfara States context. Abuja: Goodluck Jonathan Foundation).

27 C Okoli 'Of banditry and human rustling: the scourge of kidnapping in Northern Nigeria' (2022) 11 *African Journal on Terrorism*.

Terrorist groups engage in banditry and kidnapping for ransom while terrorism is ideologically motivated, banditry is often driven or motivated by economic considerations. Akogwu has argued that:

> While the term 'terrorism' entails the premeditated use of violence by an ideologically motivated individual or group to create a general climate of fear in a population with the intention of bringing about a particular political objective, 'banditry' refers to economically motivated armed violence perpetrated by gangs driven primarily by the intention to extort, dispossess or plunder their targets – individuals, groups or communities.[28]

Secondly, while the primary goal of terrorists is to kill and destroy properties with the aim of sending a signal of insecurity and vulnerability, bandits operate for the immediate gain of the crime and use it as a means of extortion of citizens.

Bandits are less likely by their *modus operandi* to carry out targeted killings which are intentional targets of and strategies of terrorists. While terrorists have a broader leadership and organisational base with international synergies, bandits are often localised and operate in clusters.[29] Furthermore, bandits have limited knowledge and interest in the use of sophisticated weapons while terrorists engage in military training of their members and increased sophistry of weaponry and theatre actions.[30] While bandits are not known for using suicide bombing tactic, it is a usual signature of terrorists.[31] While bandits do not operate media outfits, terrorist organisations usually have well organised and managed media outfits for propaganda and strategy.[32]

The above position and differences notwithstanding, it has been argued by some that there is no difference between terrorism and banditry as both crimes are often committed by the same set of criminals.[33] Be that as it may, we believe that there are differences between terrorism and banditry.

1.3 Why do people join terrorism and banditry?

One of the reasons why many people voluntarily go into terrorism and banditry is to vent their grievance against the system. It could be the political or economic system. Peter Tosh, a Reggae artist in his song 'Justice' said that asking for peace where there is no justice is needless

28 JC Akogwu 'From terrorism to banditry: Mass abductions of schoolchildren in Nigeria' Accord 19 August 2022 https://www.accord.org.za/conflict-trends/from-terrorism-to-banditry-mass-abductions-of-schoolchildren-in-nigeria/ (accessed 14 September 2022).

29 Politicsandlifestyle, 'Check out the 15 differences between terrorists and bandits as highlighted by Senator Sheu sanni', https://ng.opera.news/ng/en/politics/18 (accessed 13 September 2022).

30 As above.

31 As above.

32 As above.

33 See Politics and lifestyle, 'Check out the 15 differences between terrorists and bandits as highlighted by Senator Sheu sanni' https://ng.opera.news/ng/en/politics/18 (accessed 13 September 2022).

and that once there is justice, every crime present in the society will vanish in a short while. It has been shown that many young people who leave Europe to fight as insurgents are youths who for one reason or the other, are unhappy with the governments.[34] For this group, there are no economic considerations, but a chance to avenge a perceived injustice.

For some others, it is because they are disillusioned and have lost self-belief, confidence and courage. Consequently, they are constantly in search of what will fill the void of self-esteem and lack of courage.[35] This is one of the reasons why many youths join cult groups too. They are in search of self-esteem, security and protection.

Some people join terrorists and bandits mainly for economic gains. Some see it as a way of catering for their families and meeting personal needs. A research conducted in Somalia showed that those recruited into terrorist organisations particularly from the local communities join them mainly for economic benefits. 27 per cent of the respondents said they joined al Shabab for financial reasons. 15 per cent said their reason was religious and 13 per cent said they were forced into it.[36]

For yet others, the only motivation is the belief God-imposed a duty to defend their religion against other religions or influences considered taboo or alien to the terrorists' religion.[37] The quest for power and control forms the basis for why some other persons venture into terrorism. A typical case is the situation in Afghanistan where the terror groups have indulged in and fought for control of the country for decades and finally succeeded in what is currently referred to as the rule of terrorists in the country.

1.4 Types/forms of terrorism

Study subjects like terrorism are better classified based on observed typologies.[38] One of the popular bases for classification recognises three basic types of terrorism namely: revolutionary terrorism, sub-revolutionary terrorism, and establishment terrorism. Although this

34 See https://balkaninsight.com/2024/10/14/reversing-youth-exodus-from-western-balkans-will-be-hard-report-warns/ (accessed 20 October 2024), https://youth.europa.eu/news/eu-youth-strategy-2019-2027-proves-effective-addressing-young-peoples-concerns_en (accessed 20 October 2024).

35 T Hartsoe 'Why people join terrorist groups' *Duke Today* 23 January 2018 https://today.duke.edu/2018/01/why-people-join-terrorist-groups (accessed 13 September 2022).

36 European Institute of Peace, 'why do people join terrorist organisations?' 29 June 2015 https://www.eip.org/why-do-people-join-terrorist-organisations/ (accessed 13 September 2022).

37 SB Grant 'The understanding of evil: a joint quest for criminology and theology' in R Chairs & B Chilton (eds) *Star Trek visions of law & justice* (2003).

38 G Martins 'Types of terrorism' available at https://www.researchgate.net/publication/316220694 (accessed 28 August 2022). Terrorism typologies refer to shared characters or traits exhibited by the terror groups involved in these violent crimes.

classification has been challenged, it is helpful in the understanding and evaluation of terrorism.[39]

Revolutionary terrorism is the most common form of terrorism. Here the terrorists' goal is the complete abolishment of the political order and to replace the same with the system that agrees with the ideology.[40] Sub-revolutionary terrorism is not so common.[41] The terrorists here do not seek a total change or abolishment of the existing system or order, but a modification. An example of this type of terrorism is the case of ANC and its campaign to end apartheid in South Africa which was tagged terrorism by the white rulers.

Establishment terrorism also referred to as state or state-sponsored terrorism is used by governments — or more often by factions within a conflicting system of government.[42] One clear feature of establishment terrorism, unlike others, is secrecy. Governments that perpetuate this type of terrorism, keep their plans away from their citizens to avoid regional and international sanctions.[43]

There is another popular typology which deals with the classification of terrorism by their operational level rather than their goals.[44] Under this heading, there are mainly four types of terrorism and banditry namely: State-sponsored terrorism, dissident terrorists, international terrorists, and terrorism for religious purpose.[45]

1.5 Africa's active terror groups and their country distributions

It has been posited that across the African continent, there are 21 terror groups with presence in 54 countries that are very active with well published activities, namely:

> Al-Qaeda in the Islamic Maghreb (AQIM), Ansaroul Islam, Jamaat Nusrat Al-islam Wal Muslimeen, the Movement for Monotheism and Jihad in West Africa (MUJAO), Islamic State in the Greater Sahara, Boko Haram, Islamic State West Africa, Okba Ibn Nafaa Brigade, Shabab Al-tawhid, Soldiers of the Caliphate, Ansar Al-Sharia (Derna), Ansar Al-Sharia (Benghazi), Wilayat Barqa, Wilayat Fezzan, Wilayat Tarabulus, Ansar Bait

39 As above.

40 J Fallows, P Bergen, B Hoffman & S Simon 'Al Qaeda then and now' in KJ Greenberg (ed) *Al Qaeda now: understanding today's terrorists* (2005) 3-26.

41 PS Fosl 'Anarchism and authenticity, or why SAMCRO shouldn't fight history' In G A Dunn & JT Eberl (eds) *Sons of anarchy and philosophy: brains before bullets* (2013) 201-214.

42 AH Cordesman *Terrorism, asymmetric warfare, and weapons of mass destruction: defending the US homeland* (2002) referred to by Martins (n 38).

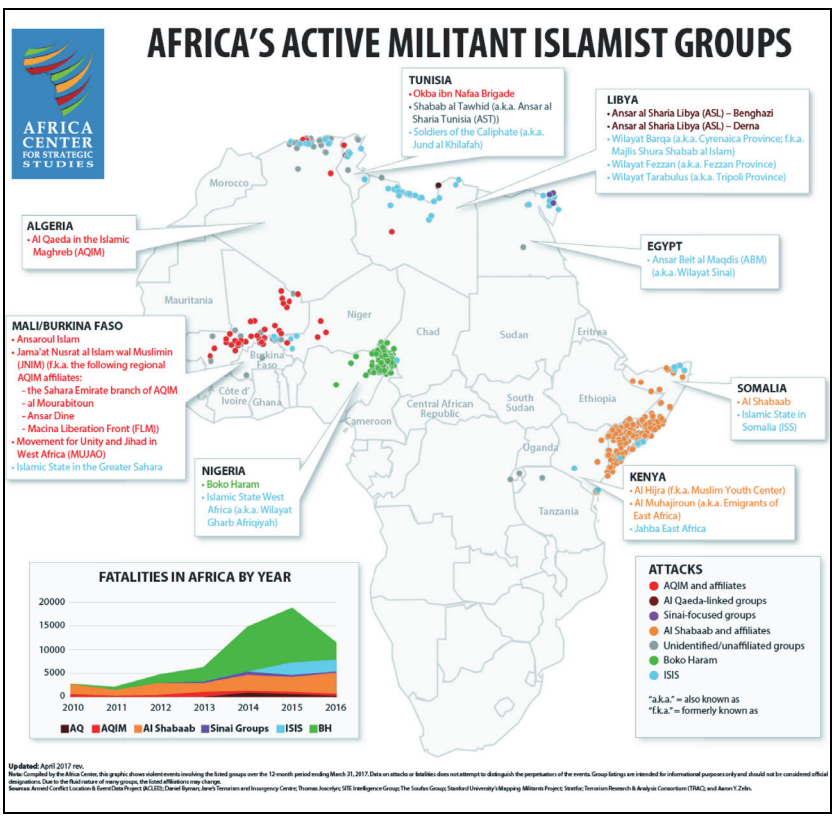
43 As above.

44 See 'Terrorism' referred to by Nicole Gutierrez, available at https://www.fbi.gov/investigate/terror (accessed 27 August 2022).

45 N Gutierrez 'Four types of terror 1' available at https://www.academia.edu/41467283/FOUR_TYPES_OF_TERROR_1 (accessed 30 August 2022).

Al-Maqdis, Al Shabaab, Islamic State in Somalia, Al Hijara, Al Muhajiroun, Jahba East Africa.[46]

The above terror groups and their country distributions are as shown in the distribution map below with the exception of Mozambique where the complexity of the conflict has made it difficult to identify others apart from the main ISIS-Mozambique, also known as al-Shabaab:[47]



46 Africa Centre for Strategic Studies referred to by Bridget Boakye, 'Terrorism in Africa: 21 active militant groups on the continent in 2018' https://face2faceafrica.com/article/terrorism-in-africa-21-active-militant-groups-on-the-continent-in-2018 (accessed 30 August 2022).

47 See The Global Terrorism Index: https://www.economist.com/middle-east-and-africa/2022/03/05/the-worlds-centre-of-terrorism-has-shifted-to-the-sahel (accessed 20 October 2024); The United Nations Counter-Terrorism Office: https://www.un.org/counterterrorism/ (accessed 20 October 2024).

2 BOYS AND MEN AS VICTIMS OF TERRORISM AND BANDITRY

Among writers, there has been a consensus on violence targeted at a particular gender,[48] evidence exists that men and women have been specifically selected as targets of terrorism because of their gender for various reasons.[49] For example, reports have shown that men and boys have been murdered in their numbers, females and even girl children have been the victims of terrorism and banditry too,[50] and both genders have come face to face with gender based violence.[51] The question therefore is why are terrorists and bandits choosing boys and men as victims of their crimes? Some of the reasons are as follows.

Enemy boys and men can be selected for abuse and terror attacks as a way to end the group's heritage and future.[52] Boys and men can also be targeted by terror groups in an attempt to leave the entire population vulnerable, weak and defenceless against future attacks and to make eventual total take-over of the affected territory less combative.[53] Using this approach, terrorist groups have taken over several territories with the men and male children annihilated, leaving no room for any revolt in the nearest future. The women and girls are at the mercy of such terror groups.[54]

Another reason why boys and men may be specifically targeted by terrorists is to immortalise the legacy of the terrorists by raising generations of terrorists after them. With this philosophy in mind, terrorists embark on kidnapping and forced recruitments of boys and young men.

Teens are particularly vulnerable to this approach of extremists using mails that promise to meet a variety of needs by the young ones it is targeted at. It could be financial, psychological, or religious needs. ISIS and al-Qa'ida have repeatedly adopted this method of recruitment to woo minors using online platforms. For instance, in the month of October 2018 al-Abd al-Faqir Media Foundation, a pro-ISIS media

48 A Berko & E Erez 'Gender, Palestinian women, and terrorism: women's liberation or oppression?' (2017) 30 *Studies in Conflict & Terrorism* 511.

49 A Speckhard & K Akhmedova 'The new Chechen jihad: militant wahhabism as a radical movement and a source of suicide terrorism in post-war Chechen society' (2006) 2 *Democracy and Security* 110.

50 EC Gentry & L Sjoberg *Beyond mothers, monsters, whores: thinking about women's violence in global politics* (2015) 2.

51 As above.

52 T Agara 'Gendering terrorism: women, gender, terrorism and suicide bombers' (2015) 5 *International Journal of Humanities and Social Science* 116.

53 A Schmid & A Jongman *Political terrorism* (1988) 53; J Poland *Understanding terrorism: groups, strategies, and responses* (1988).

54 G Ammerdown 'Rethinking security: a discussion paper' (2016) https://www.rethinkingsecurity.org.ukCurott (accessed 1 September 2022).

outfit — launched its first Arabic-language magazine titled 'Youth of the Caliphate', aimed at young supporters who may share ISIS ideology.[55]

The next question to be answered is how are boys and men victims of terrorism? These can happen in several ways, namely: through targeted elimination or annihilation by terror groups. This can be done with several reasons in mind as explained earlier. The second way in which men and boys can and have become victims of terrorism is through forced recruitment into terror armies. There have been stories about many terrorists confessing upon arrest that they were coerced into the terror groups at the risk of being killed. A report titled 'How Boko Haram is Forcefully Recruiting Cameroonian Boys'[56] showed how militants of the dreaded Boko Haram group snatch young boys in Cameroon, from across the border with Nigeria, to force them into the sect. According to the report, numerous villages in the area were cleared out and schools torched by the terrorists even despite the presence of security operatives. Some residents recounted how Boko Haram raided villages during the daytime. Indoctrination is a strong tool at the hands of the terrorists against their coerced victims.[57]

In furtherance of its position against terrorism, the International Criminal Court in the Hague has proscribed the engagement of minors particularly persons who have not attained the age of 15 into the army or making them engage in armed conflict as a crime. The UN Convention on the Rights of the Child provides that all parties should ensure to guide against the engagement or combat use of minors.[58] The above position notwithstanding, the recruitment of boys and men into terror groups have continued unabated. One of the ways by which this is done is by deceiving their victims into believing that they are going for Islamic training.[59] Evidence showed that between 2005 and 2020,

55 Joint Counter Terrorism Team 'Involvement of minors in acts of terrorism', available at https://www.dni.gov/files/NCTC/documents/jcat/firstresponders toolbox/62us--Involvement-of-Minors-in-Terrorist-Plots-and-Attacks-Likely-To-Endure-survey.pdf (accessed 30 August 2022).

56 http://img.naij.com/n/03/8/cameroon_bir.jpg (accessed 1 September 2022).

57 As above.

58 A Al-Bahri 'How terror group recruits and lures children to specialized fighting camps' https://abcnews.go.com/International/terror-group-recruits-lures-children-specialized-fighting-camps/story?id=24430928 (accessed 1 September 2022).

59 'When I arrived at the camp, fighters and religious teachers from the organization supervised our training' Mohammed says. 'The training was divided into two parts. In religious classes, they taught us their version of Islam, the extremist methods they follow, and the necessary foundations of creating an Islamic caliphate state – their ultimate goal. They also try to convince us of jihadist ideology, like the greatness of martyrdom.'

The second part of training is for combat. 'They trained us very harshly,' he said. 'They trained us to deal with being tired and to face hardship. They also trained us to use arms'. Yasser's father said officials from the militant group had tricked him into bringing his son to the camp by telling him it was merely for studying the Quran and foundations of Islam. But when his son arrived, 'It turned out to be a camp to recruit children to be a new generation of extremists. They were trying to prepare children to carry out martyr bombings on behalf of the organization. I did not accept that and tried to pull Yasser out of the camp, but they refused and

more than 93 000 children were recruited into all kinds of armed groups including terror groups.[60]

3 THEORIES OF TERRORISM

3.1 Political theory

Under this theory, the main consideration for the terrorist groups is the quest to gain political power or control over territories.[61] A ready example is the case of Afghanistan where the militants fought the US and its incumbent government with the aim of wresting power from them and achieved it in 2021 with the exit of American forces. The militants currently run the government of the country with tails of woes.[62]

Many times, terror groups have argued that their decision to take up arms against the government is their way of protesting against misrule and corruption by government officials and undue foreign interest in the natural resources of their countries among others.[63] It has been argued that Anarchism was the ideology that gave rise to political agitations.[64] For example, the theory teaches the six steps to undermining the 'social structure for revolutionary change'.[65] states: 'Wipe out the intelligent and the vigorous persons of the society then, abduct the wealthy community for ransom for your financial strength, join the group of politicians and take out their secrets, help the criminals of that society to make your own militants …' Carlo Pisacane propounded the idea of bombing and using propaganda to achieve political goals. Karl Heinzen and Johann Most on their part consented

prevented me from seeing him. They even threatened to execute me for attempting to prevent jihad.' Abou al-Ghanem, an ISIS fighter who trains children in the camps, says that his organization creates them merely 'to fulfill the duty upon us all to fight the enemy and learn the foundations of jihad and the true teachings of Islam'. He stated further 'We are teaching children who are less than 15 years old how to fight and use arms in order to build a generation of strong fighters who follow the righteous path' he says. 'That's why we created these camps'.

60 UNICEF document https://www.unicef.org/protection/children-recruited-by-armed-forces (accessed 1 September 2022).

61 I Afshan Abbasi & M Kumar Khatwan 'An overview of the political theories of terrorism' (2014) 19 *OSR Journal of Humanities and Social Science* 103-107.

62 CP Blamires & P Jackson (eds) *World fascism: a historical Encyclopedia* Volume 1:A-K (2006): D Rapoport 'Fear and trembling: terrorism in three religious traditions' (1984) 78 *American Political Science Review* 668-672.

63 D Rapoport & A Yonah (eds) *The morality of terrorism: religious and secular justification* (1982); G Caforio *Handbook of the sociology of the military, handbooks of sociology and social research* (2006) 12.

64 A Zalman 'History of terrorism: anarchism and anarchist terrorism, about news' http://terrorism.about.com/od/originshistory/a/Anarchism.htm (accessed 1 September 2022).

65 M Banuin, quoted by I Abbasi & M Kumar Khatwani in 'An overview of the political theories of terrorism' (2014) 19 *IOSR Journal of Humanities and Social Science* 103-107.

to the employment of weapons capable of wrecking massive damage to lives and property for the same purpose while Claudius Konigstein agreed with the teaching that innocent persons, crowded places and economic infrastructures be targeted to achieve a violent revolutionary goal.[66]

3.2 Economic theory

The position of this theory is that one principal motivation of terrorism is the economic gains. There abound instances where alleged terrorists have confessed that they decided to join the terror groups because they were promised good financial gains which will in turn allow them to take care of their families and meet personal needs. For the proponents of this theory, if the state wants to curb terrorism, it should concern itself primarily with ensuring a good economy and equal economic opportunities for its citizens.[67] Here, the state should pursue economic policies that are capable of giving the people economic prosperity and sustainable development. While it is the position of this paper that a country's economic state should not be a ground for commission of crime, it is common knowledge that involvement in crime has often been motivated by these factors.

3.3 Religious theory

The link between religious discipline and extremism is a strong one. About half of all the deadly terror sects across the world have religious ideologies.[68] They see the armed conflict particularly terrorism as a way of homage to God and defending their allegiance. They believe it is jihad (holy war) which they must fight for God and be ready to die for if they truly love and believe in God. To them, it is a demand placed on them by God and for which they shall be rewarded heavily in this world and the world after.[69] Influenced by this indoctrination that comes through a system of education, they can gladly engage in suicidal terror attacks using bombs and other weapons against other religions and

66 Blamires & Jackson (n 62); D Rapoport & A Yonah (eds) *The morality of terrorism: religious and secular justifications* (1982).

67 J Płaczek defines the concept of economic security of a state as '[...] such a state of development of the national economic system that ensures high efficiency of its functioning and the ability to effectively oppose external pressures that may lead to disturbances to its development. It aims to protect economic development'. Vide: J. Płaczek, the place and role of economic security in the security system of a state, in: TJemioło, sc. superv., Zarządzanie bezpieczeństwem narodowym [Managing national security], part 1, Warsaw 2006, p. 113.

68 SB Grant 'The understanding of evil: a joint quest for criminology and theology' in R Chairs & B Chilton (eds) *Star Trek visions of law & justice* (2003).

69 M Juergensmeyer *Terror in the mind of God: the global rise of religious violence* (2001) 12.

governments.[70] These terrorists see religious secularism, modernisation and westernisation including western education as vices and enemies that must be defeated at all cost. This is the case of Boko Haram in Nigeria and ISIS.

3.4 Rational choice theory

From this perspective, terrorism is a calculated violence in pursuit of certain objectives considered rational and justifiable when compared with the risks involved. Terrorism has been known to have some political undertone with goals[71] including the removal of a regime[72] or national independence.[73]

3.5 Incidents of terror attacks on boys and men across some jurisdictions in Africa

It was reported that Boko Haram insurgents murdered no less than 43 farmers who were working on a rice farm in Maiduguri on Saturday the 28 November 2020. The terrorists bound their victims and slit their throats with knives. 43 dead bodies were recovered, along with six others with fatal injuries. More bodies were recovered later raising the death toll.[74]

A truck bomb attack in Mogadishu capital of Somalia on Sunday the 15 October 2017 claimed at least 500 casualties and over 300 deaths involving mainly men and who were out to fend for their families.[75] The scale of the attack made it a matter of grave concern and one that the world will not forget in haste.[76]

In Algeria, while the government appears to be doing so much and is fully committed to the fight against terrorism, there are still reports of attacks here and there with casualties. On 14 October 2021, there was a report of the murder of a soldier with use of an improvised explosive device (IED) whilst the soldiers were on patrol duty at Tlemcen. On 6 August 2021, two military men were also murdered with the use of

70 S McGraw-Hill 'Anarchism, terrorism studies and Islamism' (2010) 1 *Global Discourse* 66-85; see also RB Fowler 'The anarchist tradition of political thought' (1972) 25 *Western Political Quarterly* 743-744.

71 The case of al Qaeda and the USA in Afghanistan.

72 As seen in Israel.

73 The Assassination of Lord Mountbatten by IRA, 'Facts and …' https://www.history.com/news/mountbatten… (accessed 1 September 2022).

74 *The Guardian* online news of 28 November 2020, 'Boko Haram kill dozens of farm workers in Nigeria' available at https://www.theguardian.com/world/2020/nov/28/boko-haram-reported-to-have-killed-dozens-of-farm-workers-in-nigeria (accessed 1 September 2022).

75 *The Guardian* news 'At least 300 people killed and hundreds seriously injured in attack blamed on militant group al-Shabaab' https://www.theguardian.com/world/2017/oct/15/truck-bomb-mogadishu-kills-people-somalia (accessed 1 September 2022).

76 As above.

IED while on a mop up duty in Ain Defla. Two soldiers were also killed on 2 January 2021 while on duty at Tipasa and several other reports.[77]

According to a report published in March 2019 by the UN High Commissioner for Refugees (UNHCR)[78] continuous conflict has resulted in the displacement of about 115 310 persons internally in Burkina Faso alone. The regions most affected include the Sahel, Centre-Nord, Nord, and East regions, where the terrorists have concentrated their attacks. This shows that the impact of terrorism and banditry on boys and men are not just in their coerced recruitment and killing, but in injury and displacement and several other ways.

On 3 June 2022, it was reported that at least 50 persons were killed in an attack linked to al-Qaeda and ISIL (ISIS) in Northern Burkina Faso. The attackers were said to have struck at night in the province of Seno.[79] Again on 10 June 2022, it was reported that 11 Burkinabe military policemen were murdered in northern Burkina Faso by terrorists after their base came under heavy attack.[80]

In Sudan, on 9 December 2014 it was reported that a gun man later identified as a member of an Islamic militant group referred to as Takfir wal Hijra, walked into the mosque in the village of Garaffa, outside Omdurman, the twin city of the capital Khartoum during prayers, and opened fire on the worshippers using an automatic rifle killing tens of worshipers. He was later killed after all entreaties to him to surrender proved abortive.[81] The Sudanese Prime Minister, Abdalla Hamdok, was said to have survived a terror attack at the capital on 9 March 2020.[82]

There is no recent data of terror attack on Angola[83] The last terror attack in Angola appears to be the train attack of 2001 where a train was derailed and 250 persons on the train were killed.[84]

77 See UK Foreign Travel Advice, https://www.gov.uk/foreign-travel-advice/algeria/terrorism (accessed 14 September 2022).

78 UNHCR (March 2019). 'Country operation update – Burkina Faso'. UNHCR available at https://www.hrw.org/report/2019/03/22/we-found-their-bodies-later-day/atrocities-armed-islamists-and-security-forces (accessed 1 September 2022).

79 *Aljazeera News* 3 June 2022 https://www.aljazeera.com/news/2022/6/13/at-least-50-killed-in-burkina-faso-rebel-attack-government (accessed 14 September 2022).

80 Sophie Garcia, *Aljazeera News* 10 June 2022, https://www.aljazeera.com/news/2022/6/10/attackers-kill-11-military-police-in-burkina-faso (accessed 14 June 2022).

81 Global fight against terrorism, 'Gunman kills at least 20 people at Sudan mosque' https://www.gfatf.org/archives/gunman-kills-least-20-people-sudan-mosque/ (accessed 14 September 2022).

82 Global Fight Against Terrorism, 'Sudan PM says survived terror attack in capital' https://www.gfatf.org/archives/survived-terror-attack-capital/ (accessed 14 September 2022).

83 UK Gov, 'Foreign travel advice Angola' https://www.gov.uk/foreign-travel-advice/angola/terrorism (accessed 14 September 2022).

84 As above; Land Mine and Munition Monitor http://archives.the-monitor.org/index.php/publications/display?url=lm/2002/angola.html (accessed 13 September 2022).

For banditry, data showed that from 2011 to 2020, persons in Nigeria paid not less than US$18.34 million (7 billion) ransom to bandits for the release of their loved ones.[85] In the first half of 2021, a total of 2 371 persons were reportedly taken hostage and the sum of about US$23.84 million (₦10 billion) demanded for their release in Nigeria.[86] A latest report has shown that the sum of ₦653.7 million ($1.2 million) was paid as ransom for kidnapping in Nigeria between July 2021 and June 2022.[87] Banditry is thriving in Nigeria more than any other African country.[88]

4 THE LEGAL FRAMEWORK FOR THE PROTECTION OF BOYS AND MEN IN AFRICA

While one may not be able to point to a law that specifically designed in its entirety to solely protect boys and men against terrorism and banditry in Africa, there are laws whose provisions protect boys and men across various jurisdictions. These include the bill of rights in national constitutions, national, regional and international human rights instruments, and the African Youth Charter among others. Additionally, there are laws with general provisions for the protection of citizens against terrorism and banditry. For example, the Anti-Terrorism Act of Uganda,[89] the Somalian Anti-Money Laundering and Countering the Financing of Terrorism Act,[90] Burkina Faso's Repression of Acts of Terrorism,[91] the Nigerian Terrorism (Prevention) Act 2022 and other legislations against terrorism in Africa, all have general provisions protecting citizens including boys and men. The laws all made general provisions for the protection of the citizens of each country against acts of terrorism. We shall proceed to consider some of the laws with provisions protecting boys and men against violent crimes and recruitment into armies and armed conflicts.

85 SBM Intelligence 2020, 'The Economics of the Kidnap Industry in Nigeria, Lagos', https://www.sbmintel.com/wp-content/uploads/2020/05/202005_Nigeria-Kidnap.pdf (accessed 14 September, 2022).

86 U William 'Insecurity: N10 billion demanded in kidnapping ransoms in H1 2021-SBM', Naira Metrics, 12 July 2021, https://nairametrics.com/2021/07/12/insecurity-n10-billion-demanded-in-kidnapping-ransoms-in-h1-2021-sbm (accessed 14 September 2022).

87 D Daniel 'Kidnapping grows as Nigerians pay N650 million ransom in 1 year' https://www.naijaloaded.com.ng/news/kidnapping-grows-as-nigerians-pay-n650-million-ransom-in-1-year (accessed 13 September 2022).

88 CA Odinkalu 'Banditry in Nigeria – a brief history of a long war' International Centre for Investigative Reporting 27 December 2018 https://www.icirnigeria.org/banditry-in-nigeria-a-brief-history-of-a-long-war/ (accessed 14 September 2022).

89 Anti-Terrorism Act of Uganda 2002.

90 Anti-Money Laundering and Countering the Financing of Terrorism Act, 2006 of Somalia.

91 Repression of Acts of Terrorism 2015 of Burkina Faso.

4.1 The United Nations Convention on the Right of the Child

The United Nations Convention on the Right of the Child (the Convention) was adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990 in accordance with the provision of article 49.

Article 1 of the Convention defines a child to mean 'every human being below the age of 18 years'. This definition accords with the position under the Nigerian Child Rights Act and that of other African countries.

Article 3 of the Convention provides that 'in all actions in relation to a child in any member state the best interest of the child shall be primary consideration'.[92] Article 6(1) provides that 'States Parties recognise that every child has the inherent right to life'. Article 6(2) provides for the 'child's right to survival'. Consequently, any act of terrorism or banditry that negatively impacts a child's right to life and survival is a violation. Article 9(1) states:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

This Article serves to protect the child against any act including terrorism and banditry that is capable of causing an unlawful separation between the minor and his/her parents.

Article 13(1) envisages a situation where a child is kept in custody on the allegation of wrongs and provides that the child must be given right to fair hearing before any decision is taken.

Apart from the right to fair hearing discussed above, the child by virtue of articles 14, 15, 16 and 17, is guaranteed the rights to freedom of thought and religion, right to peaceful assembly, right to private and family life. All these serve to protect the child from all forms of violent acts or crimes. Specifically, article 19(1) protects the child against all forms of physical or mental violence, exploitation, abuse and injury.[93] Taking this further, article 38(3) provides against the recruitment of

92 Art 3 specifically states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

93 It provides: 'States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.

children below the age of 15 into the armed forces by states. The article provides:

> States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

This provision aligns with the position of the International Criminal Court stated earlier. The direct implication of this is that the engagement of minors by terror groups and bandits is a violation of this Convention.

4.2 African Charter on the Rights and Welfare of the Child

The African Charter on the Right and Welfare of the Child was adopted in Addis Ababa, Ethiopia, in July 1990, and became effective on 29 November 1999. The Charter is a working document among African nations. By virtue of article 1, the Charter places responsibility on all parties to do all within their constitutional powers to protect the child in their various states.

Just like the UN Convention on the Right of the Child, the Charter defines a child in article 2 as '... every human being below the age of 18 years'. Article 4 affirms that 'the best interests of the child shall be the primary consideration' when dealing with any issue involving a child. This provision runs through virtually all statutory documents on 'the right of the child' across the world.

Article 22(1)-(3) seeks to protect the child from every form of armed conflict. It frowns at the recruitment of children into the army or any armed conflict. This necessarily will include terror groups and banditry.

Articles 27 and 28 protect the child from 'sexual and drug abuse'. In other words, no child should be subjected to any form of sexual and drug abuse. These are common habits of terrorists and bandits who recruit children into their groups.

4.3 The Child Rights Act 2003

This is a Nigerian legislation on the rights of the child. The Act opened in section 1 with a categorical provision to the effect that in all situations when an action is to be taken in relation to a child, 'the best interest of the child shall be the consideration'.[94]

94 See sec 1 of the Act which states: 'In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration'.

Section 3 of the Act applies the provisions of Chapter 4 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) to the Child Rights Act and every child. This means that every child in Nigeria is entitled to all the rights enshrined in chapter 4 of the Constitution. This is a laudable provision shared by this Act with the UN Convention on the Right of the Child and the African Charter on the 'Right and Welfare of the Child'. In addition, section 4 bestows on every child the right to survive and develop.

Sections 21-23 of the Act prohibit child marriage or betrothal of any kind. This is another protection of the child both male and female from being forced or coerced into such unions like we see and read about terrorist organisations who forcefully marry out minor captives who are then subjected to all kinds of sexual abuses like the case of Chibok girls who returned from captivity with babies and pregnancies.

Section 26(1) and (2) of the Act titled 'Use of children in other criminal activities' provides:

> No person shall employ, use or involve a child in any activity involving or leading to the commission of any other offence not already specified in this Part of the Act. A person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to imprisonment for a term of fourteen years.

This is an outright criminalisation of the recruitment of children whether boys or girls into any criminal act including terrorism and banditry. Section 34 prohibits the recruitment of children into the army.[95] Section 27 went on to criminalise the removal of any child from the lawful custody of his/her parents with various sanctions depending on the intention of the criminal.

4.4 Legal framework for the protection of men against terrorism and banditry in Africa

As stated earlier, a study of the anti-terrorism laws of African countries show that there are no laws with specific provisions protecting men against terrorism and banditry. However, the laws of the various African states on terrorism and other violent crimes have provisions for the protection of the citizens generally. The provisions of the laws notwithstanding, men and children have continued to be forcefully recruited by various terrorist groups. Many of these forcefully recruited men and children have been killed by either the terrorists, bombs strapped to their bodies or as a result of confrontation with state forces.

The Act in article 7 punishes acts of terrorism with imprisonment for life. Article 14(7) criminalises the recruitment outside of the authority of the state to form armed groups other than the army and police. This Article can be taken to protect boys, girls, men and women against being recruited into any terror group in the country. It is the

95 This section can also be said to apply to the recruitment of children into any form of armed conflict including terrorism and banditry.

argument of this paper that the capital punishment imposed by article 7 will serve the purpose of deterrence in the fight against terrorism and banditry.

The Uganda Anti-Terrorism Act, 2002 passed on 21 May 2002, which took effect on 7 June 2002, provides insight into this discussion. The law in an attempt to curb terrorism imposes sanctions on anyone who publicly professes, instigates, supports, finances or executes acts of terrorism. The law also imposes sanctions on anyone who convenes or attends any meeting intended to serve a terrorist purpose. To this effect, the law authorises the interception of the correspondence of and the surveillance of persons suspected to be involved in acts of terrorism.

Consequently, section 7 punishes terrorism with the death penalty. The jurisdiction of the court is as defined in section 4 of the Act. The second schedule to the Act proscribes 'the Lords' Resistance Army, the Lords' Resistance Movement, Allied Democratic Forces and Al-qaeda' as terrorist organisations in the country.

Legislation in Nigeria is the Terrorism (Prevention and Prohibition) Act, 2022. Section 1 of the Act set out its objectives in paragraphs (a) to (f). Sections 11-24 of the Act spells out the various acts that amount to terrorism and their sanctions ranging from 20 years imprisonment to death depending on whether death occurred in the course of the crime.[96]

Noticeably, section 24(1) and (2) provides: The implication of the above is that hostage taking which is a crime of both terrorists and bandits is also punishable under the Act.[97]

In our opinion, seeking special legal protection for women and children (boys and girls) against terrorism and banditry, seem logical, but to argue that men especially the healthy and strong deserve any special legal protection against terrorism and banditry other than what is provided generally in the law, will amount to begging the question of legal protection. How can such an argument fly in the face of the contest that terrorists and bandits are usually men?[98] Our study showed that despite the efforts of the International Criminal Court and the UN's Convention on the rights of the child, none of the legislations has any particular provision to protect the children and women. The Terrorism (Prevention) Act,[99] (just like the laws across the other jurisdictions), made various provisions with respect to terrorism including hostage taking in line with section 24 pointed out earlier.[100]

96 See secs 11 to 23 of the Act.

97 By virtue of sec 2, where death occurred in the course of the hostage taking, the crime shall be punishable with death.

98 M Melnick 'Why are terrorists so often young men?' https://www.huffpost.com/entry/terrorists-men-violent-biology-boston-marathon_n_3117206 (accessed 1 September, 2022) See also T Tsarnaev 'Why are terrorists so often men?' available at https://www.salon.com/2013/04/25/why_are_terrorists_so_often_men/ (accessed 1 September 2022).

99 Terrorism (Prevention) Act 2011.

100 Sec 11. This section deals directly with instances of banditry as we have it today in Nigeria and across other African countries. This provision further buttresses our

Despite the existing legal frameworks, governments of various countries in Africa are working using administrative instruments to equally combat the scourge of terrorism and banditry across Africa. Their efforts include the purchase of more weapons in the fight against these crimes, training and retraining of officers fighting these crimes, gathering of community intelligence etc. While countries like Angola, South Africa, Libya and a host of others affected by terrorism and banditry appear to be doing so much and recording successes, the same may not be said of the Nigerian government which has been accused severally of complacency on the issue of terrorism and banditry in Nigeria.[101] The truth is that Nigeria needs to do much more to truly defeat insurgency.

5 FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

This paper finds that boys and men are direct victims of terrorism and banditry across African states either as persons killed, injured or rendered orphans and widowers or victims by way of coerced recruitment into terrorism and banditry.[102] 11,000 men were reported killed in Zamfara state by armed bandits alone as at the first quarter of 2019. Several women were widowed due to the killing of their husbands, who served as the breadwinners of their families.[103] It is our finding that despite the precarious position of boys with respect to terrorism and banditry there is no particular legal protection for them against the crimes the stand of the International Court of Justice and United Nations notwithstanding.

It further finds that there are a number of factors that fuel terrorism and banditry across Africa. Such factors include bad governance, external political influence, bad or poor economy, brazen corruption by leaders, religious extremism and indoctrination among others,

argument earlier that banditry which is akin to hostage taking is a shade or arm of terrorism. Evidence has shown from the accounts of victims of banditry or kidnapping that just like the terrorist, the bandits/kidnappers are usually armed with sophisticated weapons, kill, destroy properties of their victims like cars and gadgets, threaten and have severally told their victims that they are terrorists from one camp or the other.

101 US Department of States 'Country reports on terrorism 2020: Algeria' https://www.state.gov/reports/country-reports-on-terrorism-2020/algeria/ (accessed 15 September 2022), see also Tony Nyiam 'Why Nigerian armed forces can't fight terrorism' *Vanguard News* 8 August 2020 https://www.vanguardngr.com/2020/08/why-nigerian-armed-forces-cant-fight-terrorism-tony-nyiam/ (accessed 1 September 2022).

102 International Crisis Group 'Violence in Nigeria's north west: rolling back the mayhem' 18 May 2020, referred to by JS Ojo and others 'Forces of terror: armed banditry and insecurity in North-west Nigeria' (2023) 19 *Journal of Democracy and Security* 4.

103 *The Punch*, Bandits killed 11 000 men, orphaned 44 000 in Zamfara-Marafa, 6 May 2019; *PM News* 2019. 'Zamfara under pressure from bandits for more than 10 years – SSG' 25 April 2019.

This article examines the concept of terrorism and banditry and how they affect boys and men in Africa considering the strategic roles that boys and men play in the safety and perpetuation of societies. The various theories of terrorism and banditry were examined along with the legal framework on the subject matter. The paper argued that there are no specific legislations solely dedicated to the legal protection of boys and men against terrorism and banditry in Africa. This, the article posits, is rightly so because the existing legislations and conventions have provisions for the protection of citizens (including boys and men) against terrorism and banditry. The paper further argued that while there may be no particular need for any special provision in our laws to protect boys and men against terrorism other than the general provisions in the law, the position of the International Court of Justice and the United Nations calling for heavier sanctions for persons who recruit or encourage the recruitment of minors into terrorist groups or as bandits should be adopted by all African countries and reflected in the laws.

Towards better legal protection of boys against acts of terrorism and banditry, this article makes the following recommendations:

Rather than the current situation in which governments across Africa are negotiating with terrorists and bandits or criminals which step is unrealistic and only temporary, the governments should ensure that the illiterate citizens are educated, and that jobs are created to engage the unemployed youths. This follows the backdrop that illiteracy and youth unemployment coupled with poverty have been at the centre of banditry and terrorism. Here in Nigeria, we have heard the accounts of young men who are recruited into banditry and terrorism with a promise of what an average citizen will consider ridiculous. The victims have taken such offers and have become tools for hostage taking and wanton destruction of lives and properties. Some suspects who have been caught have confessed to receiving as low as N20 000 for their involvement in banditry.

As aptly suggested by the International Court of Justice and the United Nations, there should be copious provisions in the laws across Africa to impose heavier sanctions on persons who recruit or encourage the recruitment of minors into terrorism and banditry or any criminal set whatsoever. It is the belief of this paper that heavier sanctions will serve the purpose of deterrence and discourage those who are planning to go into banditry or terrorism. African states must be seen to be serious and intentional about curbing the scourge of banditry and insurgency without any element of political colouration. African leaders need courage, equity and fairness as some essential steps that are needed to be taken to end the glaring security challenges in the nation.

This article further recommends that the intentional neglect of borders, towns or communities in the provision of socio-economic infrastructures should be replaced with actual development of the communities and effective security presence and occupation along the

borders and forests and reserves. As posited by John Sunday Ojo and others[104] weak border security and the existence of ungoverned spaces have contributed to the rise of banditry and insurgency in Africa. The governments must ensure that no part of their territories including forests is left in the hands of bandits and terrorists. There should be constant security patrol along the borders. There should be provision of security around schools knowing fully well that they have become soft targets for both terrorists and bandits to either make a statement or raise money from ransom. The governments across Africa should have verifiable security plans for the protection of lives and properties which are the basic responsibilities of any government.

Governments in Africa should address the issues of injustice by strengthening the administration of the justice system. This way, citizens will have more confidence in the systems and desists from self-help as a means of addressing injustice. Lately in Nigeria, the politicians have become so emboldened and quick to ask citizens who complain of injustice in the electoral system to go to court. Many have argued that this is so because the politicians have compromised the judiciary. This accounts for why the judiciary has lost the trust of the people who have resorted to self-help in many instances or forget about the matter all-together. This does not work any good for a state as it will encourage all forms of unrest including banditry and insurgency.

The governments should ensure the constant training and retraining of the officers engaged in the fight against insurgency and banditry. The Law enforcement agencies should be encouraged to engage in more detailed community intelligence gathering to help frustrate attacks rather than the current reactive measures. From the experience here in Nigeria, our law enforcement agents are more reactive than preventive in their fight against banditry and insurgency. The place of intelligence gathering in curbing banditry and insurgency cannot be overemphasised. The welfare of the security agents involved in the fight against banditry and terrorism should equally be taken seriously by the government officials and the heads of the various security agencies.

There should be state policies and legislations monitoring religious institutions and their teachings to guide against indoctrination and extremist tendencies. Drawing inspiration from Kenya, religious institutions should be regulated by the government to guide against indoctrination of its adherents. One recalls that what is today known as Boko Haram insurgency in Nigeria, started as a religious gathering organised by a self-acclaimed Islamic cleric who used the illiteracy and poverty of the people who gullibly followed him to indoctrinate them. Religion has become a tool used for recruiting unsuspecting adherents into crime and it should be checked. The governments of various African states should develop strategies and programmes that will disarm terrorists and change their ideologies without necessarily offering them amnesty. The current practice where terrorists are given amnesty and even recruited into the military as we see in Nigeria, is not

104 Ojo and others (n 102).

safe for national security. There should be well intended programmes targeted at reorienting arrested terrorists and a massive campaign against the crimes in the domains where they are perpetuated to discourage others from joining the crime.

African leaders should evolve themselves and be given to good governance. They should shun the attitude and quest to remain in power till death and encourage youth participation in government across board. The unbridled quest by African leaders to remain in office till death has led to various uprising and security threats in the continent. African leaders should learn to respect the constitutions of their various countries and ensure smooth transitions whenever their tenure laps.

Negotiation and payment of ransom to bandits and terrorists should be criminalised across Africa. This recommendation is coming on the hills of the fact that banditry is growing daily across Africa because of the payment of ransom. It has been repeatedly shown that the payment of ransom to bandits and terrorists has further enhanced their operations and given them access to more alms. It has equally led to the rising of other groups of terrorists and bandits who now see the crimes as highly profitable ventures. In Nigeria, banditry and hostage taking is on the rise because of the humongous ransoms that are paid to bandits on daily bases. Several bandits suspects have confessed that they formed their own kidnapping gangs when they were told of the amounts being collected as ransoms by other groups and the ease with which the ransoms are collected.

Governments across Africa should be bold to proscribe any criminal groups using the modus operandi of terrorists like the bandits in Northern Nigeria. In Northern Nigeria, there are various groups overseeing and levying several communities. They dictate to the farmers when the farmers can go to their farms and when they should remain indoors. They charge various sums and until they are paid, such communities are held under siege. The same thing applies in South Eastern Nigeria where some militias have designated Monday as a sit-at-home day and those who go out to work have been killed and maimed. Several law enforcement agents have been killed without provocation. It is the position of this paper that the government should have no difficulty whatsoever designating such groups as terrorist organisations.

Exploring the potential of the dominance feminist approach in interpreting socio-economic rights in the Maputo Protocol

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ABSTRACT: Africa's women have continued to be victims of violations of their rights including socio-economic rights simply by being women. The Maputo Protocol entrenches, among other rights, a comprehensive set of socio-economic rights. Though this inclusion is commendable, interpreting these rights plays a significant role in engendering them and eliminating discrimination against women. A general argument has been made for teleological interpretation of the Maputo Protocol, as it is with other human rights instruments. Considering that the Maputo Protocol is a specific treaty for women's rights, this article argues for a teleological interpretation of the socio-economic rights that integrates a gender perspective for effective protection and engendering of these rights. The article explores the potential of the dominance feminist approach for a gendered teleological interpretation. The article shows that the dominance approach is not alien to the Maputo Protocol; it is included in the Protocol's objective and purpose, socio-economic rights provisions, and other related provisions. Moreover, the article shows that the dominance feminist approach gels with substantive equality entrenched in the socio-economic rights provisions. The article also develops a methodological model for the proposed gendered teleological interpretation.

TITRE ET RÉSUMÉ EN FRANÇAIS

Repenser l'interprétation des droits socio-économiques: l'apport d'une approche féministe dans le cadre du Protocole de Maputo

RÉSUMÉ: Les femmes africaines continuent de subir des violations de leurs droits, notamment socio-économiques, en raison de leur statut de femmes. Le Protocole de Maputo garantit un éventail complet de droits socio-économiques, mais leur pleine réalisation dépend largement de l'interprétation qui en est faite. Si une interprétation téléologique est généralement préconisée pour les instruments relatifs aux droits de l'homme, cet article soutient qu'une approche téléologique spécifiquement basée sur le genre est essentielle pour garantir l'effectivité des droits consacrés par le Protocole de Maputo et pour éliminer les discriminations systémiques à l'égard des femmes. Cet article examine le potentiel de l'approche féministe de la dominance comme cadre pour une interprétation téléologique genrée des droits socio-économiques dans le Protocole de Maputo. Il démontre que cette approche est intrinsèquement alignée avec l'objectif et le but du Protocole, notamment en ce qui concerne les dispositions sur les droits socio-économiques et les principes connexes. L'analyse révèle également que l'approche féministe de la dominance concorde avec le concept d'égalité matérielle inscrit dans le Protocole,

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favorisant ainsi une interprétation qui transcende les inégalités structurelles et les formes de domination patriarcale. Enfin, l'article propose un modèle méthodologique pour guider l'application d'une interprétation téléologique genrée dans le cadre des droits socio-économiques.

KEY WORDS: dominance feminist approach; socio-economic rights; Maputo Protocol; teleological interpretation; substantive equality

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1 INTRODUCTION

Equality of access to, and enjoyment of socio-economic rights is vital for socio-economic development and power of both genders in Africa. However, women are culturally marginalised and systematically denied socio-economic power and intellectual recognition.[1] It is a regrettable reality that the mere fact of being a woman implies various degrees of discrimination in these matters essential to life.[2] Women's ability to access socio-economic rights is also shaped by the gendered nature of social institutions, including legal, cultural, customary, and traditional factors.[3]

Patriarchal practices and male dominance in Africa have excluded women from effective access to, and enjoyment of their socio-economic rights. Patriarchy in Africa is much embedded and enshrined in the mindset of men starting from childhood through socialisation.[4] Nigeria, for example, is noted to be a strongly patriarchal society that subjects women to male dominance and female subservience.[5] Women are seen as belonging to the home and as incapable of making sound decisions.[6] Patriarchy gives men the power to prevail over women[7] in the socio-economic sphere. Socio-economic rights field was, and

1 ATO Emordi and others 'Women, marginalisation, and politics in Africa and Asia' (2021) 2 *Integrity Journal of Arts and Humanities* 27-28.

2 MA Moreno 'Women's rights and international dialogue' (1997) 16 *Penn State International Law Review* 193.

3 S Fredman 'Engendering socio-economic rights' (2009) 25 *South African Journal on Human Rights* 415.

4 Emordi (n 1) 29.

5 As above.

6 As above.

continues to be, dominated by men, who only rarely demonstrate an appreciation for women's experiences as they relate to human rights.[8] The African Commission on Human and Peoples' Rights (Commission)[9] has also noted this exclusion and stated:[10]

> Women on the continent find themselves in a vulnerable status in terms of the enjoyment of their socio-economic rights on an equal basis as men. They have limited access to and enjoyment of … rights. Unequal power dynamics in the relations between the sexes, discriminatory social and cultural structures and practices, and women's lack of economic empowerment, among others, are key factors that affect women's rights …

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[11] protects, among other rights, socio-economic rights. It aims to improve the reality of women's lives.[12] Though the inclusion of these rights in the Maputo Protocol is commendable, extending socio-economic rights to women is not sufficient. Little is done to address the gendered nature of social institutions and structures.[13] Interpretation of these rights plays a huge role in the elimination of discrimination against women. A general argument has been made for teleological interpretation of the Maputo Protocol as it is with other human rights instruments. While noting that the teleological interpretation is itself inherently satisfactory, the effective approach to interpreting the Maputo Protocol requires an integration of a feminist perspective in the teleological interpretation. The argument for a gendered teleological interpretation takes into account the understanding that though the Maputo Protocol extensively protects specific rights of women; it still needs to be interpreted in a manner that entrenches a gender perspective for the effective elimination of discrimination against women. Most feminist theories agree on the importance of highlighting the lack of equality for women and viewing international problems and events through women's eyes.[14] Fredman noted that the Maputo Protocol comes a step closer to fully engendering human rights … but it, too, needs to be

7 G Robbertze & G Muller 'Conceptualising the home in law and gender' (2020) *De Jure Law Journal* 341.

8 L Farha 'Is there a woman in the house – re/conceiving the human right to housing' (2002) 14 *Canadian Journal of Women and the Law* 120.

9 The African Commission was established in terms of art 30 of the African Charter.

10 General Comment 6 on the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (art 7(d)) (General Comment 6), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 para 1.

11 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 11 July 2003, CAB/LEG/66.6.

12 F Viljoen & M Kamunyu 'The interpretive mandate under the Maputo Protocol' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 569.

13 Fredman (n 3) 410.

14 RC Preston & RZ Ahrens 'United Nations convention documents in light of feminist theory' (2001) 8 *Michigan Journal of Gender & Law* 4.

interpreted to advance the envisaged equality.[15] Considering that the Maputo Protocol in its elimination of the discrimination clause obliges states to integrate a gender perspective in their legislation and other measures taken to combat discrimination against women,[16] it is imperative for interpretation that addresses discrimination and harmful practices against women to also integrate an appropriate gender perspective.

The article explores the potential of the dominance feminist approach (dominance approach) for a gendered teleological interpretation of the socio-economic rights in the Maputo Protocol. However, arguing for the integration of dominance perspective does not necessarily mean that other feminist perspectives are irrelevant. The article only demonstrates that among several feminist approaches, the dominance perspective has the greatest effect. Examining the influence of the feminist theories on the United Nations human rights instruments Preston and Ahrens argue that although UN human rights instruments demonstrate the influence of various feminist theories, the dominance theory has the greatest impact.[17] This gendered teleological interpretation will enable the interpretive organs to interpret the object and purpose of the Maputo Protocol in a manner that identifies, takes into account, and criticises women's socio-economic lived inequality reality exacerbated by discriminatory laws, policies, and societal harmful practices. It will also help them engage in the interpretative process, appropriate approaches, including substantive equality that women employ to end discrimination practices. Arguing in the context of the housing rights for women, Chenwi and McLean note:[18]

> A gendered, or feminist, perspective on women and housing focuses on the lived reality of poor women and women-headed households, and the survival strategies employed by these women. It also provides a critique of how existing laws, policies, and social practices perpetuate their situation.

Apart from this introductory part, part two provides the context of Africa's women's concrete socio-economic rights reality and theories applied in this article for a gendered interpretation of the socio-economic rights in the Maputo Protocol. The aims of this analysis are four-fold: first, to unpack women's lived reality; second, to analyse the teleological approach, that aims at achieving substantive equality, and demonstrate the need to engender it through the dominance approach; third, to analyse the dominance approach, which has the potential to address the socio-economic lived reality of Africa's women, and to identify the elements of the dominance approach in the provisions of the socio-economic rights in the Maputo Protocol as a proof that this approach is not alien to the Maputo Protocol and in its object and purpose; and, finally, to develop the methodological model for the application of a dominance-oriented teleological approach. Part 3

15 Fredman (n 3) 438.

16 Art 2(1)(c) of the Maputo Protocol.

17 Preston & Ahrens (n 14) 6.

18 L Chenwi & K McLean 'A woman's home is her castle – poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 517.

analyses the socio-economic rights in the Maputo Protocol and the relevant jurisprudence and show how to apply the dominance approach to build on the meaning of substantive equality. Part 4 concludes the article.

2 THEORETICAL FRAMEWORK FOR A THOROUGH UNDERSTANDING OF SOCIO-ECONOMIC RIGHTS LIVED REALITY OF AFRICA'S WOMEN

2.1 Concrete socio-economic rights lived reality of Africa's women

Africa's women have been experiencing discrimination and widespread socio-economic inequality from their male counterparts, simply by being women. Their oppression is caused by social and cultural arrangements, which require women to submit to men because of their sex.[19] As a result of male dominance, Africa's women's socio-economic rights reality is covered with stories of violations, discrimination, exclusion, illiteracy, and deep patterns of poverty.

Male dominance is prevalent in women's rights to marriage and family. It includes child marriage, virginity testing, widowhood practices, witchcraft, extreme dietary restrictions (forced feeding, food taboos- including during pregnancy), binding, breast ironing, beading and son preference and its implications for the status of the girl child.[20] While in marriage, women exercise limited or no economic decision-making power in the household. Where much of their contribution comes from their household and reproductive roles, neither these roles are taken as having economic value nor any account is given to the economic values of these roles.[21]

Male dominance is also predominant in women's right to property and related land rights. The Commission noted that some legislation and customary norms as well as patriarchal practices entrench gender inequality in the enjoyment of property rights.[22] In many parts of Africa, women's contribution in the acquisition of marital property has been consistently undermined through, among others:

> (a) Gender discriminatory registration laws and practices, which in effect prohibit or discourage women from owning housing, land and property jointly with their spouse, or which give preference for registration of housing, land and property in the name of the male spouse only; (b) The

19 K Mahoney 'Theoretical perspectives on women's human rights and strategies for their implementation' (1996) 21 *Brooklyn Journal of International Law* 814.

20 S Nabaneh 'Elimination of harmful practices' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 118-119.

21 General Comment 6 (n 10) para 2.

22 General Comment 6 (n 10) para 4.

> application of the concept of marital power, which grants power to only the husband to administer his wife's property and/ or their jointly owned property; (c) Gendered responsibilities dictating that women use their resources for the upkeep of the family and maintaining the home while men use theirs for the acquisition of properties; and (d) The application of negative customary norms and religious practices.[23]

Relating to male-oriented dominance of property rights, Banda notes another emerging issue, which is the growth in land leasing where sovereign funds are used to purchase vast tracts of land from which the locals are excluded and removed from arable land. Women are the most affected; they are disproportionately responsible for sourcing and growing food for family consumption. Land is linked to the right to housing. If the land resource base shrinks, women will get even less.[24]

In Tanzania for example, agriculture is a principal source of livelihood. It provides more than two-thirds of employment and almost half of Tanzania's GDP.[25] Women play an essential role in agricultural production. Despite the essential role that women in Tanzania play in smallholder agriculture, and the importance of land ownership to agricultural development, women seldom own the land they cultivate, and they own less land than men when they do own land.[26]

Women's experience in enjoyment of their right to education is not any better. Girls suffer the highest levels of exclusion from formal education, 'exacerbated by poverty and economic crises, gender stereotyping in curricula, textbooks, and teaching processes, violence against girls and women in and out of school and structural and ideological restrictions to their engagement in male-dominated academic and vocational fields'. These, in turn, reproduce multiple, often intergenerational inequities at individual and societal levels.[27] There is evidence pointing to the harmful effects of stereotyping on girls. For example, by promoting images of girls and women as the "weaker" sex, they 'contradict values of gender equality and non-discrimination, and dampen girls' career aspirations and self-esteem'. Further, research has drawn a connection between early socialisation into gender stereotypical roles and careers and 'girls' interest, engagement and achievement in science, technology, engineering, and mathematics (STEM).[28]

23 General Comment 6 (n 10) para 5.

24 F Banda 'African gender equality' in RJ Cook (ed) *Frontiers of gender equality: transnational legal perspectives* (2023) 274.

25 MK Leavens and others 'Gender and agriculture in Tanzania' EPAR brief No 134 Evans School of Public Affairs, University of Washington April 2011 p 1.

26 Leavens and others (n 25) 2.

27 CP Wamahiu & CN Musembi 'The right to education' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 261.

28 Wamahiu & Musembi (n 27) 267.

In Africa, women also experience a wide range of violations of their economic and social welfare rights in public and private spheres. 'Calculations using the UNDP gender indices indicate notable gender inequality in almost every African country.[29] Gender gaps in income and non-income dimensions result in lower human development by females compared to males.'[30] There are still sectors of the economy that are largely closed to women.[31] For instance, the mining industry has historically been seen as a masculine occupational culture, despite technological advances that have redefined the nature of minework.[32] There are also fields of education in which women are under-represented, for example, in STEM.[33] This significantly diminishes their earning potential.[34] Furthermore, the economic contribution of most African women is not recognised in national statistics because it is largely in the informal agricultural and domestic sectors.[35] As such, African women's economic contribution in agriculture, entrepreneurship, and other related economic sectors is not documented.[36] Women's work such as subsistence agriculture, household maintenance, voluntary work, and other related unpaid services, are excluded from economic measurement.[37] The invisibility of women's work translates into exclusion from social security and control over resources.[38]

On health and reproductive rights, women experience a wide range of inequalities, including a lack of decision-making power on several children they should have and their spacing. Others include lack of power on the use of contraceptives and self-protection against sexually transmitted infections.

29 AA Mnzava 'Economic and social welfare rights' in A Rudman et al (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*: *a commentary* (2023) 287.

30 United Nations Development Programme, Africa Human Development Report 2016: Accelerating Gender Equality and Women's Empowerment in Africa 4 https://www.afdb.org/fileadmin/uploads/afdb/Documents/AEC/2016/AfHDR_Summary_ highres_EN.pdf (accessed 16 May 2023).

31 Mnzava (n 29) 287.

32 D Botha 'Women in mining: an assessment of workplace relations struggles' (2016) 46 *Journal of Social Science* 252.

33 C Hill and others 'Why so few? Women in science, technology, engineering, and mathematics' 5-9. A report published by AAUW in 2010.

34 Mnzava (n 29) 288.

35 As above.

36 African Union 'African Union set to launch the "What African Women Want" Campaign to rally more action on women's empowerment on International Women's Day' (2022) https://au.int/en/pressreleases/20220307/african-union-set-launch-what-african-women-want-campaign-rally-more-action#:~:text=The%20%E2%80%9CWhat%20African%20Women%20Want%E2%80%9D%20campaign%20will%20be%20launched%20on,for%20the%20implementation%20of%20programmes (accessed 23 June 2023).

37 M Waring 'The invisibility of women's work: the economics of local and global "bullshit"' (1997) 17 *Canadian Woman Studies* 31.

38 J Meeker & D Meekers 'The precarious socio-economic position of women in rural Africa: the case of the Kaguru of Tanzania' (1997) 40 *African Studies Review* 35.

Access to housing is an integral part of an adequate standard of living.[39] This right entails access to a 'safe and secure home and community in which to live in peace and dignity'.[40] In reality, however, many women live in squalor.[41] While inadequate housing affects many people living in poverty, there is a clear gender dimension.[42]

Harmful cultural and religious practices have resulted in restrictions on women's rights to inheritance, access to health, education, and work. Trends in terms of labour migration, influenced by rapidly changing economic opportunities, have been implicated in new forms of exploitation and risk to women.[43]

2.2 Dominance feminist approach

Considering the above-analysed Africa's women lived socio-economic reality, it is imperative to analyse theoretical approaches relevant for interpreting socio-economic rights in the Maputo Protocol that aims at eliminating such unequal socio-economic reality. The analysis begins with the dominance approach that uses the notion 'as a woman' to explain women's lived reality of socio-economic inequality and suggest ways of addressing and transforming such reality.

> We who work with the law need to be about the business of articulating the theory of women's-practice women's-resistance, visions, consciousness, injuries, notions of community, and experience of inequality.[44]

MacKinnon develops the dominance theory, which takes into account women's socially constructed inequality.[45] It considers women as victims of a male-dominated system.[46] It recognises and challenges a pervasive system of gender hierarchy. It critically examines, rather than obtain, the status quo.[47] It recognises that women's inequality is not theoretical or abstract, but rather real and concrete.[48] The dominance approach articulates the unrecognised pervasiveness of male domination in many facets of women's lives.[49] The dominance

39 M Killander 'Right to adequate housing' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 346.

40 Killander (n 39) 346.

41 As above.

42 As above.

43 Report issued by the Association for Women's Rights in Development (AWID) on achieving women's economic and social rights: Strategies and lessons from experience 2006 at p 6.

44 CA MacKinnon 'From practice to theory, or what is a white woman anyway?' (1991) 4 *Yale Journal of Law and Feminism* 14.

45 KRL Rand 'Making a real difference: the dominance approach in the opinions of Justice Beryl J. Levine' (1996) 72 *North Dakota Law Review* 1031-1032.

46 AJ Albert 'The use of MacKinnon's dominance feminism to evaluate and effectuate the advancement of women lawyers as leaders within large law firms' (2006) 35 *Hofstra Law Review* 310.

47 Rand (n 45) 1031.

48 As above.

49 Albert (n 46) 311.

approach argues that women know things from their life experiences. Women are in confrontation with the realities of male dominance. This subordination of women to men is socially institutionalised, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in the community, speech, and power.[50] As such, dominance theory is a theory of women's practice that identifies and critiques social practices of subordination and makes tools for women's consciousness and resistance that further a practical struggle to end inequality.[51]

The dominance approach considers women's subordination to men as exclusively based on their sex 'as women'. It uses the notion 'as a woman' as the practice which makes the concept of discrimination "based on sex" a legal theory. As such, the dominance approach investigates how the realities of women's experiences of sex inequality in the world have shaped some contours of sex discrimination in the law.[52] It uses 'discrimination based on sex' as a cause of action. Therefore, the ability of women to translate their experiences of sex inequality is of paramount importance.[53] It bases its argument on the understanding that women are subordinate to men because of their status as women.[54] The dominance approach argues that, comprised of all its variations, the group of women can be seen to have a collective social history of disempowerment, exploitation, and subordination extending to the present. To be treated 'as a woman' in this sense is to be disadvantaged in these ways.[55] To speak of social treatment 'as a woman' is to refer to this diverse and pervasive concrete material reality of social meanings and practices.[56] To speak of being treated 'as a woman' is to make an empirical statement about reality.[57] To speak of being treated 'as a woman' is to describe the realities of women's situation.[58]

The dominance approach considers women's experience in a collective form rather than in an individual form. The experience of an individual woman is considered to be the experience of almost all women. It, therefore, takes up the notion 'as a woman' to consider an individual woman's experience as an experience of women in a collective form. It treats women not as uniform or homogeneous, but as interrelated in their common experiences of inequality and powerlessness.[59] It is a feminist approach based on women's shared suffering; in practice, it therefore aspires to eradicate the validation of

50 MacKinnon (n 44) 15.
51 MacKinnon (n 44) 14.
52 As above.
53 Albert (n 46) 311.
54 Rand (n 45) 1033.
55 MacKinnon (n 44) 15.
56 MacKinnon (n 44) 14.
57 As above.
58 As above.
59 Albert (n 46) 311.

women's subjugation in every culture, society, and institution.[60] The dominance approach focuses on group experiences because understanding the individual suffering of women in this regard 'does not improve one's ability to analyse hierarchy as socially constructed'.[61] Women's reality outside the courtroom benefits not only the woman named in a particular case caption but all women.[62] 'Given that women are not situated similarly to men, but rather are socially unequal, looking at women one at a time rather than as women ensures that it is only the exceptional woman who escapes gender inequality enough to be able to claim she is injured by it.[63]

Furthermore, the dominance approach centres on the argument that women's subordination to men leaves women with no power [powerless] in all aspects of life, including socio-economic power. It focuses on the differences in power between men and women. It critiques not only physical power, but social, economic, and sexual power as well. It finds that women are oppressed because they are subject to social and sexual mores, which require them to submit to men.[64] Dominance feminism attributes women's inferior societal position to men's concerted effort to subordinate and control women. It holds that men wield power over women through social, sexual, and physical domination.[65] Physically, men control women by wielding the threat of violence, or by practicing domestic abuse or other forms of battery. Socially, men control women on a small scale by exerting patriarchal control over them or by objectifying them. On a large scale, men control women by perpetuating a legal system that reinforces gender inequality and wage discrimination, keeping women financially and legally powerless. Men dominate women sexually by wielding the threat of sexual violence over women and by using cat-calls, sexual advances in the workplace, rape, and pimping, to name a few examples. To a dominance feminist, these long-standing practices have resulted in systematic male dominance of any sexually feminine individual.[66] The dominance approach is an approach of how the erotisation of dominance and submission creates gender and creates women and men in the social form in which we know them. It identifies the problem as not that the sexes have been treated differently, but that one group (men) has dominated the other (women). The recognition that men and women occupy unequal positions of power in society, is the fundamental underpinning of the dominance approach.[67] Women will never be able to enjoy freedom as long as men's power and sexuality define the basis of women's existence.[68]

60 Albert (n 46) 311.
61 As above.
62 Rand (n 45) 1031.
63 Rand (n 45) 1033.
64 Preston & Ahrens (n 14) 9-10.
65 A Mazingo 'The intersection of dominance feminism and stalking laws' (2014) 9 *Northwestern Journal of Law & Social Policy* 337-338.
66 Mazingo (n 65) 338.
67 Rand (n 45) 1035.
68 Preston & Ahrens (n 14) 9-10.

The dominance approach rejects formal equality feminism, which seeks formal legal equality and equal access to traditionally male privileges for women.[69] The dominance approach argues that instead of using the male norm to decide discrimination questions, the inquiry should be whether the policy or practice in question integrally contributes to maintaining an underclass or a deprived position because of gender status. The use of this test would require the law to take systematic sex subordination into account and support freedom from it, making it a qualitatively different approach from formal equality, which does not even acknowledge that sex-based subordination exists.[70] This test requires two things: first, the impact of laws and policies rather than on intention, second, the context of the plaintiff rather than comparison to a male norm.[71]

The dominance approach is critical of 'reality' and tries to challenge and change it. That reality is male dominance that sets the standards by which one succeeds (or just survives) in society.[72] Women's situation combines unequal pay with the allocation of disrespected work, sexual targeting for rape, domestic battering, sexual abuse, and systematic sexual harassment; depersonalisation demeaned physical characteristics, use in denigrating entertainment, deprivation of reproductive control, and forced prostitution.[73] The dominance approach would move the law further, in the direction of gender equality.[74]

Preston and Ahrens argue that dominance approach is not concerned with theoretical equality or rights guaranteed on paper. It is not enough for women to have the same potential opportunities as men. Women are not equal unless they can take advantage of those opportunities, define them outside the male paradigm, and thereby obtain real power. Dominance approach demands actual social, legal, and economic equality, not just the vague assurance of equal opportunity. The theory argues women break free of the male-dominated system 'with their knowledge and power'. The dominance approach focuses on reproductive capacity, violence against women, and traditional institutional power structures.[75]

Furthermore, the dominance approach emphasises power imbalance underlying the issues relating to women's sexuality and reproductive capability. Dominance Feminists view female reproductive capacity as a symbol of male domination. Traditional male views of women as sources of childbearing, child-rearing, breastfeeding, and sexual pleasure are oppressive because these viewpoints keep women from achieving equal economic, social, and

69 Mazingo (n 65) 337.
70 Mahoney (n 19) 815.
71 See also: Mahoney (n 17) 816.
72 Rand (n 45) 1035.
73 Rand (n 45) 1036.
74 Rand (n 45) 1039.
75 Preston & Ahrens (n 14) 10.

political power with men'.[76] The dominance approach rejects the use of women's reproductive capacity to subordinate women to men. It seeks to eliminate the traditional gender stereotypes that bind women to the home and make them the chief caretakers of children because such stereotypes prevent women from gaining power. The dominance approach, therefore, argues that governments should enact laws such as mandatory paid leave and child care which allow women both to have children and to pursue similar activities as men.[77]

Importantly, the dominance approach considers violence and sexual harassment against women as a form of male domination. This is another way in which the dominance approach seeks to raise a new feminist consciousness by critically evaluating violence inflicted upon women. The dominance approach identifies violence against women as a means by which men keep women from attaining power. Pornography, rape, sexual harassment, and physical abuse are all forms of male dominance that, until recently, have been widely accepted. Until violence against women is eliminated, women will never be equal because men are not affected by systematic violence in the same way as women. Dominance theory focuses on each of these issues and can largely take credit for increased social awareness and action taken to remedy them.[78]

Finally, the dominance approach argues for the transformation of the current international legal, cultural, and social systems. Their envisioned transformation will result in women obtaining actual power. In this regard, the dominance approach argues for quotas, affirmative action, and strong government involvement in increasing the opportunities for women to obtain that power.[79] The dominance theory calls for social protections to guarantee rights protecting women's interests. Dominance feminists believe that the envisioned transformation of society can be achieved by seeking control through current systems.[80]

The dominance approach helps the interpretive machinery to have an in-depth understanding that women's access and enjoyment of their socio-economic rights is hampered by systemic inequality and discrimination practices. This hierarchy of discrimination favours men rather than women. It considers women as inferior compared to their male counterparts.[81] It helps the interpretive machinery to address the inequality in question and develop appropriate ways of encountering it effectively.[82] Concerning the right to work, for example, the dominance approach offers such institutions an opportunity to recognise the dominance of male-worker norms inherent in the established criteria

76 Preston & Ahrens (n 14) 11.
77 Preston & Ahrens (n 14) 11-12.
78 Preston & Ahrens (n 14) 12.
79 As above.
80 Preston & Ahrens (n 14) 13.
81 See also: Albert (n 46) 291.
82 As above.

for promotion and to rectify the resulting structural impediments that presents to the advancement of women.[83]

The dominance approach has the potential to address the inequality and patriarchal practices women in Africa experience. Inequality and discriminatory patriarchal practices are experienced in various socio-economic settings including, employment rights, health rights, and property rights. About property rights, the Commission in its General Comment 6 noted:[84]

> In particular, the prevalence of discriminatory laws and legal processes resulting in property rights violation during separation, divorce or annulment of marriage in Africa and the impacts thereof on women are a major concern on the African continent. Although a number of legislations in different African States guarantee the right to equality, non-discrimination and property, other legislations and customary norms as well as patriarchal practices entrench gender inequality in this regard.

Dominance approach with its approach of women as a collective is significant in that it has the potential of looking at and addressing the challenges of women in their collective capacity rather than in their individual capacity. Challenges women face in their individual capacity represent challenges many women face in different areas.

The tenet 'as a woman' used in the dominance theory is key in addressing male dominance practices and discrimination practices done to women as a woman and nothing else. They are raped as women, they are denied access to employment as women, they are denied property and land rights as women, they are denied certain job positions as women, they are sexually harassed at work as women, they are denied a promotion at workplaces or paid less as women, they are denied maternity leave as women, they are subjected to early marriages as women, they are denied access to education as women, they are denied carrier development as women, they are denied managerial positions as women, leviratic marriages (the practice of inheriting a wife) i.e. they are forced to marry their late husbands' relatives as women, they are denied inheritance of their husbands or late fathers as women, etc.

2.3 Teleological interpretation[85]

The main argument in this article is to use the dominance approach to engender the teleological approach, which is appropriate for interpreting human rights treaties. The application of the teleological

83 Albert (n 46) 291.

84 General Comment 6 (n 10) para 4.

85 I have analysed the teleological approach and its relevance in interpreting socio-economic rights in various writings: See A Amin 'A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' unpublished LLD thesis, University of Stellenbosch, 2017 (Amin 2017); A Amin 'Assessing violations of states' socio-economic rights obligations in the African Charter: towards a model of review grounded in the teleological approach (2020) 4 *African Human Rights Yearbook* 16-42 (Amin 2020); A Amin

approach helps interpretive organs to develop the meaning, scope, and content of socio-economic rights in line with the object and purpose of the Maputo Protocol.

The teleological approach, sometimes referred to as purposive interpretation,[86] considers the object and purpose[87] of a treaty as the main element in its interpretation.[88] An inquiry into the object and purpose of a treaty is vital in generating the meaning, scope, and content of the treaty's provisions in question.[89] The teleological approach and its notion of object and purpose are endorsed in the Vienna Convention on the Law of Treaties (Vienna Convention)[90] through its single authoritative rule of interpretation in article 31 and 32 respectively. Through article 31, the Vienna Convention requires a treaty to be 'interpreted in good faith, following the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

The object and purpose of a treaty are found through a recourse to a wide range of interpretative tools including the treaty's historical background and its preparatory work, the circumstances at the time of the adoption of the treaty, any change in these circumstances that the parties sought to effect, and the conditions prevailing at the time the treaty is interpreted.[91] It also includes a treaty's preamble at both its interpretive and binding characters,[92] the subsequent practice of the

'The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 23-50 (Amin 2021a); A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 209 (Amin 2021b); A Amin Teleological interpretation in the emerging socio-economic rights jurisprudence of the African Court: *African Commission on Human and Peoples' Rights v Kenya* (2022) 14 *African Journal of Legal Studies* 45-67 (Amin 2022).

86 TS Bulto 'The emergence of the human right to water in international human rights law: invention or discovery?' (2011) 12 *Melbourne Journal of International Law* 299. See also: Viljoen & Kamunyu (n 12) 549.

87 J Klabbers 'Some problems regarding the object and purpose of treaties' (1999) 8 *Finnish Yearbook of International Law* 138, quoted in SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2013) 45. Klabbers identifies the object and purpose of a treaty as a 'comprehensive blanket term' referring to the 'aims, nature and end' of a treaty. It applies to a treaty 'as a whole rather than to its parts or articles'. In addition to Klabbers's definition, this article considers the 'object and purpose' of a treaty as a single concept (rather than two distinct concepts) that requires a general meaning rather than a specific fixed meaning. For a thorough discussion, see Amin (n 85) 43-49; see also Amin 2021b (n 85) 209.

88 Amin 2017 (n 85); Amin 2022 (n 85) 3.

89 GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British YB of Intl Law* 1, 1-2 (1951 Interpretations).

90 The Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force 27 January 1980, 8I LM 679.

91 'Art 19(a) of the Draft Convention on the Law of Treaties' (1935) 29 *American Journal of International Law* Supp 971.

92 Fitzmaurice '1951 Interpretations' (n 89) 10.

parties to a treaty[93] (including, the decisions of the interpretive organs,[94] and the rules of procedure formulated by these interpretive organs to interpret the treaty);[95] and the principle of effectiveness,[96] which is embodied in all tenets of the teleological approach.[97]

The principle of effectiveness posits that provisions of a treaty are formulated to fulfil a specific effect. Accordingly, they should be interpreted to make them effective rather than ineffective.[98] The principle, in its general dimension, interprets the text in light of the declared or apparent object and purpose of the treaty. The principle of effectiveness gives such a text its effective meaning consistent with the words used to formulate it and with the other provisions of the treaty.[99] To assign effective meaning to the text, the principle of effectiveness allows the interpretive organs to consider and apply different possibilities of interpretation, which will safeguard the effectiveness of the text.[100] As such, in its substantive dimension, it requires interpretive organs to interpret the rights enshrined in a treaty broadly.[101] It also requires the limitations of such rights to be interpreted narrowly.[102] In its temporal dimension,[103] the principle of effectiveness considers a treaty as a living instrument.[104] The systemic dimension consists of both the internal and external coherence dimensions. [105]The internal coherence dimension emphasises a form of interpretation that reads the treaty as a whole, in a manner that advances internal consistency and harmony among the various provisions of the treaty.[106] Concerning external coherence, the principle of effectiveness focuses on interpreting a treaty through other comparative legal sources.

The overall object and purpose of the Maputo Protocol is articulated in its Preamble, which is to ensure that the rights of women are promoted, realised, and protected.[107] The Preamble elaborates that the Maputo protocol aims to eliminate discrimination, harmful

93 Fitzmaurice, '1951 Interpretations' (n 89) 9.

94 As above.

95 As above.

96 GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1957) 33 *British Yearbook of International Law* 203, 211 (1957 Interpretations).

97 Fitzmaurice, '1957 Interpretations' (n 96).

98 Fitzmaurice, '1951 Interpretations' (n 89) 8.

99 Fitzmaurice, '1957 Interpretations' (n 96) 211.

100 D Rietiker 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*' (2010) 79 *Nordic Journal of International Law* 256.

101 Rietiker (n 100) 259.

102 As above.

103 Rietiker (n 100) 261.

104 As above.

105 Rietiker (n 100) 267-275.

106 Rietiker (n 100) 267.

107 Preamble to the Maputo Protocol para 14.

practices, and gender-based violence against women.[108] The Preamble also emphasises equality between men and women.[109] Imperatively, the Preamble recognises the African values of equality, peace, freedom, dignity, justice, solidarity, and democracy.[110] It also recognises the crucial role of women in the preservation of these values.[111] The Preamble also notes the states' commitment to ensure the full participation of African women as equal partners in Africa's development.[112] The Preamble also notes the relevance of other regional and international human rights sources for the protection of women's rights.[113] Significantly, the Preamble recognises the principles of inalienability, interdependence, and indivisibility of rights.[114] All these Preambular statements elaborate the object and purpose of the Maputo Protocol. Accordingly, all interpretations of the Protocol must necessarily pursue this objective.[115]

2.4 Substantive equality

The preceding part has shown that teleological approach, through object and purpose of the Maputo Protocol, emphasises on equality. This sub-part analyses substantive equality as a form of equality envisaged by the teleological approach.

Traditionally, equality has been understood in formal terms, requiring simply that likes be treated alike.[116] Formal equality has been of central importance for women, particularly in achieving equality before the law, whether in terms of equal suffrage, equal right to own property, or other similar limitations.[117] Formal equality requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as gender.[118] The focus on the sameness between women and men is the flaw of formal equality as it fails to consider the male-dominated practices that discriminate against women. Even when women are equal before the law, they lag behind in social and economic terms, and this is the major weakness of formal equality.[119] Equality in its formalistic form, arguably does very little to change the position of women in an overwhelmingly patriarchal

108 Preamble to the Maputo Protocol paras 2-3, 9 & 13.
109 Preamble to the Maputo Protocol para 11.
110 Preamble to the Maputo Protocol para 10.
111 As above.
112 Preamble to the Maputo Protocol para 8.
113 Preamble to the Maputo Protocol paras 4-6 & 8-9.
114 Preamble to the Maputo Protocol para 5.
115 Viljoen & Kamunyu (n 12) 550.
116 S Fredman 'Women and poverty – A human rights approach' (2016) *African Journal of International and Comparative Law* 505.
117 As above.
118 A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611; see also Mnzava (n 27) 291.
119 Fredman (n 116) 505.

context.[120] The CEDAW Committee notes that purely formal equality is not sufficient to achieve equality for women.[121] It is not enough to guarantee women treatment that is identical to that of men. Biological, social, and culturally constructed differences between women and men must be taken into account.[122] Women must be given an equal start and they should be empowered by an enabling environment to achieve substantive equality.[123]

Substantive equality was developed to address the limitations of formal equality.[124] The Commission states that substantive equality:

> refers to the form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice, and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law.

Substantive equality is concerned to ensure outcomes that are equal in substance, not just on paper. It refers to 'equality in distribution of economic and social power and of opportunities for people to experience self-realisation'.[125] Substantive equality takes cognisance of existing patterns of inequality, taking economic and social conditions into account. The aim is to enable women to realise their full potential as equal members and actors in society. This aim is elaborated in Fredman's four features and dimensions of substantive equality.[126] Substantive equality is asymmetric in that it distinguishes between different treatment that causes detriment and different treatment that redresses past disadvantages to improve the disadvantaged group's position.[127] It moves away from relative equality – the assumption of conformity to a male norm. Rather, it takes differences into account when difference matters. Substantive equality is inherently transformative; it seeks to change existing structures.[128] Moreover, it insists on levelling up rather than down.[129] Finally, it entails a positive

120 A Rudman 'Access to justice and equal protection before the law' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 183.

121 CEDAW General Recommendation 25, on art 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (CEDAW GR 25) para 8.

122 As above.

123 As above.

124 Fredman (n 116) 505.

125 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 153-154; see also Mnzava (n 27) 291.

126 Fredman (n 116) 505-506. See also R Holtmaat 'The CEDAW: a holistic approach to women's equality and freedom' in A Hellum & HS Aasen (eds) *Women's human rights: CEDAW in international, regional and national law* (2013) 106; see also Mnzava (n 27) 291.

127 As above.

128 As above.

129 As above.

responsibility to bring about change, regardless of whether individual culpability or violation has been established.[130]

The dimensions of substantive equality are four-fold. First, it concentrates on remedying disadvantage rather than achieving gender neutrality. It redresses the gendered context, including women's subordinate position in areas such as the workplace. Second, it aims to redress stigma, stereotyping, humiliation, and violence on grounds of gender. The third-dimension entails recognition of how the structures of society entrench women's disadvantage. Instead of requiring women to conform to male norms, substantive equality requires the transformation of existing male-oriented institutions and structures. The final dimension of substantive equality is that it attaches importance to women's agency and voice in engendering the socio-economic rights necessary for women's empowerment.[131] These dimensions are vital in understanding the socio-economic provisions of the Maputo Protocol.

2.5 Application of the dominance-oriented teleological interpretation: methodological model

2.5.1 Introduction

The methodological model for the application of a dominance- oriented teleological approach in interpreting the socio-economic rights does not just require reference to the tenets of the teleological approach but also it requires the engagement of dominance approach, to build on substantive equality, in interpreting socio-economic rights in the Maputo Protocol. It should be noted that in *Social and Economic Rights Action Centre (SERAC) v Nigeria* (*SERAC*)[132] the Commission did apply the teleological approach but it did not address effectively gender implications on violations of a myriad of socio-economic rights including, the right to property, health, food, water, housing, and dignity. Though commended for its application of the teleological approach in interpreting these rights, the Commission's legally neutral gender analyses were an opportunity missed. The Commission did not pay attention to the gendered impact of the oil spills, which included ill health and the depletion of food reserves because of the inability to fish, which impacted women disproportionately.[133] The Commission could have further elaborated on the impact of the violations by noting that economic violence against a community impacts psychological health and can lead to physical violence, with women being disproportionately

130 As above.

131 As above.

132 *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication no 155/96 (2001) AHRLR 60 (ACHPR 2001).

133 F Banda 'African gender equality' in RJ Cook (ed) *Frontiers of gender equality: transnational legal perspectives* (2023) 274.

impacted. As dignity is rooted in equality, the failure to address the discriminatory impacts of socio-economic violations leads to a pervasive form of gendered discrimination and violence against women.[134]

Therefore, the methodology that integrates the dominance approach in the teleological approach is significant in five ways. First, it can guide the interpretive organs to apply the teleological approach and infuse in it the dominance approach to engender the interpretation. Second, it can help the interpretive organs to interrogate issues of women's lived reality and analyse them appropriately. Third, the methodology will help the interpretive machinery to critique legal, socio-economic, traditional, and sexual discriminatory practices against women. Fourth, the methodology will enable the interpretive machinery to practically reform inequality. Fifth, the methodology can help the interpretive organs to justify their decisions. As Tobin rightly observes, the appropriate application of the interpretive approach renders the interpretative process legitimate.[135] As such the article adopts a methodology of application that is in four interrelated stages as elaborated in the ensuing sub-parts.

2.5.2 Reference to the object and purpose of the Maputo Protocol

To interpret socio-economic rights through a teleological interpretation requires firstly, the interpretive organs to start with an inquiry into the object and purpose of the Maputo Protocol in relation to the socio-economic rights in question. The object and purpose of a treaty are established through a wide range of other significant intrinsic and extrinsic elements of the treaty in question.[136] Secondly, the interpretive organs must constantly engage the elements of the dominance approach in the inquiry of the object and purpose through all these tenets of the teleological approach. Women's narrative of their experience is vital to help interpretive organs identify and criticise the legal, social, economic, traditional, and sexual practices that violate women's socio-economic rights. The infusion of the tenets of the dominance approach is justified with the teleological approach that interprets a treaty in its context.

2.5.3 Principle of effectiveness

The principle of effectiveness as elaborated upon should be integrated throughout the interpretative process. This engagement is useful in ensuring that all interpretive aids referred to by interpretive organs assist in attaining the practical and effective meaning of the provisions

134 Banda (n 133) 274-275.

135 J Tobin 'Seeking to persuade: a constructive approach to human rights treaty interpretation' (2010) 23 *Harvard Human Rights Journal* 3-4.

136 For a methodology for the application of the teleological approach see generally: Amin 2017 (n 85).

being interpreted. Constant engagement of the principle of effectiveness ensures the effectiveness of treaty provisions. The effectiveness of the provisions implies that the rights are broadly interpreted, and their restrictions are interpreted narrowly. Moreover, the principle of effectiveness ensures consistency and uniformity in the interpretation of the treaty. This principle also guarantees an interpretation of a treaty that addresses the conditions prevalent at the time of interpretation. In this regard, all four dimensions of this principle should be engaged in the entire interpretative process.[137]

2.5.4 Substantive equality

The interpretive organs should engage the notion of substantive equality and its all dimensions should be engaged throughout the interpretative process. Engagement of substantive equality ensures four key elements. First, remedy disadvantage in question; second, redress stigma, stereotyping, humiliation, and violence on grounds of gender; third, identify the manner in which societal structures embody women's disadvantage; finally, advance women's participation in engendering socio-economic rights in question.

2.5.5 Dominance approach

Like the principle of effectiveness, the dominance approach as elaborated upon should be integrated throughout the above-mentioned interpretative process. The inquiry should be: What is women's lived reality to the socio-economic rights in question?; does the law, policy, or practice discriminate against women; Do these sources keep and strengthen women's exclusion from accessing and enjoying their socio-economic rights? As such, the interpretative process should be guided with above-mentioned guiding key informative questions. The interpretive organs should be mindful of the fact that the victims are women or on behalf of women, as such women victims should be provided with an opportunity to narrate their lived reality concerning socio-economic rights in question.

3 ANALYSIS OF SELECTED SOCIO-ECONOMIC RIGHTS IN THE MAPUTO PROTOCOL IN LIGHT OF THE DOMINANCE-ORIENTED TELEOLOGICAL INTERPRETATION

The analysis in this part aims at showing how the dominance approach can build on the teleological interpretation and substantive equality to develop the envisaged meaning of the socio-economic rights in the Maputo Protocol. The analysis focuses on selected socio-economic rights in the Maputo Protocol and relevant jurisprudence. The selected

137 Amin 2021b (n 85) 232.

rights are: right to marriage, right to education, and the right to health and reproductive health. The reasons for this selection are two-fold: first, these rights contain a wide range of concepts that are explicitly or implicitly relevant in other socio-economic provisions. As such the analysis will be useful for the interpretation of other socio-economic rights not covered in this part. Second, there is available jurisprudence by the African Court on Human and Peoples' Rights (African Court),[138] and Commission relating to these rights that is potential to demonstrate how the dominance approach can be applied by the interpretive organs.

3.1 Right to marriage

Marriage is a formal and informal union between men and women[139] recognised under any system of law, custom, society or religion.[140] The article dealing with marriage in the Maputo Protocol is article 6. The main paragraph of article 6 sets the equality standard and the rest of the paragraphs establish the content to the right. The right to marriage obliges states to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. These provisions give an impression that they are framed within the concept of formal equality. The dominance approach becomes useful as it rejects formal equality, which requires equal rights between women and men in marriage. Dominance approach helps the interpretive machinery to inquire whether equality in article 6 integrally contributes to maintaining women's inequality in marriage. The inquiry will help to understand the impact of article 6 on women, and the context of a woman in marriage rather than comparison to a male counterpart.

Furthermore, the right to marriage imposes upon states an obligation to ensure that no marriage takes place without 'free and full consent' of both parties.[141] The concept of 'free and full consent' entails a non-coercive agreement to the marriage with full understanding of the consequences of giving consent.[142] The dominance approach through the notion 'as a woman' is relevant to elaborate on discriminatory practices and prevalent male-domination that render women powerless and unable to give a free and full consent to marriage. Free and full consent is negated by practices such as arranged marriage (betrothal), forced marriage or forced remarriage, and when women

138 The African Court is established by art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc.OAU/LEG/EXP/AFCHPR/PROT (III), adopted on 9 June 1998 and entered into force on 25 January 2004.

139 Art 1(k) of the Maputo Protocol defines 'women' to include girls.

140 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage (Joint General Comment), adopted at the 29th session of the African Committee on the Rights and Welfare of the Child 2-9 May 2017 in Maseru, Lesotho para 6.

141 Art 6(a) of the Maputo Protocol.

142 Joint General Comment (n 140) para 6.

subject themselves to marriage in search of financial security.[143] In *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali (IHRDA)*,[144] the African Court regarding article 6 of the Maputo Protocol,[145] noted that the manner in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards that define conditions regarding age of marriage and consent of parties in marriage.[146] Practices that allow application of religious and customary laws on the consent to marriage were held to be inconsistent with article 6 of the Maputo Protocol.[147] While the decision is commendable, application of the dominance approach through "as a woman" tenet would have helped the African Court to engender its reasoning by considering that free and full consent was denied to women by simply being women. Significantly, the Maputo Protocol stipulates 18 years as the minimum age of marriage for women.[148] These provisions are instrumental in ensuring that the rights of girls are protected from the practice of child marriage.[149] Child marriage is a marriage in which either one of the parties, or both, is or was a child under the age of 18 at the time of union.[150] In *IHRDA* the African Court held that article 6(b) of the Maputo Protocol imposes upon states the obligation to take all appropriate measures to abolish negative practices customs, and practices discriminatory to children born out of wedlock for reasons of their gender, especially measures to guarantee the minimum age for marriage at 18 years.[151] This reasoning resonates with the dominance approach through its emphasis for transformation of the international legal, cultural, and social systems that do not address women's inequality lived reality effectively. This way the dominance approach gels with substantive equality dimension on transformation.

In the *Attorney General v Rebeca Z. Gyumi* (*Gyumi*),[152] the Court of Appeal of Tanzania had an opportunity to address equality of a girl-child in relation to child marriage and the concept of free and full consent. *Gyumi* was an appeal from the decision of the High Court regarding the constitutionality of sections 13 and 17 of the Tanzania's Law of Marriage Act (LMA) respectively. At the High Court the

143 CN Musembi 'Marriage' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 139.

144 *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) v Mali,* Application 46 of 2016.

145 *APDF* (n 144) para 90.

146 *APDF* (n 144) para 94.

147 *APDF* (n 144) para 95.

148 Art 6(b) of the Maputo Protocol.

149 RD Nanima 'The ACHPR and ACERWC on ending child marriage: revisiting the prohibition as a legislative measure' (2019) 20 *ESR Review* 11.

150 Joint General Comment (n 140) para 6.

151 *APDF* (n 144) para 75.

152 *The Attorney General v Rebeca Z. Gyumi*, civil appeal no 204 of 2017.

respondent challenged the constitutionality of sections 13 and 17 of the LMA. The challenged provisions require consent of parents or courts for girls below 18 years before marriage. At the same time section 13(1-2) of the LMA allows a girl to get married only upon 15 years and a male person to get married only upon attaining the age of 18 years. The respondent asked the High Court to declare the said provisions null and void and be expunged from the LMA, and 18 years should remain the minimum age of marriage until the Government amends the law.[153] The High Court was satisfied that the provisions are discriminatory as they uphold different treatment to persons of similar situations hence offending the constitutional principle of equality in articles 12(1) and 13(1) of Tanzania's Constitution. The High Court directed the Government to amend the law within one year and put 18 years as the eligible age for marriage for both boys and girls. The applicant appealed to the Court of Appeal.[154] Referring to article 6 of the Maputo Protocol, the Court of Appeal held that this provision only allows men and women of 18 years to marry. Persons below 18 years lack the capacity to enjoy the right to marriage. It held further that persons who enter into marriage must pass the test of free and full consent.[155]

Furthermore, article 6(c) obliges states to promote and protect the rights of women in marriage and family, including polygamous marital relationships.[156] Polygamous marriage is a form of marriage that allows a man to have more than one wife.[157] Considering the non-recognition of the rights of women in a polygamous marriage, these provisions of article 6(c) cannot be overstated. Dominance approach that is critical of reality and tries to change can be applied to transform the discriminatory practices facing women in polygamous marriage. Article 6(c) has potential to be protective of women who willingly or unwillingly find themselves in a polygamous marriage.[158] The right to marriage also includes a woman's right to choose a matrimonial regime and place of residence.[159] Other rights include a woman's right to retain and use her maiden name;[160] the right to retain her nationality. Article 6 also protects the right of a woman to acquire her property during her marriage.[161] This clause was necessitated by the reality of formal and

153 *Gyumi* (n 152) 1-2.

154 *Gyumi* (n 152) 3-5.

155 *Gyumi* (n 152) 30-31.

156 Art 6(c) of the Maputo Protocol.

157 EM Baloyi 'Critical reflections on polygamy in the African Christian context' (2013) 41 *Missionalia* 165. It should be noted that neither the Maputo Protocol nor any other African regional human rights in Africa has defined polygamous marriage.

158 Banda (133) 264.

159 Art 6(e) of the Maputo Protocol.

160 Art 6(f) of the Maputo Protocol.

161 Art 6(j) of the Maputo Protocol.

informal restrictions on women's legal capacity to enter into transactions.[162] Article 6(d) requires all marriages to be recorded in law and registered to acquire legal status. However, only civil and religious marriages respectively are registered, customary marriages are not registered.[163] Unregistered marriages pose challenges in the distribution of matrimonial property during separation, divorce, or annulment of marriage.[164] Since the dominance approach takes into account structural inequalities such as omission of the existing laws to address registration of customary marriage, which many women in Africa are in. Application of the dominance approach will give recognition of customary marriage a gender perspective. As such, non-recognition will be considered a violation of women's right to marriage and related rights such as right to property, inheritance etc.

3.2 Right to education and training

Article 12 of the Maputo Protocol protects the right to education and training. Education plays a pivotal transformative and women's empowerment role.[165] Education entails all types and levels of education and includes access to education, the standard and quality of education, and the conditions under which it is given.[166] Types and levels of education include pre-school, primary, secondary, tertiary, and adult education, and vocational training.[167] Significantly the right to education encompasses three dimensions namely: access to education, rights within education, and rights through education.[168] Access to education refers to participation, particularly the extent to which girls/boys, and women/men are equally represented, as well as adequate infrastructure.[169] Rights within education refer to substantive gender equality in education.[170] Rights through education define ways in which schooling shapes gender equality in other spheres of life.[171] These three dimensions are embedded in the 4As framework: availability, accessibility, adaptability, and affordability.[172]

162 CN Musembi 'Marriage' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 146.

163 General Comment 6 (n 10) para 19.

164 As above.

165 Committee on the Elimination of Discrimination against Women General recommendation 36 on girls' and women's right to education (CEDAW GR 36), CEDAW/C/CG/36, adopted on 16 November 2017 para 1.

166 Article 2 of Convention against Discrimination in Education (CADE), adopted by the General Conference at its eleventh session, Paris, 14 December 1960. It should be noted that the Maputo Protocol does not provide the definition of education.

167 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24 October 2011 (Principles and Guidelines) para 70.

168 CEDAW GR 36 (n 165) para 14.

169 CEDAW GR 36 (n 165) para 15.

170 CEDAW GR 36 (n 165) para 16.

171 CEDAW GR 36 (n 165) para 17.

172 CEDAW GR 36 (n 165) para 14.

Importantly, the right to education requires states to eliminate all forms of discrimination against women, and guarantee equal opportunity and access in the sphere of education and training.[173] Dominance approach is relevant here as it emphasises on the elimination of direct and indirect discriminatory practices in all spheres of life including the public and private sphere under the definition of discrimination in article 1(f) of the Maputo Protocol, and article 1(1) of the Convention against Discrimination in Education (CADE).[174] States should also eliminate stereotypes in textbooks, syllabuses, and the media, which perpetuate discrimination.[175] Stereotypes operate to attribute generalised behaviours, abilities, interests, values, and roles to a person or group of persons on the basis of their sex, gender, ethnicity, religion, social class, disability, or the intersection of these, or roles to people based on their membership in an identified group.[176] These provisions entrench the language of dominance approach in the right to education and training. The application of dominance approach that uses women's experience of stereotypes and exclusion in education can be applied to help a better understanding of the right to education and training in relation to these matters. Moreover, the dominance approach that strives to transform women's inequality into reality in education becomes useful to engender the right to education and advance its object and purpose to women.

Furthermore, states are obliged to protect women and girls from all forms of abuse, including sexual harassment in schools and other educational institutions, and provide for sanctions against the perpetrators of such practices. The Maputo Protocol does not explicitly define the phrase sexual harassment.[177] However, the meaning of sexual harassment can broadly be construed through the provisions of article 1(j) on violence against women[178] that define violence against women to mean

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or war.[179]

The prohibition of sexual harassment must be observed from the enrolment of students until the completion of education and training. It is also vital that women victims of sexual harassment are provided

173 Art 12(a), Maputo Protocol.

174 Convention against Discrimination in Education, adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

175 Art 12(1)(b), Maputo Protocol.

176 Wamahiu & Musembi (n 27) 267.

177 Mnzava (n 29) 296.

178 As above.

179 Art 1(j), Maputo Protocol. See also: African Commission on Human and Peoples' Rights, 'Guidelines on Combating Sexual Violence and Its Consequences in Africa' (Guidelines), adopted on 22 May 2017 para 3.1. See also CEDAW General Recommendation 19.

with access to counselling and rehabilitation services.[180] States should also integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.[181]

The application of the dominance approach that considers violence and sexual harassment against women as a form of male domination can help the interpretive organs to evaluate sexual harassment and violence inflicted on women and girls in schools. It can be applied to elaborate, through women and girls experience on sexual harassment in schools, how men use sexual harassment to keep women from attaining power and therefore render them powerless socially, economically, and politically.

Aspects of sexual harassment and gender-based violence appeared in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (*Egyptian*),[182] whereby the Commission found it imperative to define discrimination and its relationship with gender-based violence.[183] It referred to the provisions of article 1(f) and 1(j) of the Maputo Protocol, article 1 of CEDAW, and paragraph 6 of the General Recommendation 19 of CEDAW.[184] The Commission found that verbal assault used against the victims such as 'slut', and 'whore' is not usually used against men. They are generally meant to degrade and rip off the integrity of women who refuse to abide by traditional religious, and even social norms.[185] The Commission found that the physical assaults against the victims in this case are gender-specific in the sense that the victims were subjected to acts of sexual harassment and physical violence, including breast fondling, and touching or attempting to touch private and sensitive parts, that can only be directed to women.[186] It also held that threats against some of the victims who were accused of practicing prostitution when they refused to withdraw their complaints could also be classified as being gender specific.[187] The Commission held that incidents alleged took place in the form of a systematic sexual violence targeted at the women participating or present in the scene of the demonstration. It therefore held that the type of violence used during the demonstrations was perpetrated based solely on the sex of the persons at the scene of the demonstration. In other words, the violence was gender-specific and discriminatory by extension.[188] Although the Commission did not state it explicitly, it applied the tenet 'as a woman' to determine the *Egyptian* case.

180 Art 12(d), Maputo Protocol.
181 Art 12(e), Maputo Protocol.
182 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication 323/06.
183 *Egyptian* (n 182) para 120.
184 *Egyptian* (n 182) para 120-123.
185 *Egyptian* (n 182) para 143.
186 *Egyptian* (n 182) para 144.
187 *Egyptian* (n 182) para 145.
188 *Egyptian* (n 182) paras 152-153.

3.3 Right to health including sexual and reproductive health

The Maputo Protocol covers the right to health including sexual and reproductive health in article 14. States are obliged to ensure the right to health of women, including sexual and reproductive health is respected and promoted. The right therefore entails obligations to respect, protect and fulfil women's health including sexual and reproductive health. This main clause of article 14 is framed within the principle of substantive equality. As such, substantive equality is embedded in all provisions of article 14 including the right to control fertility; the right to decide whether to have children, the number of children and spacing of children; the right to choose any method of contraception; right to self-protection and to be protected against sexually transmitted infections including HIV; right to be informed on one's health status and on the health status of one's partner; and right to have family planning education.[189] The General Comment 2 on article 14(1)(a), (b), (c), and (f) and article 14(2)(a) and (c) of the Maputo Protocol (General Comment 2) explains that these rights are inextricably linked, interdependent and indivisible.[190] They are also interlinked with the rights to dignity, non-discrimination, and life.[191] The right to family planning education incorporates in it an obligation upon states to provide complete and accurate information necessary for enjoyment of health, including the choice of contraceptive methods.[192] The African Commission's Principles and Guidelines on the Implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights demonstrate that access to health-related education and information, control over one's own body and health, including sexual and reproductive freedom are the vital components of the right to health.[193]

Despite the above promising analysis that gives hope regarding the protection of the right to health and reproductive health the Commission issued a regressive decision recently in *Community Law Centre and three Others (on behalf of the Five Victims) v Nigeria* (*Community Law Centre*).[194] In this communication the complainants submitted to the African Commission on Human and Peoples' Rights complaints on behalf of five (5) women in Nigeria (the victims) who suffer from lifelong injuries such as obstetric fistulas, haemorrhage, and those who have died as a result of complications related to

189 Art 14(1)(a)-(e) of the Maputo Protocol.

190 African Commission General Comment 2 on art 14(1)(a), (b), (c) & (f) & art 14(2)(a) & (c) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 54th ordinary session of the African Commission held in Banjul, The Gambia, 22 October-5 November 2013 para 23 (African Commission General Comment 2).

191 African Commission General Comment 2 (n 189) paras 24-27.

192 African Commission General Comment 2 (n 189) para 28.

193 Principles and guidelines (n 167) para 64.

194 *Community Law Centre and three Others (on behalf of the Five Victims) v The Federal Republic of Nigeria*, Communication 564/15.

pregnancy or childbirth.[195] The Complainants argued that the Respondent State failed to provide adequate access to maternal healthcare services. They alleged the violation of the right to health and reproductive health in article 14, and the right to life in article 4 respectively.[196]

The Commission noted that though the complainants identified the violation of certain provisions of the Maputo Protocol they failed to elaborate on or show what the violation was.[197] It held that it could not find a basis for a decision on whether the said provisions have been violated or not.[198] On the right to life, it held that the right is a significant component of the right to sexual and reproductive health but the complainant's submissions did not show how maternal deaths were the result of a failure by the respondent state to take necessary measures to prevent such deaths. The Commission further stated that in particular, the respondent state has sufficient resources to prevent maternal deaths and, more importantly, that despite the existence of resources, it has failed to take necessary steps to ensure the continuous and sustainable improvement of the right to maternal health. Surprisingly, it stated that the complainants failed to demonstrate that the respondent state has promoted or adopted measures that undermine access to healthcare or social security benefits, including laws, policies or practices that have discriminatory effects. The Commission concluded that due to the absence of such explanation, the right to life in article 4 was not violated.[199]

Regarding the violation of the right to health, and sexual and reproductive health in article 14(1)(a), (b), (c), (f), and 2(a) and (c), the Commission held that the complainants had failed to demonstrate the causal link between the facts described and the mentioned provisions of article 14 on how the facts impeded the victims' personal decision-making of the right to exercise control over their fertility, on the right to decide on the number of children and the spacing of births, or on family planning in general. The Commission concluded therefore, that article 14 of the Maputo Protocol was not violated.[200]

Concerning the right to equality and non-discrimination relating to the right to health and reproductive health, the Commission held that article 2 of the Maputo Protocol exclusively focuses on non-discrimination on the basis of sex through the phrase 'discrimination against women'.[201] As such, in the context of article 2 of the Maputo Protocol differential treatment must be based on the sole ground of sex. In particular, law must guarantee the equality of women and men.[202] While noting the complainants' argument that the patriarchal system

195 *Community Law Centre* (n 194) para 1.
196 *Community Law Centre* (n 194) paras 10, 13, 57-58 & 60-88.
197 *Community Law Centre* (n 194) para 91.
198 *Community Law Centre* (n 194) para 92.
199 *Community Law Centre* (n 194) paras 104-105.
200 *Community Law Centre* (n 194) paras 117-118, and 121.
201 *Community Law Centre* (n 194) para 133.
202 *Community Law Centre* (n 194) para 135.

and adherence to cultural practices subject women to daily discriminatory practices concerning maternal health, the Commission held that the Complainants failed to show the kind of discriminatory treatment the victims had been subjected to. It further held that the Complainants failed to demonstrate how the patriarchal system and cultural practices had caused differential treatment of the victims compared to the treatment accorded to other similar categories in the same situation as the victims.[203]

Regarding the right to information as a component of the right to health and reproductive health in article 14(1) the Commission noted that the right to information is a gateway to all other human rights, including the right to health and reproductive health.[204] The Commission noted further that the right to health and reproductive health impose upon states an obligation to provide complete and accurate information necessary for the respect, protection, and enjoyment of health, including contraceptive methods.[205] However, the Commission held that the Complainants had failed to demonstrate how the ignorance of Nigerian women about contraception had contributed to maternal mortality and, more importantly, how the respondent state had played a passive role in providing family planning education. The Commission was of the view that the Complainants failed to establish a causal link between family planning education and maternal mortality.[206] Based on this reasoning, the Commission found that there was no violation of the right to information in article 14(1)(f) of the Maputo Protocol.[207]

The Commission could have benefited from the application of the dominance approach and avoid the regressive decision it arrived at. This is a good decision where the Commission applied the teleological approach but missed an opportunity to engender it. The application of the dominance approach would have allowed the Commission to use the argument that women are denied their right to health including sexual and reproductive health based on their sex 'as women'. The Commission could also apply the tenet 'as a woman' to find that women's experiences of sex inequality have shaped contours of sex discrimination. This line of reasoning would have helped the Commission to establish the violation of the right to equality and non-discrimination relating to the right to health and reproductive health.

The Commission could use the dominance approach argument that emphasises power imbalance underlying issues relating women's sexuality and reproductive health. This power imbalance tenet would have enriched the Commission's reasoning by considering that male-dominated practices view women's reproductive capacity as a symbol of male domination. This discriminatory practice is oppressive, as it perceives women as sources of childbearing, child rearing, breast-

203 *Community Law Centre* (n 194) para 136.
204 *Community Law Centre* (n 194) para 146.
205 *Community Law Centre* (n 194) para 148.
206 *Community Law Centre* (n 194) para 149.
207 *Community Law Centre* (n 194) para 150.

feeding, and sexual pleasure. As a result women's health and life is put in danger. This reasoning would have helped the Commission avoid the regressive decision it arrived at in relation to the relationship between health and reproductive rights and right to life.

The Commission could apply the argument of the dominance approach that men dominate women socially by perpetuating a legal system that reinforces gender inequality. The application of this tenet would help to show the respondent state's promotion or adoption of measures that undermine access to healthcare or social security benefits, including laws, policies or practices that have discriminatory effects.

Moreover, the Commission could have applied the dominance approach's argument that women's subordination to men leaves women powerless. This could be applied by the Commission as a causal link between the facts of this case and their implication on women's decision-making regarding rights in article 14. Generally, male domination affects women's personal decision-making of the right to exercise control over fertility, the right to decide on the number of children and the spacing of births, or on family planning. This reasoning could have assisted the Commission to establish the violation of article 14 on the right to health including sexual and reproductive health.

4 CONCLUSION

This article has shown that in Africa women have continued to be the victims of socio-economic rights by simply being women. The research carried out in this article has shown that male dominance is prevalent in all socio-economic rights. Women's socio-economic rights experience is the experience of inequality and male dominance. Importantly, the article has illustrated that the Maputo Protocol protects socio-economic rights extensively, but the interpretation that addresses women's experience is required. The article has also demonstrated that the teleological approach is relevant for the interpretation of socio-economic rights in the Maputo Protocol, however, it needs to integrate a feminist gender perspective. The article has also shown that the teleological interpretation that engages a gender perspective enables the interpretive organs to inquire into the object and purpose of the Maputo Protocol as well as women's socio-economic lived reality. Importantly, the research conducted in this article has demonstrated that the dominance approach can be integrated into the teleological approach and substantive equality for effective interpretation of socio-economic rights. Importantly, the article has developed the methodological model to guide the interpretive organs in the application of the developed gendered teleological interpretation. Finally, the article has analysed selected socio-economic rights and analysed the relevant jurisprudence to show how application of the dominance approach could help engender the

socio-economic rights in question and its implication on all socio-economic rights.

The right to adequate housing under African regional human rights law: exploring the extent of protection accorded to refugees

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ABSTRACT: A considerable portion of disadvantaged people in Africa live in inadequate housing and are particularly prone to homelessness, forced evictions and other housing challenges. These people include refugees in vulnerable situations, who face multiple challenges linked to their refugee status and other factors such as gender, disability, status as a child and poverty. African regional human rights law provides a robust protection for the right to adequate housing. However, for those who live in homelessness and precarious housing conditions, the regional legal protection is only useful if it is given effect at the domestic level. The clarification of the nature of the right to adequate housing and the corresponding obligations of states through the work of the three African regional human rights bodies, scholars and other actors is a worthwhile endeavour that can potentially contribute to the realisation of this right. So far, important contributions have been made in this regard, but further clarification of applicable norms is necessary. Situated in two areas of the African human rights system, namely the regional human rights law and refugee law regimes, this article builds on the rather limited literature in these areas and sheds new light on relevant provisions of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on Human and Peoples' Rights and its Protocols on the Rights of Women in Africa and the Rights of Persons with Disabilities in Africa, and the African Charter on the Rights and Welfare of the Child. It articulates the group-specific dimensions of the right to adequate housing and argues that the corresponding obligations imposed on states, including the immediate obligation to fulfil (or 'provide') adequate housing, must not be overlooked in the interpretation of this right.

TITRE ET RÉSUMÉ EN FRANÇAIS

Le droit à un logement adéquat en droit africain des droits de l'homme: analyse de l'étendue de la protection accordée aux réfugiés

RÉSUMÉ: En Afrique, un nombre significatif de personnes économiquement et socialement marginalisées vivent dans des conditions de logement inadéquates, les exposant à des risques accrus de sans-abrisme, d'expulsions forcées et d'autres formes de précarité résidentielle. Parmi elles figurent les réfugiés, une catégorie particulièrement vulnérable, confrontés à des défis complexes découlant de leur statut juridique, auxquels s'ajoutent des facteurs aggravants tels que le genre, le handicap, l'âge ou la pauvreté. Le cadre juridique régional africain en matière de droits de l'homme reconnaît et protège le droit à un logement adéquat. Toutefois, pour les populations vivant dans des conditions de logement précaires ou privées de logement,

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cette protection juridique n'est efficace que si elle est dûment mise en œuvre et appliquée au niveau national. Une clarification des contours de ce droit ainsi que des obligations des États en la matière, menée à travers les travaux des organes africains de protection des droits de l'homme, des chercheurs et d'autres parties prenantes, constitue une démarche essentielle pour en garantir la réalisation effective. Bien que des avancées significatives aient été réalisées dans ce domaine, des incertitudes subsistent quant à la portée normative et opérationnelle des obligations imposées aux États. S'inscrivant dans le cadre du système africain des droits de l'homme, cet article explore les interactions entre le droit régional des droits de l'homme et le droit des réfugiés. Il s'appuie sur des contributions doctrinales encore limitées pour examiner les dispositions clés de la Convention de l'OUA régissant les aspects propres aux réfugiés en Afrique, de la Charte africaine des droits de l'homme et des peuples, ainsi que de ses Protocoles relatifs aux droits des femmes et des personnes handicapées, et de la Charte africaine des droits et du bien-être de l'enfant. L'analyse met en lumière les dimensions spécifiques au groupe des réfugiés du droit à un logement adéquat, tout en insistant sur l'importance d'interpréter ce droit à la lumière des obligations immédiates et progressives des États. L'obligation de garantir un accès effectif à un logement adéquat, y compris par des mesures immédiates, ne saurait être sous-estimée dans la mise en œuvre et l'interprétation des droits garantis.

KEY WORDS: right to adequate housing; refugees; African regional human rights law; economic, social and cultural rights; the rights of refugees

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1 INTRODUCTION

The lack of adequate housing is a major challenge that affects a significant number of people in Africa. Although accurate and updated data on the situation of the right to adequate housing in Africa is not available, various sources show that this right has been realised only to a very limited extent. The number of homeless people is estimated to be in the tens of millions.[1] A 2019 report of the UN Habitat for Humanity International showed that 55.4 per cent of households in sub-Saharan

1 For the number of homeless persons in African countries, see World Population Review 'Homelessness by country 2024' https://worldpopulationreview.com/country-rankings/homelessness-by-country (accessed 17 December 2024).

Africa lived in unaffordable housing.[2] The majority of urban dwellers in Africa live in informal settlements in inadequate houses or shelters.[3] It is estimated that, by 2050, the number of informal settlement dwellers in Africa will reach 1.2 billion.[4] One of the main causes of the housing challenges in Africa is the lack of affordable housing in sufficient quantity.[5]

People in vulnerable situations are disproportionately and uniquely affected by the lack of adequate housing. A significant number of women, persons with disabilities, children, older persons, and refugees who live in homelessness or inadequate housing face peculiar housing challenges.[6] Many refugees experience housing challenges that are linked to their refugee status, poverty, sex or gender, disability, and their status as children.[7] Since most of them live in refugee camps[8] that are located in remote areas,[9] they do not have adequate access to infrastructure, services and amenities.[10] Their encampment also confines them to live in overcrowded shelters that do not give them adequate protection from the elements. Encamped refugees may also

2 UN Habitat for Humanity International 'The global housing affordability challenge: a more comprehensive understanding of the housing sector' (2019) Urban Data Digest 5.

3 B Chitekwe-Biti and others 'Upgrading informal settlements in African cities' 24 March 2022 *African Cities Research Consortium* available https://www.african-cities.org/upgrading-informal-settlements-in-african-cities/ (accessed 17 December 2024).

4 UN Habitat International 'Urban development in Africa, and the role of participatory city-wide slum upgrading for urban sustainability and the prevention of new slums' (year not provided) Policy recommendation paper 1.

5 M Maina and others 'Housing: domain report' African Cities Research Consortium working paper 18 (2024) 4.

6 See M Sobantu 'Revisiting gender and housing: housing as seen through the eyes of women in social rental housing in Gauteng, South Africa' (2019) 56 *Social Work/Maatskaplike* 65; S Tesemma & S Coetzee 'Manifestations of spatial exclusion and inclusion of people with disabilities in Africa' (2023) 38 *Disability and Society* 1938-1939; UNICEF & Ministry of Labour and Social Affairs 'Situation and access to services of people with disabilities and homeless people in two sub-cities of Addis Ababa' (2019) 23-25, 38-40.

7 See Y El-Lahib 'Social work at the intersection of disability and displacement: Rethinking our role' (2020) 31 *Journal of Progressive Services* 2; J van der Goltz and others 'The labour market impact of forced displacement: Jobs in host communities in Columbia, Ethiopia, Jordan, and Uganda' Executive summary booklet (2023) World Bank Group vii.

8 UNHCR's report shows that 78.5 per cent of refugees in Africa live in refugee camps. See UNHCR 'Global Report: 2018' 65.

9 ND Coniglio and others 'The geography of displacement, refugees' camps and social conflicts' (2022) World Bank Group: Policy research Working Paper 3.

10 The UNHCR's Handbook for Emergencies confirms that although 'the availability of an adequate amount of water' is crucial in camps, it is also 'the most problematic'. See UNHCR *Handbook for emergencies* (2007) 210. In Kenya, Kakuma refugee camp is camp is the largest urban settlement in North-West Turkana County, but only five per cent of its residents have access electricity. See UNHCR 'Kakuma camp and Kalobeyei settlement: Briefing kit, May 2019'. See also EO Abuya 'Past reflections, future insights: African asylum law and policy in historical perspective' (2007) 19 *International Journal of Refugee Law* 54.

lack legal security of tenure to their shelters in refugee camps.[11] A 2019 study showed that 65 per cent of refugee shelters in refugee settlements in Uganda were damaged,[12] and 'female-headed households' were particularly affected because most of them lived in shelters that had 'structural damage'.[13] Ironically, they were not allowed to construct their shelters using durable and culturally appropriate materials.[14]

Refugees living in urban areas also experience housing challenges. They are seldom included in national housing schemes, and, therefore, do not benefit from enabling mechanisms that facilitate their access to housing.[15] Many of them face discrimination in accessing housing in the market, expressed either in the denial to let housing to them, or in landlords requiring them to pay exorbitant rent.[16] In one instance, refugee women and their children were rendered homeless because they were unable to pay rent.[17] To make matters worse, state authorities evicted them from their makeshift shelters and demolished their shelters.[18]

Although refugees often face housing challenges that are distinct in their nature and extent, it is clear that many citizens of asylum states also face housing challenges. For example, in Uganda, one of the most generous refugee hosting countries in Africa, the government reported that more than 1 in 10 people were homeless,[19] and over three-fourths of the population lived in 'sub-standard housing conditions'.[20] Therefore, an intuitive reaction to any discourse about refugees' right to adequate housing in a country like Uganda may be 'these states should not be required to ensure the right to housing of refugees because they do not have sufficient resources and most of their own citizens have significant housing problems'. However, it must be noted that the housing challenges faced by citizens do not absolve these states from their obligations towards refugees. One may also argue that housing problems in any given country reflect the level of attention paid to the right to adequate housing and the measures taken by the state to ensure this right. In light of this, one may raise a counter question: in a country that has adequate legal and policy frameworks, mobilised and allocated sufficient resources for adequate housing, adopted all appropriate

11 For example, in refugee settlements in Uganda, almost all refugees lack documents attesting ownership or 'legal occupancy'. See REACH Initiative and Norwegian Refugee Council 'Refugee access to livelihoods and housing, land and property in Uganda' (2019) 24.

12 REACH Initiative and Norwegian Refugee Council (n 11) 2.

13 REACH Initiative and Norwegian Refugee Council (n 11) 18.

14 REACH Initiative and Norwegian Refugee Council (n 11) 18.

15 See eg C Kavuro 'Housing and integrating refugees: South Africa's exclusionary approach' (2019) 40 *Obiter* 81-82.

16 See eg Women's Refugee Commission 'The living ain't easy: urban refugees in Kampala' (2011) 12.

17 Women's Refugee Commission (n 16) 13.

18 E Lyytinen 'Congolese refugees' "right to the city" and urban (in)security in Kampala, Uganda' (2015) 9 *Journal of Eastern African Studies* 602.

19 Committee on Economic, Social and Cultural Rights 'Initial reports submitted by states parties due in 1990: Uganda' (2013) paras 120 & 136.

20 As above, paras 120 & 136.

measures and prioritised the most disadvantaged sections of its population, will a significant proportion of its population experience serious housing problems? Resource-related scepticism may also be countered. African states are endowed with enormous amounts of natural and human resources[21] that are more than enough to ensure that their populations live a dignified life. As Olowu points out, the problem is not the lack of resources: 'the bigger crisis of [African states'] incapacity lies in corruption and malevolent governance exemplified by skewed policy prioritisation'.[22]

These issues show that realising the right to adequate housing of refugees is often indistinguishable from realising the same right for other sub-groups of a country's population.[23] After all, in a state that has not ensured that sufficient affordable housing is available for its own people, how can refugees find affordable housing? While responses tailored to the unique housing challenges of refugees are crucial, in many cases, it would be appropriate to ensure that they are integrated into responses that address the housing challenges of all segments of the population of an asylum state. Such an approach must comply with the normative frameworks in place at the African regional level. In order to ensure this, articulating the applicable normative framework is in order. It is precisely for this reason that this article seeks to shed new light on the regional normative framework on the right to adequate housing applicable to everyone.

However, there are differences in the nature and scope of the protection given to the right to adequate housing under the treaties discussed in this article. In order to clarify and bring out a consistent interpretation of the relevant provisions of the treaties, this article employs the rules of treaty interpretation set out under the Vienna Convention on the Law of Treaties (VCLT). For the purpose of clarifying the meaning of the relevant provisions of treaties, this article relies on the 'general rule of treaty interpretation' laid out in article 31 of the VCLT. According to article 31 of the VCLT, the meaning ascribed to treaty provisions must accord with the 'ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose'.[24] The context of a treaty includes the 'text, including its preamble and annexes', subsequent legal instruments, including agreements between all the state parties, or by 'one or more state parties', that relate to the treaty in question.[25] Article 31(3) of the VCLT requires that subsequent agreement or practice of the state parties and any other pertinent 'rules of international law applicable in the relations between the parties'

21 F Viljoen *International human rights law in Africa* (2012) 544.

22 D Olowu *An integrative rights-based approach to human development in Africa* (2009) 206.

23 In the context of the rights of refugee children, Kaime has also emphasised the importance of addressing the challenges faced by children who are citizens of asylum states. See T Kaime 'The protection of refugee children under the African human rights system: finding durable solutions in international law' in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 193-194.

24 VCLT, art 31(1); M Waibel 'Demystifying the art of interpretation' (2011) 22 *The European Journal of International Law* 574.

25 VCLT, arts 31(2)(a) & (b).

must be considered along with the context of a treaty. It is only in cases where using the general rule leads to an 'ambiguous' or 'manifestly absurd or unreasonable' meaning that the supplementary rule of interpretation (interpretation based on the drafting history and conclusions of the drafters of a treaty) becomes utilisable.[26] In other words, if one uses the general rule of interpretation and ascribes a sufficiently clear and reasonable meaning to a treaty provision, it is neither permissible, nor necessary to use the supplementary rule of interpretation.[27]

In order to interpret the relevant provisions of each treaty in relation to other treaties considered in this article, and to demonstrate their applicability to refugees, this work relies on article 30 of the VCLT. This work seeks to identify, analyse, and explore the applicability to refugees of treaties that offer relatively more favourable standards of protection to the right to adequate housing. Except for the OAU Refugee Convention, all of the treaties considered in this article contain express provisions that either allow or require the application of more favourable standards enshrined in other treaties.[28] Because the more favourable clauses of these treaties are self-explanatory, this article does not foresee any interpretative issues.[29] This view is supported by article 30(2) of the VCLT, which provides that, if a treaty specifies that 'it is not to be considered as incompatible with an earlier or later treaty, the provisions of the other treaty prevail'.[30]

Regarding the OAU Refugee Convention, two alternatives may be pursued in order to apply the more favourable standards enshrined in other treaties. First, because the OAU Refugee Convention provides that it is the 'effective regional complement' to the UN Refugee Convention, the 'more favourable treaty clause' contained under article 5 of the UN Refugee Convention serves as a gateway for applying the higher normative standards enshrined under other treaties. Second, one may invoke the relevant rule of the VCLT that applies in situations where a treaty does not contain a 'more favourable treaty clause'. Article 30(3) of the VCLT provides that 'the earlier treaty applies only

26 VCLT, arts 32(a) & (b).

27 U Linderfalk *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 323.

28 See eg UN Refugee Convention, art 5; African Women's Protocol, art 31; African Protocol on PWDs, art 36(1).

29 Regarding the UN Refugee Convention and other treaties, a similar approach has been adopted by notable writers in the field. See eg MG Wachenfeld & H Christensen 'Note: an introduction to refugees and human rights' (1990) 59 *Nordic Journal of International Law* 183; T Clark & F Crépeau 'Mainstreaming refugee rights: the 1951 Refugee Convention and international human rights law' (1999) 17 *Netherlands Quarterly of Human Rights* 389-392, 401; A Edwards 'Human rights, refugees and the right to "enjoy" asylum' (2005) 17 *International Journal of Refugee Law* 306; V Chetail 'Are refugee rights human rights? An unorthodox questioning of the relations between refugee law and human rights law' in R Rubio-Marin (ed) *Human rights and immigration*: *collected courses of the Academy of European Law* (2014) 22.

30 VCLT, art 30(2).

to the extent that its provisions are compatible with those of the later treaty'.[31]

This article is divided into eight sections. The introduction is the first section. Section 2 explores the protection of the 'right' to housing under the UN Refugee Convention.[32] Section 3 analyses how and to what extent the OAU Refugee Convention protects this right. Section 4 discusses how the indirect protection accorded to the right to housing under the African Charter on Human and Peoples' Rights (African Charter) complements the protection accorded to this right under the global and African regional refugee-specific treaties. Section 5 analyses the novel legal protection accorded to (refugee) women's right to adequate housing under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). Section 6 analyses the protection accorded to the right to adequate housing of persons with disabilities under the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (African Protocol on PWDs). In this section, the article spotlights the unique nature of the right to adequate housing of persons with disabilities and the corresponding obligations of states under the African Protocol on PWDs and its applicability for refugees with disabilities in Africa. Section 7 analyses the indirect protection accorded to refugee children's right to adequate housing under the African Charter on the Rights and Welfare of the Child (African Children's Charter). Section 8 concludes the article.

2 THE PROTECTION OF REFUGEES' 'RIGHT' TO HOUSING UNDER THE UN REFUGEE CONVENTION

The UN Refugee Convention[33] does not expressly provide for refugees' right to housing using a rights language. Under article 21, it merely lays down obligations on its state parties with respect to refugee housing. As discussed below, the obligations it imposes are contingent on three factors: the level of the relationship that a refugee has with the state, the

31 In this case, the interpretative issue must relate to 'the same subject matter' governed by the treaties in question. The OAU Refugee Convention does not contain a provision that expressly deals with refugees' right to housing. However, as the analysis in section 3 shows, the 'right' to housing is implied in article 2(1) of this Convention. It is worth noting that the rule provided under art 30(3) also applies in cases where not all the parties to the earlier treaty are parties to the latter treaty. If all the parties to the earlier treaty are not parties to the latter treaty, the latter treaty applies to the states that are parties to it. See VCLT, art 30(4)(a)-(b).

32 This is necessitated by the fact that the OAU Refugee Convention does not contain a provision that expressly deals with refugees' right to housing, and instead, encourages its state parties to accede to the UN Refugee Convention and its Protocol of 1967, and apply the provisions of these treaties. See the preamble to the OAU Refugee Convention, para 11.

33 The temporal and geographic scope of application of this Convention has been by article 1(1) & (2) of the Protocol Relating to the Status of Refugees in 1967.

state's role with regard to housing, and the level of treatment it is required to grant refugees.

Under article 21 of the UN Refugee Convention, state parties' obligation towards refugees does not apply to all refugees. Instead, it is limited to refugees 'lawfully staying'. Lawful stay is determined based on the length of the refugees' stay in the country of asylum. If a refugee stays in an asylum state for more than a temporary period, they meet the criteria of lawful stay.[34] This clearly excludes refugees who have stayed in an asylum state for a short period of time. Because the personal scope of article 21 is restricted to this group of refugees, refugees who do not satisfy the requirement of lawful stay do not qualify as holders of the 'right' under article 21.[35] For this reason, Leckie and Simperingham suggest that these refugees 'will be limited, as regards housing, to protection under general human rights law'.[36]

In addition, under the UN Refugee Convention, state parties' obligation regarding refugees' 'right' to housing is conditional upon whether housing is 'regulated by laws or regulations or is subject to the control of public authorities'. This implies that a state party does not have housing-related obligations towards refugees if (and to the extent that) housing is a matter left outside its control, for example, if housing is entirely left to the private sector.

Unlike the typical formulation of housing related state obligations in human rights treaties, housing related state obligations under the UN Refugee Convention are formulated in relative terms. There are two types of relative obligations under article 21 in this regard, which may be understood as obligations pertaining to the minimum and higher standards of treatment. The minimum obligation of states is to grant protection to refugees to the extent that they protect the right to housing of 'aliens generally in the same circumstances'.[37] The higher standard enjoins states to grant refugees 'treatment as favourable as possible'. Although both types of obligations have similarity in that they

34 'Where the term "habitual residence" is used in other articles of the 1951 Convention [other than art 1A(2)], it signifies more than a stay of short duration, but was apparently not intended necessarily to imply permanent residence or domicile'. See G Goodwin-Gill & J McAdam *The refugee in international law* (2007) 526.

35 See S Leckie & E Simperingham 'Lodgment/housing' in E Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary* (2011) 1009. However, refugees may be accorded a national treatment by virtue of art 23. But this depends on whether housing forms part of public relief in the relevant laws and policies of a state party. See E Lester 'Article 23 (Public relief/Assistance publique)' in E Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary* (2011) 1055.

36 Leckie & Simperingham (n 35) 1009. It is important to note that the protection of the right to adequate housing under international human rights law is also beneficial for 'refugees lawfully staying' in the territory of an asylum state.

37 States are permitted to give preferential treatment to citizens of states with which they have bilateral or other treaties to this effect. This article, thus, permits states to exclude refugees and other aliens from the standard of protection accorded to foreigners who enjoy preferential treatment. See JC Hathaway *The rights of refugees under international law* (2005) 197-198.

are formulated in relative terms, there are also clear differences between these levels of obligations. Whether a state has complied with the minimum obligation can be ascertained by looking at the treatment it gives to the comparator group, namely, 'aliens generally in the same circumstances'. In contrast, establishing whether a state has complied with its obligation concerning the higher standard of treatment may not be easy. The higher standard obliges states to give protection to refugees' 'right' to housing to the extent they can, as favourable as possible. Clearly, this obligation is contingent on different factors, including the capacity of the asylum state and the particular circumstances of the refugees.

The relative standard adopted regarding the minimum standard is problematic. This is not only because the comparator group is 'aliens generally in the same circumstances'. The relative standard is problematic even if the comparator group were nationals. For example, in the latter case, this provision would have little or no significance to refugees in a state party that does not protect the right to housing of its citizens. The use of a comparator group under article 21 of the UN Convention also implies that state parties to the Convention do not have an obligation to treat refugees on par with their citizens. The non-discrimination provision of the Convention is clear in this regard because it does not prohibit asylum states from making a distinction between refugees and citizens.[38] The Convention only prohibits discrimination among refugees. The prohibited grounds of discrimination are also limited: states are required to refrain from discriminating between refugees based on race, religion or country of origin.[39]

Refugees' 'right' to housing is also implicitly protected under article 23 of the UN Refugee Convention, which deals with public relief. Public relief concerns state interventions to provide services or benefits for those who are in need.[40] Under article 23, the Convention requires state parties to provide public relief for refugees on equal terms with their 'nationals'. However, Hathaway points out two major limitations of article 23 of the UN Refugee Convention. First, this provision applies for refugees lawfully staying, which means that refugees who do not meet this criterion are outside the scope of this provision.[41] Second, if public relief programmes are not in place in a state party, the Convention does not require it to provide public relief for refugees.[42] If an asylum state provides public relief to its citizens, but the extent of public relief provided by the state is insufficient to meet the housing needs of refugees, the Convention does not require it to provide an adequate level of relief for refugees.[43] Similarly, if housing is not part of the existing public relief programmes of an asylum state, the

38 See UN Refugee Convention, art 3.
39 UN Refugee Convention, art 3; Clark & Crépeau (n 29) 393.
40 Hathaway (n 37) 824.
41 Hathaway (n 37) 808.
42 Hathaway (n 37) 808.
43 Hathaway (n 37) 809.

Convention does not enjoin the state to include housing as part of its public relief programmes. Therefore, though article 23 is significant in addressing the housing needs of refugees, its significance is also limited.

The UN Refugee Convention was not intended to set a static standard of protection for the rights of refugees. Instead, it was intended to enshrine minimum standards.[44] State parties to the Convention can 'grant' refugees 'more liberal rights'.[45] Under its article 5, the UN Refugee Convention provides that '[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'. A state party to the Convention may give a better protection for the rights of refugees by enacting legislation or by ratifying treaties that accord better protection for refugees' rights as compared to the UN Refugee Convention.[46] If new legislation or a treaty subsequently ratified more favourably protects refugees' right to housing as compared to the protection of this right under the UN Refugee Convention, the minimum standard of protection enshrined under the UN Refugee Convention should not bar refugees from benefiting from such protection.[47]

Subsequent to the coming into force of the UN Refugee Convention in 1954, several human rights treaties that protect the right to adequate housing have been adopted at the global and regional level. This contribution mainly deals with African regional refugee-specific and 'general' human rights treaties that, in many ways, complement the protection of refugees' 'right' to housing enshrined under the UN Refugee Convention. Although this article makes a specific reference to refugees, the analyses and arguments of this article pertaining to the 'general' human rights treaties are also relevant for people other than refugees.

3 REFUGEES' RIGHT TO ADEQUATE HOUSING UNDER THE OAU REFUGEE CONVENTION

The OAU Refugee Convention contains provisions that are distinct from the provisions of the UN Refugee Convention. This includes the expanded definition of the term refugee,[48] (which, in relation to refugees' right to adequate housing, means that persons falling under

44 N Robinson *Convention Relating to the Status of Refugees: its history, significance and contents* (1952) 9-10; Hathaway (n 37) 109.

45 Robinson (n 44) 9-10.

46 A Grahl-Madsen *Commentary on the Refugee Convention* (1997) article 5; Hathaway (n 37) 109.

47 If this relates to a treaty ratified by the state party subsequent to its ratification of the UN Refugee Convention, art 30(3) & (4) of the Vienna Convention on the Law of Treaties apply. See also Robinson (n 44) 17.

48 Art 1(2).

the broader definition are holders of the right to housing); the recognition, in the broader sense, of the obligation not to return refugees to their country of origin against their will;[49] and the obligation it imposes on states of origin to 'make adequate arrangements' for the repatriation of refugees and 'facilitate their re-settlement'.[50]

Unlike the UN Refugee Convention, the OAU Refugee Convention does not contain a broad range of substantive provisions. The limited number of substantive provisions under the OAU Refugee Convention are, just like in the UN Refugee Convention, framed as state obligations. However, as Viljoen notes, 'entitlements (or "indirect rights") are implied by the imposition of obligations on states'.[51] The substantive provisions under the OAU Refugee Convention, from which 'indirect rights' can be inferred, are the ones that deal with refugee status and the protection against refoulement,[52] non-discrimination,[53] the issuing of travel documents,[54] and the obligation to 'secure the settlement' of refugees.[55]

The absence of explicitly stated substantive rights in the OAU Refugee Convention was because this Convention was designed to be an 'effective regional complement in Africa' to the UN Refugee Convention.[56] The aim was to ensure that the substantive provisions under the UN Refugee Convention would be applicable in African states that become parties to both the UN Refugee Convention and the OAU Refugee Convention.[57] This is why the Assembly of Heads of State and Government requested state parties of the OAU Refugee Convention to accede to the UN Refugee Convention and its Protocol of 1967, and to 'apply their provisions to refugees in Africa'.[58] Consequently, the 'right' to housing enshrined under article 21 of the UN Refugee Convention is applicable in asylum countries that are parties to both the UN and OAU Refugee Conventions.[59]

In addition to the applicability of article 21 of the UN Refugee Convention, the right to adequate housing is more robustly, but

49 Art 2(3).

50 Art 5(2) of OAU Refugee Convention. See also Viljoen (n 21) 244.

51 Viljoen (n 21) 242.

52 OAU Refugee Convention, arts 1 & 2(3).

53 OAU Refugee Convention, art 4.

54 OAU Refugee Convention, art 6(1) & (3).

55 OAU Refugee Convention, art 2(1).

56 OAU Refugee Convention, art 8.

57 G Okoth-Obbo 'Thirty years on: a legal review of the 1969 Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 98; BTM Nyanduga 'Refugee protection under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 *German Yearbook of International Law* 93.

58 See the preamble of the OAU Refugee Convention, where the Assembly of Heads of State and Government requested Member States of the OAU to apply the provisions of the 1951 Refugee Convention.

59 See also VCLT, art 30(2); M Sharpe 'The 1969 African Refugee Convention: innovations, misconceptions, and omissions' (2012) 58 *McGill Law Journal/ Revue de droit de McGill* 140-141.

impliedly, protected under the OAU Refugee Convention. The obligation to 'secure the settlement of refugees', set out under article 2(1) of the OAU Refugee Convention imposes positive obligations on state parties. The term 'to secure the settlement of refugees' implies that state parties have an obligation to ensure that refugees have access to adequate housing, without which their settlement cannot be secured. It is crucial to note that this phrase imposes immediate and positive obligations (including the obligation to fulfil (provide)) on state parties to the Convention. This interpretation is consistent with state practice in several African countries.

The obligation to secure the settlement of refugees concerns the duty of states to find long term solutions for refugees.[60] Karadawi distinguishes between different phases of assistance that were provided to refugees in Sudan. The first phase is the 'relief phase' during which refugees are provided with emergency assistance upon their arrival.[61] The second phase is the 'settlement phase', which is defined by some level of permanence.[62] During this stage, refugees are given land, while 'infrastructure and services are financed by UNHCR'.[63] The allocation of plots of land for refugees, the primary aim of which was to enable refugees' self-reliance,[64] also facilitates their access to housing (for example, through self-help housing) and therefore, can be regarded as part of the state's performance of its Convention obligation to secure the settlement of refugees. While this is a widespread practice in many African countries that place refugees in refugee camps and refugee settlements, it is crucial that African states also pay attention to securing the settlement of refugees living in urban settings by facilitating and fulfilling their right to adequate housing.

It is also useful to note that the personal scope of article 2(1) is broader than the personal scope of article 21 of the UN Refugee Convention. In other words, the obligation to secure the settlement of refugees is not restricted to a portion of refugees, unlike article 21 of the UN Refugee Convention, which merely applies to a sub-group of refugees who have stayed in the country of asylum beyond a prescribed period of time.

The limitation of article 2(1) is that the right is circumscribed by the proviso 'consistent with their respective legislation'. Accordingly, the measures that states are required to take, including measures to ensure refugees' right to housing, are subject to their domestic legislation. This has the potential of jeopardising the protection of refugees' right to housing implied in this provision[65] because article 2(1) does not include a clause that stipulates limitations on domestic legislation, for example,

60 This does not necessarily imply durable solutions.

61 A Karadawi 'Constraints on assistance to refugees: some observations from the Sudan' (1983) 11 *World Development* 541.

62 As above, 541.

63 As above.

64 As above.

65 See also J Oloka-Onyango 'Plugging the holes: refugees, OAU policy and the practices of member states' (1986) USC Issue Brief, Washington DC 7-8.

where domestic legislation is too restrictive. However, the jurisprudence of the African Commission and the African Court on Human and Peoples' Rights (African Court) affirms that the term 'law' in such clauses does not give states an open remit to arbitrarily restrict human rights.

The protection of refugees' right to housing under the OAU Refugee Convention also has its limitations. Although article 2(1) can be interpreted broadly in a manner that addresses the housing challenges of diverse sub-groups of refugees, such as refugees with disabilities, refugee women, refugee children, and older refugees, its potential is yet to be unlocked through interpretation and application. A related setback to addressing refugees' housing challenges through the OAU Refugee Convention is that its non-discrimination provision has a very limited scope because it does not prohibit discrimination based on refugee status, sex, gender, disability and many other markers of identity or status.

To sum up, the OAU Refugee Convention indirectly protects refugees' right to housing in two ways. The first is by referring to article 21 of the UN Refugee Convention which deals with housing. The second indirect protection is through its article 2(1). As much as its value may be circumscribed by a clawback clause, the nature of states' obligations under article 2(1) reaffirms, and gives refugees a robust legal basis to claim their right to housing. Moreover, the expanded definition of the term 'refugees' under the OAU Refugee Convention provides a legal basis for the protection of the right to housing of a broader category of refugees included under article 1(2) of the OAU Refugee Convention, as compared to the narrow definition of the UN Refugee Convention. Furthermore, unlike the limited personal scope of application of article 21 of the UN Refugee Convention (which restricts the applicability of the right to housing to a sub-group of refugees), article 2(1) of the OAU Refugee Convention has a broader personal scope. However, its prohibition of discrimination is limited because it does not prohibit discrimination based on refugee status, sex or gender, and disability, among other grounds.

In what follows, this article explores how the African Charter, the African Women's Protocol, the African Protocol on PWDs, and the African Children's Charter strengthen the indirect protection of refugees' 'right' to housing under the OAU Refugee Convention, and respond to the specific housing challenges that different groups of refugees experience.

4 THE PROTECTION OF REFUGEES' RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN CHARTER

The right to adequate housing is not explicitly recognised in the African Charter. However, the African Commission on Human and Peoples' Rights (African Commission) has, in its jurisprudence, applied the

principle of interdependence of rights[66] and 'read into' other rights contained in the Charter in order to recognise and give meaning to the right to housing. In *Social and Economic Rights Action Centre and Another v Nigeria* (*SERAC* case), the Commission stated that the right to housing is impliedly protected in the rights to property, health and to the protection of family life, all of which are explicitly recognised in the African Charter.[67] It held that the destruction of the houses and villages of the Ogoni people by the Nigerian state violated its minimum obligations.[68] The Commission found that the minimum obligations with respect to the right to housing are the obligation to refrain from interfering in the enjoyment of the right to housing and the obligation to protect the enjoyment of this right.[69] It concluded that the state's acts amounted to a 'massive violation of the right to shelter'.[70] Similarly, the Commission has recognised the right to housing in other communications brought before it by invoking the interdependence of rights recognised in the Charter.[71]

The Commission elaborated on the content of the right to adequate housing. In its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (Principles and Guidelines), it incorporated the 'elements' of adequate housing,[72] which are useful for assessing the adequacy of housing.[73] The Commission made an important contribution to the clarification of the contents of the right to adequate housing. For example, its Principles and Guidelines spell out the elements of the right to adequate housing in a rights language and clearly state the corresponding obligations of states. This contrasts with the formulation of the 'elements of adequate housing' in General Comment 4 of the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), which, for the most part, does not couch the 'elements of adequate housing' as entitlements and freedoms, and fails to specify the obligations of states in relation to each element.[74] In addition, in its Principles and Guidelines, the Commission has made it clear that state parties to the African Charter have an obligation to

66 For a discussion on the Commission's use of the interdependency of rights in order to give recognition to the right to housing, see L Chenwi 'The right to adequate housing in the African regional human rights system: convergence between the African Commission and South African approaches' (2013) 17 *Law Democracy & Development* 355-357.

67 *SERAC and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 60.

68 *SERAC* para 61.

69 As above.

70 As above.

71 *Sudan Human Rights Organisation and Another v* Sudan (2009) AHRLR 153 (ACHPR 2009) para 159, 164, 205; and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 218.

72 Principles and Guidelines, paras 79(g)-(l).

73 The elements of adequacy were adopted by the Committee on ESCR in its General Comment 4, paras 8(a)-(g).

74 See eg Principles and Guidelines, para 79(j).

'ensure, at the very least, basic shelter for everybody'.[75] The Principles and Guidelines denote that states have an immediate obligation that includes the obligation to fulfil (provide).

Perhaps most people who lack adequate housing would be able to realise their right to housing if states merely respect, protect, promote, and facilitate favourable conditions that enable them to meet their housing needs. For those who cannot do so for various reasons, states have the obligation to fulfil (provide), at minimum, basic shelter. This is because the obligation of states to 'ensure, at the very least, basic shelter for everybody' is an immediate obligation of result. In other words, for those who cannot or will not meet their shelter needs even if states respect and protect the right to adequate housing and facilitate favourable conditions, an immediate obligation of result triggers states' obligation to fulfil (provide) basic shelter (at a minimum).

It is clear that the African Commission has adopted a minimalist approach in its Principles and Guidelines.[76] However, this should not come as a surprise given the absence of an express provision on the right to adequate housing under the Charter, which would have provided a solid legal basis and guidance for the Commission. As discussed in sections 5 and 6 below, the African Women's Protocol and the African Protocol on PWDs contain express provisions on the right to adequate housing and impose immediate obligations of result on their state parties.

The rights enshrined under the African Charter apply to every individual. The Charter requires that the rights contained in it must be applied 'without distinction of any kind'.[77] The list of the prohibited grounds of distinction under the African Charter are not exhaustive, which means that it is possible to recognise the prohibition of distinction based on unenumerated arbitrary grounds, such as refugee status and intersectional discrimination that involves refugee status. It is particularly worth noting that one of the prohibited grounds listed in the Charter is 'fortune'. As discussed in sections 6 and 7 of this article, the explicit legal recognition of fortune as a prohibited ground of distinction is significant with regard to the right to adequate housing.

The implied right to adequate housing is also applicable to refugees in their countries of refuge. The jurisprudence of the African Commission and its soft laws provide support to this interpretation. For example, in a matter that concerns human rights violations including the mass expulsion and forced eviction of Sierra Leonean refugees from their houses in Guinea,[78] the Commission based its findings both on the African Charter and the OAU Refugee Convention. It held that Guinea violated articles 2, 4, 5, 12(5) and 14 of the African Charter and

75 Principles and Guidelines, para 79(c).

76 See also *SERAC* para 61.

77 African Charter, art 2.

78 *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) para 3.

article 4 of the OAU Refugee Convention.[79] In addition, the Principles and Guidelines recommend that states 'take measures to ensure that [...] refugees are guaranteed equal access to [...] adequate housing and shelter'.[80] The most explicit recognition of refugees as holders of the right to adequate housing is found in the African Guiding Principles on the Rights of All Migrants, Refugees, and Asylum Seekers (Guiding Principles on Migrants' Rights), adopted by the African Commission on 21 October 2023.[81]

In sum, although the African Charter does not expressly enshrine the right to adequate housing, its provisions have been relied on to infer this right. As demonstrated in the jurisprudence and soft law of the Commission, this right applies to refugees. It is possible for the regional judicial and quasi-judicial human rights bodies to interpret this 'derived' right in a manner that addresses the peculiar housing challenges of various sub-groups of refugees.[82] In order to do so, these bodies may invoke other provisions of the African Charter and the relevant provisions of the group-specific regional human rights treaties. The next three sections analyse how and to what extent the African Women's Protocol, the African Protocol on PWDs, and the African Children's Charter protect this right, with a particular reference to refugees.

5 THE PROTECTION OF WOMEN'S RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN WOMEN'S PROTOCOL AND ITS APPLICABILITY FOR REFUGEE WOMEN

The African Women's Protocol aims to ensure the elimination of discrimination against women[83] and the 'promotion, realisation, and protection' of their rights.[84] This Protocol enhances the protection of women's rights under the African Charter. For example, it includes rights that are not explicitly recognised in the African Charter. Banda has aptly stated that the 'introduction of the right to adequate housing' was 'an important innovation of the African Protocol'.[85] Viljoen has also commented that, 'by including the right to food security and the right to adequate housing', the Protocol has 'gone beyond the scope' of

79 Although the Commission cited the non-discrimination provision, it did not reason that it interpreted 'other status' to include refugee status. It merely invoked article 2 of the Charter along with other provisions without any explanation.

80 Guiding Principles, para 79(p).

81 See Guiding Principles, Principle 28(1).

82 This is possible because the Commission is required to 'draw inspiration' from African regional and UN human rights instruments that do so. See art 60(1) of the African Charter.

83 African Women's Protocol, preamble, para 13.

84 African Women's Protocol, preamble, para 14.

85 F Banda 'Blazing a trail: the African Protocol on Women's Rights comes to force' (2006) 50 *Journal of African Law* 23.

the rights enshrined under the African Charter.[86] Their observations elucidate that the Protocol has added more subsistence related rights to the catalogue of the rights enshrined in the African Charter.

In its article 16, the African Women's Protocol specifically deals with the right to adequate housing. Unlike article 14(2)(h) of the International Convention against the Elimination of All forms of Discrimination against Women (CEDAW), which applies only to women living in rural areas, article 16 of the African Women's Protocol applies to all women. It states that

> [w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, states parties shall grant to women, whatever their marital status, access to adequate housing.

This provision has started to attract scholarly attention.[87] Building on existing literature, this article analyses this provision and its significance for addressing the housing challenges of women (including refugee women). Before proceeding to the analysis of this provision, it is appropriate to note that the Principles and Guidelines of the African Commission have dealt with the right to housing, mentioned women and refugees as part of vulnerable groups, and specified state obligations regarding their right to housing.[88] However, the Principles and Guidelines only relate to the African Charter, which does not contain an express provision on this right. The robust protection accorded to women's right to adequate housing is not the legal basis for the Principles and Guidelines. Although the Principles and Guidelines have substantially clarified the contents of the right to adequate housing, some aspects of the Principles and Guidelines, such as the 'minimum core obligations' regarding the right to housing are at variance with the level of obligation imposed by the Women's Protocol.[89] Therefore, further clarification of women's right to adequate housing in line with article 16 of the African Women's Protocol and the object and purpose of this Protocol is essential. Women's right to adequate housing under the African Women's Protocol and the corresponding obligations of state parties to this Protocol are analysed below.

One of the most important and innovative features of article 16 of the Protocol concerns its formulation of the nature of women's right to adequate housing and the corresponding obligations of states. This article identifies four distinct features of women's right to adequate housing under the Protocol.

86 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 20.

87 See M Killander 'Right to adequate housing' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 351; Viljoen (n 86) 20; Banda (n 85) 23.

88 Principles and Guidelines, para 79(n)-(r).

89 See Principles and Guidelines, para 79.

First, article 16 protects women's 'equal access' to adequate housing as an immediately claimable right and requires states to ensure this right immediately.

Second, by including the qualifier 'in a healthy environment', women's right to adequate housing under the African Women's Protocol strengthens the habitability element of adequate housing found in General Comment 4 of the Committee on ESCR.[90] By doing so, it crystalises the soft law obligation of states (regarding the habitability of housing) into a binding obligation. This responds to several housing challenges experienced by women in general, and refugee women in particular. It recognises their right to live in housing that protects them from, and is free from, threats to their health. This should also be understood as protection from physical threats, including domestic violence,[91] harassment in housing, and discriminatory rental levels that jeopardise the affordability of housing and ultimately compromise women's health, for example, by undermining their ability to cater for their needs.

Third, by proclaiming that 'women shall have the right to *equal access* to housing',[92] it transforms the accessibility dimension of the right to adequate housing, adopted in General Comment 4 of the Committee on ESCR[93] into a claimable right and a binding obligation on state parties. In addition to this relative standard (equal access), the Protocol also lays down an immediate and absolute standard by requiring state parties to 'grant to women [...] access to adequate housing'.

The 'equal access' clause under the first sentence of article 16 has profound significance and further comment is in order. Two issues stand out in this regard: (i) This right is framed as an immediately claimable right which means that state obligations are also immediate.[94] (ii) The term 'equal access' is not qualified by the comparator group found in CEDAW, namely, men. This addresses women's unequal access to housing more comprehensively. This is because inequality in access is not only related to gender-based factors, but also to other factors that play a role in women's access to housing.

Fourth, in the second sentence of article 16, which deals with what state parties must do in order to realise women's right to adequate housing, the Protocol imposes a combination of an obligation of

90 See Committee on Economic, Social and Cultural Rights 'General Comment 4' para 8(d).

91 In relation to this, the African Commission Guidelines prescribe that 'alternative housing should be provided to women victims of domestic violence. See African Commission Principles and Guidelines para 67(xxxv)(g). See also Chenwi (n 66) 352. It is important to note that refugee women and refugee girls living in refugee camps are highly vulnerable to sexual and gender-based violence.

92 Emphasis added.

93 Committee on ESCR, General Comment 4, para 8(e).

94 See also SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2013) 258. It is important to note that non-discrimination is one of the immediate obligations.

conduct and an obligation of result on state parties. This underscores the important role of state parties in the realisation of women's right to housing, mainly by taking positive measures that guarantee this right. This includes facilitating women's access to housing and fulfilling this right.

The word 'access' in this phrase has been interpreted as implying that what is required of states is 'to create and maintain conducive environment within which individuals are able to acquire [housing] for themselves and not to provide them directly, except in certain exceptional cases'.[95] However, I argue that the obligation to 'grant access' is broader than merely facilitating conditions for women to realise their right to housing.

Given the multiple challenges that must be overcome in order to finally create a conducive condition for many women in Africa to realise their right to housing, and the fact that states in which most women lack access to housing might find it easy to claim that they are taking measures towards creating such conditions, a narrow interpretation of this word is not beneficial to women who are deprived of access to housing.

The steps to be taken to ensure women's access to adequate housing depend on the circumstances prevailing in a state party and on the challenges faced by each woman deprived of access to housing. In many contexts, what is required might be facilitating conditions for them to secure their own housing,[96] for example, by ensuring their access to land, and providing housing finance. Given the multiple barriers many women in Africa experience in accessing housing, removing all barriers and creating suitable conditions that enable all of them to 'acquire' housing might take a long time.

The obligation of states to 'grant to women [...] access to adequate housing' is not qualified by the progressive realisation terminology. The ordinary meaning of the terms 'grant' and 'access' both imply an obligation to fulfil (provide) and an obligation to fulfil (facilitate).[97] The Merriam-Webster's Dictionary defines the term 'grant' as follows (these are the relevant ones to this analysis): 'to consent to carry out for a person: allow fulfilment of', 'to permit as a right, privilege or favour', and 'to bestow or transfer formally'. The Cambridge Dictionary defines this term as follows: 'to give or allow someone something, usually in an official way'.[98] From these definitions, one may conclude that this term not only implies permission, but also 'bestowing, giving, and officially

95 Yeshanew (n 94) 290, citing C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' in G Bekker (ed) *A compilation of essential documents on economic, social and cultural rights* (1999) 1 *Economic and Social Rights Series* 7.

96 Yeshanew (n 94) 290.

97 I rely on the ordinary meaning of these terms because the ordinary meaning of the terms of a treaty, read in their context, is the main means or rule of interpretation of treaties. See VCLT, art 31.

98 Cambridge dictionary, available https://dictionary.cambridge.org/dictionary/english/grant (accessed 9 January 2024).

transferring something to someone'.[99] Consequently, one may conclude that states' obligation to grant access to adequate housing includes a positive obligation to fulfil (provide) as one of its main components to realise this right. While the obligation to fulfil (provide) is not always relevant to realise this right, it is indispensable in many contexts, and it is enshrined in the Protocol to serve a purpose.

The African Women's Protocol was adopted to rectify a critical challenge that women in Africa face. As stated in the preamble to the Protocol, the central concern that necessitated the adoption of the Protocol was the fact that 'despite the ratification of the African Charter [...] and other human rights instruments' by African states, 'women in Africa still continue to be victims of discrimination'.[100] In other words, the Protocol was a 'response to the lack of implementation' of the rights of women enshrined under African and global human rights law.[101] Its aim is to 'ensure that the rights of women are promoted, realised and protected'.[102] It is in light of this aim that the right to adequate housing of women enshrined in the Protocol must be interpreted.

More support can be provided to the interpretation advanced in this article. 1) The formulation of accessibility of the right to health by the UN Committee on ESCR: Drawing on and adapting the four dimensions of the term 'accessibility' in its General Comment 15,[103] it would be helpful to construe 'access to adequate housing' in a multi-dimensional way that encompasses economic, informational, physical, and non-discrimination aspects. 2) The decision of the South African Constitutional Court in *Grootboom*, in which the Court interpreted the 'right to have access to adequate housing' enshrined under article 27(1) of the South African Constitution. It stated that '[f]or a person to have access to adequate housing, all of these conditions must be met: there must be land, there must be services, there must be a dwelling'.[104] It further emphasised that state policy must respond to the different needs of people. It stated that 'for those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses'.[105] Whereas, for 'those who cannot afford to provide themselves with housing', the Court stated that the state must 'pay special attention' and suggested that it must respond to their particular situation by providing 'adequate social assistance'.[106] It is worth noting that this decision, as well as the articulation of the different dimensions of 'accessibility' by the UN Committee on ESCR

99 This is a synthesised meaning of one aspect of the term.

100 Preamble to the African Women's Protocol, para 12; Banda (n 85); Viljoen (n 86) 16-17.

101 Viljoen (n 86) 17.

102 Preamble to the African Women's Protocol, para 14.

103 Committee on ESCR 'General Comment 15: the right to the highest attainable standard of health' para 12(b).

104 *Grootboom and others v Government of the Republic of South Africa and Others* (CCT38/00) [2000] ZACC 14 (21 September 2000) para 35.

105 *Grootboom*, para 36.

106 *Grootboom*, para 36.

relate to provisions of the South African Constitution and the ICESCR respectively, under which state obligations are qualified.[107] For this reason, although they provide insight into what 'access to adequate housing' entails, their interpretations of state obligations do not entirely correspond to how state obligations under article 16 of the African Women's Protocol should be interpreted. This is because the African Women's Protocol does not subject the realisation of women's right to adequate housing to the availability of resources.[108]

In light of this, state parties' obligation to fulfil (provide) women's right to adequate housing should not be treated as an exception without even assessing the barriers to their right to housing and identifying the most suitable way of ensuring their access to adequate housing.

Research shows that domestic laws and customary practices in various African countries subject women's right to housing to their marital status.[109] In response, by enshrining women's equal access to housing regardless of their marital status, the Protocol addresses another dimension of access, and is useful to challenge laws and practices that anchor women's right to housing on their marital status. State parties' obligations in this regard are also immediate and are not subject to progressive realisation.

The African Women's Protocol contains provisions that specifically refer to refugee women. This includes article 4(2)(k), which concerns refugee women's equal access to refugee status determination and obliges states to give refugee women the 'full protection and benefits guaranteed under international refugee law, including their own identity and documents'. Under the rubric of 'the right to peace', the Protocol enjoins states to secure the participation of asylum seeker and refugee women at all levels of decision making regarding the protection of refugees.[110] Evidently, the fact that the Protocol contains specific provisions dealing with refugee women does not mean that other rights contained in the Protocol do not apply to refugees. The specific provisions deal with matters that are specific to refugee women. In light of this, women's right to adequate housing, enshrined under the African Women's Protocol equally applies to refugee women.

It may be concluded that the African Women's Protocol provides a robust protection to the right to adequate housing of women. The main feature of the right to adequate housing of women under the African Women's Protocol is its formulation of the obligation of states as an immediate obligation of conduct and result. The other important feature of the right to adequate housing under the Protocol is the transformation of some aspects of the components of the right to

107 See the Constitution of the Republic of South Africa, secs 26(1)-(2); ICESCR, art 12.

108 In addition, the interpretation of the Court must be viewed by taking into account other factors such as the overall difference in the level of socio-economic development between South Africa and the majority of the rest of African states.

109 See eg L Chenwi & K McLean '"A woman's home is her castle?" – Poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 531-532.

110 African Women's Protocol, art 10(2)(c) - (d).

adequate housing from soft law-based, non-binding obligations into binding obligations. This section has also shown that the rights contained in the Protocol, including the right to adequate housing apply to refugee women.

6 THE RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN PROTOCOL ON PWDS AND ITS APPLICABILITY FOR REFUGEES WITH DISABILITIES

The African Protocol on PWDs was adopted with the aim of providing a legal response to multiple factors that constitute, and contribute to, the violation of the rights of PWDs in Africa. In its preamble, this Protocol mentions some of the factors that necessitated its adoption, which include the 'extreme levels of poverty',[111] and the 'systemic discrimination, social exclusion, prejudice within political, social and economic spheres',[112] which PWDs experience, and the absence of an appropriate and binding legal and institutional framework at the regional level.

One of the serious challenges that PWDs face relates to housing.[113] Difficulties in access, caused by financial and physical inaccessibility,[114] discrimination,[115] harassment, violence, and the lack of essential services and facilities could be cited as some examples of the housing challenges that PWDs face. As shown below, by providing tailored legal responses to these challenges, the African Protocol on PWDs addresses the shortcomings of the African Charter, and the OAU Refugee Convention and its global counterpart.

6.1 An overview of general and housing-specific obligations

In response to the above mentioned and other challenges, the African Protocol on PWDs enshrines the right to housing of PWDs and related PWDs-specific rights. The PWD-specific rights include, and are reflected in the Protocol's provisions dealing with, the right to

111 African Protocol on PWDs, para 16, 20, of preamble.

112 African Protocol on PWDs, para 17 of preamble.

113 El-Lahib (n 7) 2.

114 United Nations Department of Economic and Social Affairs 'Factsheet on persons with disabilities' available https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html (accessed 30 September 2023).

115 United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of an adequate standard of living, and non-discrimination in this context' A/72/128 (2017) para 13.

equality[116] and non-discrimination based on disability,[117] reasonable accommodation,[118] accessibility,[119] and the 'right to live in the community'.[120]

The Protocol provides that the rights it contains apply to every person with disabilities 'without distinction of any kind on any ground'.[121] Just like the African Charter, it mentions prohibited grounds of distinction but does not exhaustively list them. One of the prohibited grounds of distinction is 'fortune'.[122] Given the fact that access to adequate housing mainly depends on one's economic resources, those who lack the economic resources needed to secure adequate housing live either in substandard housing or homelessness. In recognition of the strong link between the availability or lack of economic resources and access or deprivation of adequate housing, the Committee on ESCR has stated that 'the right to housing should be ensured to all persons irrespective of income or access to economic resources'.[123] Because many PWDs lack adequate housing due to poverty, the fact that the African Protocol on PWDs states that the enjoyment of the rights it contains must not be contingent on the economic resources available for the PWDs is a significant legal protection.

Other general obligations applicable to the rights contained in the Protocol include obligations to 'ensure, respect, promote, protect and fulfil' the rights contained in the Protocol.[124] The obligation to respect entails abstaining from 'engaging in any act or practice' that violates the rights of PWDs.[125] The obligation to protect includes taking measures to protect PWDs from discrimination by non-state entities.[126] The obligation to fulfil includes allocating sufficient resources for the realisation of the rights of PWDs enshrined in the Protocol, and 'providing assistance and support' to PWDs.[127]

The Protocol enjoins its state parties to take 'appropriate and effective measures' to ensure that PWDs live in the community,[128] and stipulates various measures required for the full realisation of this right. Among the measures is that community services and facilities have to be provided to PWDs on equal terms with the general population.[129] This requires modifying inaccessible infrastructure and

116 African Protocol on PWDs, art 6.
117 African Protocol on PWDs, arts 4 & 5.
118 African Protocol on PWDs, art 3(g).
119 African Protocol on PWDs, art 15.
120 African Protocol on PWDs, art 14.
121 African Protocol on PWDs, art 5(1).
122 African Protocol on PWDs, art 5(1).
123 Committee on ESCR, General Comment 4, para 7.
124 African Protocol on PWDs, art 4.
125 African Protocol on PWDs, art 4(g).
126 African Protocol on PWDs, art 4(f).
127 African Protocol on PWDs, art 4(h) & (i).
128 African Protocol on PWDs, art 14(2).
129 African Protocol on PWDs, art 14(2)(g).

ensuring that all new infrastructures are universally designed.[130] State parties shall take 'reasonable and progressive' steps to ensure that such infrastructures are made accessible to PWDs.[131]

These obligations overlap with the specific obligations laid down in the article dealing with the right to adequate housing. State parties' disability-specific obligations relating to housing include, inter alia, the obligation to ensure that PWDs have access to various services and 'accessible housing',[132] and making available financial resources to 'cover disability-related expenses'.[133] State parties must ensure that PWDs get equal access to housing provided by the state.[134] They must also ensure that such housing is accessible to PWDs.[135] The obligation to ensure that PWDs shall be given equal access to housing provided by the state should not be interpreted in a formalistic and restrictive manner. In this regard, the Protocol does not expressly enjoin states to give PWDs priority of access to housing provided by the state.[136]

6.2 The formulation of the right to adequate housing of PWDs

The African Protocol on PWDs enshrines the right to adequate housing of PWDs and related disability-specific rights. The PWD-specific rights include and are reflected in the Protocol's provisions dealing with the right to equality (article 6) and non-discrimination based on disability (articles 4 and 5), reasonable accommodation (article 3(g), accessibility (article 15), and the 'right to live in the community' (article 14).

In addition to the abovementioned disability-specific rights and the corresponding state obligations they entail, the African Protocol on PWDs enshrines their right to adequate housing. Just like article 11(1) of the ICESCR, article 20 of the Protocol provides for PWDs' right to adequate housing as a component of the right to an adequate standard of living.

The African Protocol on PWDs does not subject the realisation of PWDs' right to adequate housing to the availability of resources or frame adequate housing as a progressively realisable right. Similarly, the 'general obligations' provision of the African Protocol on PWDs does not state that the realisation of the rights enshrined in the Protocol

130 African Protocol on PWDs, art 15(2)(e).

131 African Protocol on PWDs, art 15(2).

132 African Protocol on PWDs, art 20(2)(a).

133 African Protocol on PWDs, art 20(2)(c).

134 African Protocol on PWDs, art 14(2)(g).

135 See African Protocol on PWDs, art 15(1) & (2)(b).

136 The Commission's Principles and Guidelines require states to prioritise disadvantaged groups in their housing programmes. At the global level, the Committee on ESCR has, in its General Comment 4, included PWDs as a group that 'should be ensured some degree of priority in the housing sphere'. See General Comment 4 para 8(e).

depends on the availability of resources for a state party.[137] This contrasts with similar provisions of the ICESCR and the UN Convention on the Rights of Persons with Disabilities (CRPD), which contain clauses such as 'progressive realisation' and 'maximum available resources'.[138] Despite the fact that many provisions of the Protocol mirror the provisions of the CRPD, the omission of such a clause from the Protocol signals that the Protocol seeks to avoid giving states a leeway that they might misuse to cloak their failure to implement the rights enshrined under the Protocol, This interpretation of the omission of such a clause is also consistent with the general approach adopted in the African Charter and the African Women's Protocol.

Under the African Protocol on PWDs, the scope of state obligations pertaining to the right to adequate housing is not limited by the 'availability of resources' clause.[139] The Protocol requires state parties to 'take appropriate and effective measures to facilitate full enjoyment' by PWDs of 'this right'.[140] 'Appropriate and effective measures' include 'policy, legislative, administrative, institutional and budgetary' measures that will 'ensure, respect, promote, protect and fulfil' the rights laid out in the Protocol.[141] State parties have a margin of appreciation to decide on the kinds of measures that they deem appropriate. The fact that the measures required of state parties must be 'effective' further qualifies whether the measures taken by a state party are appropriate to eventually realise the full enjoyment of the right to adequate housing by PWDs. In many cases, an appropriate and effective measure to ensure the realisation of PWDs' right to adequate housing may require the deployment of all the abovementioned measures and a direct state intervention. If the realisation of PWDs' right to adequate housing depends on the direct intervention of the state (for example, the provision or facilitation of housing), the state party has an obligation to do so.[142]

Article 20 of the Protocol deals with the right to adequate housing of PWDs, nothing more, nothing less. It does not deal with the full realisation of this right (which refers to more than an adequate level of housing). The term 'full realisation' is used under article 2(1) of the ICESCR and article 4(2) of the CRPD. The full realisation of the right to housing can only be achieved progressively. The term 'full enjoyment of this right' is used under article 20(2) of the Protocol on PWDs and implies immediate obligations. This is because the (level of the) right it refers to is the right to adequate housing, which, in turn, is not formulated as a progressively realisable right. This is to flag the far reaching consequences that could result from confusing the terms 'full enjoyment of this right' and 'full realisation'.

137 African Protocol on PWDs, art 4.

138 See ICESCR, art 2(1); CRPD, art 4(2).

139 See African Protocol on PWDs, art 20(1) - (2).

140 African Protocol on PWDs, art 20(2).

141 Adapted from African Protocol on PWDs, art 4(1).

142 See for example African Protocol on PWDs, arts 4(h) & 20(2)(a).

Regarding the right to adequate housing of PWDs, the Protocol imposes disability-specific obligations on its state parties. The most explicit of these obligations is found in article 20(2)(a), which requires states to ensure access by PWDs to 'appropriate and affordable services, devices and other assistance for disability-related needs, including accessible housing'. In order to 'ensure' 'accessible housing' for PWDs, state parties to the Protocol must take measures that secure accessible housing for PWDs, and fulfil the 'access dimension' of the right to adequate housing. Again, one may argue that accessible housing encompasses inclusion and non-discrimination, economic accessibility, physical accessibility, and the accessibility of information.[143] This level of state parties' obligation is not subject to progressive realisation.

The Protocol on PWDs explicitly provides for disability-related dimensions of the right to adequate housing and imposes binding obligations on states in this regard.[144] Moreover, the African Protocol on PWDs transforms some aspects of the 'elements' of the right to adequate housing recognised in General Comment 4 of the Committee on ESCR from 'soft' obligations to binding obligations. For example, under this Protocol, the right to 'safe drinking water', 'sanitation', and 'accessible housing' entail binding obligations.[145] Furthermore, by comparing the different components of the right to an adequate standard of living enshrined under article 20(1) of the with article 28 of the CRPD, Basson notes that 'the express inclusion of [safe drinking water and sanitation], which have historically proved to be socially and politically critical, reminds us that many persons with disabilities in Africa do not yet have access to these basic necessities'.[146]

The overview of state obligations analysed above shows the extent to which the African Protocol on PWDs protects the right to adequate housing of PWDs in Africa. Therefore, it is important to explore whether the Protocol extends this protection to refugees with disabilities. The Protocol does not expressly state that its provisions apply to refugees with disabilities. However, the term 'persons with disabilities' is an umbrella term that encompasses refugees with disabilities and therefore, the protection accorded to the right to adequate housing under the Protocol applies to refugees with

143 With respect to 'facilities and services open or provided to the public', see these dimensions under the African Protocol on PWDs, art 15(1) & (2)(b). Regarding these dimensions in the context of the right to health under ICESCR, see Committee on ESCR 'General Comment 15: the right to the highest attainable standard of health' para 12(b).

144 See Committee on Economic, Social and Cultural Rights 'General Comment 5 on the rights of persons with disabilities'.

145 See art 11(1) of CESCR; Committee on ESCR 'General Comment 4' paras 8(b) & (e), and art 20(1) of the African Protocol on PWDs. See also arts 28(2)(a) & (d) of the UN Convention on the Rights of Persons with Disabilities.

146 Y Basson 'The right to an adequate standard of living in the protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 262.

disabilities.[147] The non-discrimination provision of the Protocol also affirms that the rights contained in the Protocol apply to 'every person with a disability'.

The Protocol requires state parties to take 'specific measures to ensure the protection and safety of persons with disabilities in situations of [...] forced displacements'.[148] The obligation of states to take 'specific measures' that protect forcibly displaced PWDs implies that these measures are additional to the general measures that are applicable to all PWDs. This indirectly confirms that the personal scope of the Protocol includes refugees with disabilities. It also confirms that the Protocol not only extends the same level of protection to refugees with disabilities, but also requires states to take further measures that particularly ensure the protection of refugees with disabilities. The Protocol enshrines specific rights and corresponding obligations that deal with women and girls with disabilities (article 27), children with disabilities (article 28), youth with disabilities (article 29), and older persons with disabilities (article 30).

To sum up, the African Protocol on PWDs is a crucial treaty that addresses many housing related challenges that refugees with disabilities experience. It transforms the nature of obligations regarding some aspects of the elements of adequate housing, for example, accessibility and the availability of services (including water) from soft obligations to binding obligations. The Protocol recognises the right to adequate housing of persons with disabilities and imposes immediate obligations on states. It also contains a number of disability-related dimensions of the 'elements' of the right to adequate housing. In general, the Protocol addresses the shortcomings of the African Charter, the OAU Refugee Convention, and the UN Refugee Convention.

7 THE LEGAL PROTECTION OF REFUGEE CHILDREN'S RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN CHILDREN'S CHARTER

The African Charter on the Rights and Welfare of the Child (African Children's Charter) is the only African human rights treaty that expressly proclaims that the rights it contains, including the right to housing, apply to refugee children. This sets it apart from other African human rights treaties and the UN Refugee Convention. It also enshrines child-specific principles and rights, such as the right to life

147 Except for the right to vote, the right to run for public office, and 'the right to enter and stay in a country', all human rights apply for refugees. See F Crépeau & I Atak 'Global migration governance: avoiding commitments on human rights, yet tracing a course for cooperation' (2016) 34 *Netherlands Quarterly of Human Rights* 117 (in relation to migrants in general). See for example African Charter, art 13. The African Protocol on PWDs is uncharacteristic in this regard. See art 21.

148 African Protocol on PWDs, art 12(a).

and development,[149] non-discrimination,[150] the best interests of the child, and the right to participation.[151]

Unlike the UN Convention on the Rights of the Child, the African Children's Charter does not contain an express provision on the right to adequate housing.[152] However, as discussed below, this right is implied in the provisions dealing with the freedom against interference in the home and parental responsibilities. The protection against interference in the home is one of the guarantees for housing rights that the Charter provides for the (refugee) child. Under article 10, it stipulates a non-interference obligation stating that '[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family, home …' As the prohibition relates to arbitrary or unlawful interference, this provision suggests that reasonable and lawful interference is permissible and recognises the rights of parents or legal guardians to 'exercise reasonable supervision over the conduct of their children'. Clearly, an interference amounting to harassment or forced eviction is outside the ambit of the rights of parents and guardians. To protect a child from arbitrary or unlawful interference, the provision guarantees the child's right to be legally protected against such an interference.[153] This provision has the potential of protecting a child's housing rights, for example, from various forms of interference including forced eviction.

The African Children's Charter explicitly provides for the obligation to fulfil (provide) both on parents and those responsible for the child, and on state parties. It recognises parents and other persons responsible for the child as primary duty bearers in the provision of housing for the child.[154] State parties must take 'all appropriate measures' to assist parents or those responsible for the child especially if they are in need. The African Children's Charter requires state parties to take 'all appropriate measures' to 'provide material assistance and support programmes' for such parents or people responsible for the child. The measures that state parties are required to take must be 'in accordance with their means and national conditions'. The phrase 'in accordance with their means and national conditions' is a key

149 African Children's Charter, art 5(1).

150 African Children's Charter, art 3.

151 African Children's Charter, art 4; See also C d'Orsi 'Legal protection of refugee children in Africa: positive aspects and shortcomings' (2019) 3 *African Human Rights Yearbook* 300-303; P Eriamiatoe 'Article 23: refugee children' in J Sloth-Nielsen, E Fokala & G Odongo (eds) *The African Charter on the Rights and Welfare of the Child: a commentary* (2024) 339.

152 Viljoen (n 21), regarding the right to adequate standard of living.

153 African Children's Charter, art 10.

154 Art 20(1) imposes on parents and those responsible for the child the duty 'to secure, within abilities and financial capacities, conditions of living necessary to the child's development'. States also have the obligation ensure, to the maximum extent possible, the survival, protection and development of the child'. See art 5(2). Evidently, housing is one of the conditions necessary for the development of a child. See also art 20(2)(a), and the Committee's recommendation to Liberia, in which the Committee states that inadequate and substandard provision of […] housing […] affect[s] the healthy development of children'. ACRWC Committee 'Concluding recommendation to Liberia' (2014) 8. See also Kaime (n 23) 184.

determinant of the scope of states' obligations under article 20(2)(a). As discussed below, it may be interpreted in two ways – restrictively or broadly:

i) Whether a state party has an obligation to provide 'material assistance or support programmes' depends on its 'means and national conditions'. A state party can invoke the lack of resources to justify its failure to provide assistance and support for those in need. In other words, any measure required of states towards fulfilling this obligation is resource dependent and progressively realisable. States are required to 'take all appropriate measures', which means that the obligation to fulfil (provide) is not an immediate obligation.

ii) The phrase 'in accordance with their means and national conditions' does not make state parties' obligations entirely conditional. The obligation of states to 'take all appropriate measures' to provide assistance or support for children in need is a given. The phrase in question only deals with the extent of the assistance required of states. It is not permissible for states to sidestep their obligation of providing 'material assistance or support programmes' by invoking the lack of resources. States have an immediate obligation to take measures. Regardless of the extent of resources available for a state, if the state takes all appropriate measures immediately, it can provide some form of assistance and support for children in need.

The second interpretation is more favourable for children in need because it does not open room for states to avoid fulfilling their article 20(2)(a) obligation on the pretext of the lack of resources. This interpretation also aligns with article 5 of the Charter, which deals with the 'survival and development' of children. Article 5 proclaims that 'every child has an inherent right to life', and requires state parties to 'ensure, to the maximum extent possible, the survival, protection and development of the child'.[155] Given the fact that the lack or deprivation of adequate housing is a threat to a child's life, the failure to 'take all appropriate measures' to provide assistance for a child with a housing need would constitute a violation of article 5 of the Children's Charter. A consideration of the object and purpose of the Charter also supports the second interpretation. As the object and purpose of the African Children's Charter includes the provision of a legal response to the specific 'needs of [the child's] physical and mental development', which are not met for a significant proportion of children in Africa,[156] an interpretation of article 20(2)(a) that better responds to the situation of deprived children is certainly preferable. Finally, the second interpretation is consistent with the right to housing provisions of the African protocols on women and persons with disabilities. As shown in the forgoing sections, the provisions of these protocols dealing with the right to adequate housing, which require states to fulfil (provide) this right, do not subject this obligation to the availability of resources.

When read in conjunction with the qualifier 'all appropriate measures', the clause 'in accordance with their means and national

155 African Children's Charter, arts 5(1)-(2).

156 See preamble to the African Children's Charter, paras 4, 6 & 8.

conditions' also serves as an important tool for assessing the appropriateness of measures taken by states towards 'provid[ing] material assistance and support programmes', including adequate housing. It can also be used to question states that have not fulfilled this obligation. A 2020 data released by the UNICEF shows that, in a number of African states South of the Sahara, only a small percentage of children benefited from state provided social protection schemes.[157] In light of this, the obligation of states enshrined under article 20(2)(b) of the African Children's Charter can be understood as a key legal response to the prevailing situation and as guidance for states that are yet to fulfil their obligation towards children in need.

7.1 The prohibition of discrimination against refugee children

The rights and freedoms enshrined under the African Children's Charter are applicable to 'every child' regardless of the child's 'race, ethnic group, [...] fortune, birth or other status'.[158] It is noteworthy to point out three features of the non-discrimination provision of the African Children's Charter. First, the list of 'prohibited grounds' is not exhaustive, which means that it is possible to recognise and remedy discrimination based on other arbitrary factors. Second, the Charter 'prohibits' discrimination by association. The rights and freedoms enshrined under the Children's Charter must not be denied to a child based on the race and other status of 'his or her parents or legal guardians'. Third, in the same way as the African Charter and the African Protocol on PWDs, the African Children's Charter expressly recognises that the rights it contains apply to every child irrespective of 'fortune'.[159] By comparing the African Children's Charter and the CRC, Karabo and Nanima note that the inclusion of 'fortune' in the Children's Charter is unique as CRC does not have a similar ground listed in article 2 thereof'.[160] Earlier sections of this article have pointed out the significance of the recognition 'fortune' as a prohibited ground of distinction in the enjoyment of the right to adequate housing, so it will not be repeated here.

157 The report does not contain data regarding 38 African countries (because data was not available). There is also a significant disparity in the percentage of children covered by social protection schemes provided by the 16 states for which data was available. See UNICEF 'One billion strong: Protecting children's rights in Africa today and tomorrow' (2020) 28. Available https://data.unicef.org/resources/one-billion-strong-protecting-childrens-rights-in-africa-today-and-tomorrow/ (accessed 24 December 2024). See also L Mills 'Article 20: parental responsibilities' in J Sloth-Nielsen, E Fokala & G Odongo (eds) *The African Charter on the Rights and Welfare of the Child: a commentary* (2024) 289.

158 African Children's Charter, art 3.

159 See African Charter, art 2; ACHPR Protocol on PWDs, art 5.

160 RL Karabo & RD Nanima 'Article 3: non-discrimination' in J Sloth-Nielsen, E Fokala & G Odongo (eds) *The African Charter on the Rights and Welfare of the Child: a commentary* (2024) 44.

The African Children's Charter does not, either directly or indirectly, allow differential treatment between refugee children and children who are also citizens of the country of asylum. Instead, it states that the rights it contains apply to a refugee child.[161] This guarantee against discrimination is distinctly framed when compared with references made to refugees in other African human rights treaties, and is the most straightforward legal protection accorded to refugees in this respect.

7.2 The applicability of more favourable standards under other legal regimes

Unlike the UN Convention on the Rights of the Child, the African Children's Charter does not contain an express provision dealing with the right to adequate housing.[162] However, the Charter provides a partial remedy for this omission. One of the ways that the omission could be remedied (to some extent) is by reading into article 20(2)(a). However, article 20(2)(a) does not sufficiently protect the right to adequate housing of (refugee) children. This is because the entitlements, freedoms and state obligations pertaining to the right to adequate housing cannot be equated with a mere obligation to provide material assistance. For this reason, it is essential to resort to article 1(2) of the African Children's Charter, which deals with the applicability of more favourable standards contained under other treaties. Under article 1(2), the African Children's Charter acknowledges that the Charter's rights 'shall [not] affect any provisions [of other treaties] that are more conducive' for children. Whereas, under article 23(1), which deals with refugee children, the African Children's Charter requires states to make use of 'applicable international [...] law'. It provides that state parties shall 'take all appropriate measures' to ensure that a refugee child 'receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in [...] international human rights and humanitarian instruments' which they are party to.[163] It is useful to note that the scope of protection accorded to refugees' right to adequate housing under 'general' international human rights instruments is broader than that of the UN Refugee Convention. In light of this, the African Children's Charter's reference to international human rights law means that, the more favourable legal protection given to the right to adequate housing under human rights law is applicable for the protection of refugee children.[164] For example, as discussed in the previous sections, the Protocols to the African Charter on women and persons with disabilities enshrine key

161 African Children's Charter, art 23(1).

162 Art 27(3) of the CRC deals with the right to adequate housing as part of the right to an adequate standard of living. See Viljoen (n 21) 395.

163 African Children's Charter, art 23(1).

164 See art 1(2) of the African Children's Charter, which provides that more favourable provisions contained under other treaties are applicable for the protection of children. See also Kaime (n 23) 184; Viljoen (n 21) 395.

legal guarantees that protect the right to adequate housing of women and persons with disabilities respectively. They also contain principles and rights that are specific to women and persons with disabilities. The African Children's Charter obliges its state parties to apply these standards for refugee girls and refugee children who have disabilities.[165]

In order to bridge the omission of the right to adequate standard of living in the African Children's Charter, Viljoen has suggested that the recognition of the right to housing by the African Commission and the express inclusion of this right under the African Women's Protocol 'could justify an updated interpretation of the Children's Charter as a "living instrument"'.[166] He further comments that the fact that 'all state parties to the Children's Charter are in any event also parties to the CRC', clearly suggesting the possibility of rectifying the omission of this right in the Children's Charter by resorting to the CRC.

7.3 Unaccompanied or separated refugee children

Unaccompanied or separated refugee children are more vulnerable than refugee children under the care of their parents or guardians.[167] The African Children's Charter recognises their vulnerability and provides that they 'shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment'.[168] This means that, for unaccompanied or separated refugee children, the obligation of state parties is to ensure that alternative care is provided for them on equal terms with other similarly situated children, for example, unaccompanied or separated children who are also citizens of the asylum state.[169] As housing is implied in alternative care, the protection of this right under the Charter responds to the peculiar housing challenges of such children.

The granting of nationality to unaccompanied or separated refugee children also gives them the legal basis (at the domestic level) to claim the same level of treatment accorded to unaccompanied or separated children who are citizens of a host state. This is especially important in cases where unaccompanied or separated refugee children are stateless. Recognising this, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee)

165 See also ACHPR Protocol on PWDS, art 27, which deals with 'women and girls with disabilities'.

166 Viljoen (n 21) 395.

167 Kaime (n 23) 188; SC Maioli and others 'International migration of unaccompanied minors: trends, health risks, and legal protection' (2021) 5 *Lancet Review* 882; Committee on the Rights of the Child 'General Comment 6(2005): treatment of unaccompanied and separated children outside their country of origin' paras 7-8.

168 Art 23(3); See also Eriamiatoe (n 151) 348.

169 African Children's Charter, art 25(2)(a); See also d'Orsi (n 151) 306.

has made recommendations to state parties to grant nationality to such children.[170] For example, in its concluding recommendation on the report of Ghana, it recommended that the state 'provide centres to house [migrant] children until [they] are united with their families'.[171]

In sum, the African Children's Charter responds to a wide range of specific housing challenges that many refugee children and sub-groups within them, such as unaccompanied or separated refugee children and refugee children living in poverty, experience. In addition to protecting their right to housing, the Charter recognises the applicability of their rights under human rights and humanitarian law. The African Children's Charter provides two alternative types of standards of treatment: national treatment (relative standard) and qualitative standards. This gives refugee children alternatives, for example, if the relative standard (national treatment) falls short of sufficiently protecting refugee children's right to housing, the standard of 'adequate housing' enshrined under other human rights treaties can be invoked. Also, if a state party accords better protection to children as compared to the standard of adequate housing under human rights treaties, claims based on the national treatment would be more beneficial for refugee children.

8 CONCLUSION

The lack of adequate housing is one of the most critical challenges that affect a significant number of people in Africa, particularly those in vulnerable situations. Refugees in vulnerable situations, who are also unevenly affected by the lack of adequate housing, experience this challenge in dismally unique ways. Adequate legal responses are part of the range of essential tools that guide African states to address this problem. Given the fact that these challenges have persisted despite the existence of robust legal frameworks in African regional human rights law, interpreting and clarifying the normative standards in a manner that is responsive to the prevailing situation is necessary and aligns with the object and purpose of relevant human rights treaties of this region. It is with the aim of doing so that this article has analysed applicable normative standards of African regional human rights law.

In addition to analysing the legal protection of the right to adequate housing under African human rights law, this article has explored the extent of protection given to refugees. It has found that, although the OAU Refugee Convention does not explicitly provide for the right to housing of refugees, and its non-discrimination provision fails to

170 ACRWC Committee 'Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Federal Democratic Republic of Ethiopia's report on the status of implementation on the African Charter on the Rights and Welfare of the Child' (2014) para 33.

171 ACRWC Committee 'Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Federal Democratic Republic of Ghana initial report on the status of implementation of the African Charter on the Rights and Welfare of the Child' (2016) para 16.

protect refugees from discrimination based on their refugee status, gender, disability, and many other markers of identity, it imposes an obligation on its state parties to secure the settlement of refugees. It has asserted that this obligation is broad and includes obligations pertaining to refugees' right to adequate housing. The article has shown that the shortcoming of the OAU Refugee Convention with regard to non-discrimination has been addressed by the African Charter, its protocols on women and persons with disabilities, and the African Children's Charter. The African Women's Protocol and the Protocol on PWDs provide robust protection to the right to adequate housing, for example, by imposing immediate obligations on state parties to fulfil (provide) adequate housing. This article has demonstrated why the protection of these protocols applies to refugee women and refugees with disabilities, respectively. Although the right to adequate housing is not expressly enshrined under the African Children's Charter, this article has shown the indirect ways in which the Charter protects refugee children's right to adequate housing.

A critical appraisal of the national institutional mechanisms for the prevention of torture in Nigeria

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ABSTRACT: According to the Optional Protocol to the Convention against Torture (OPCAT), national preventive mechanisms (NPMs) are required to conduct regular visits to detention centres and provide recommendations to authorities for preventing torture. Following its ratification of OPCAT, Nigeria established its NPM, known as the National Committee Against Torture (NCAT), in 2009 and enacted the Anti-Torture Act of 2017, which prohibits the use of torture in Nigeria without any exceptions. To comply with OPCAT requirements and create an effective NPM, Nigeria dissolved the 2009 NCAT and inaugurated a new NCAT in 2022. In 2024, the National Human Rights Commission (NHRC) was designated as the NPM, with a specialised department tasked with preventing torture. This raises an important question: If the previous two NCATs as an NPM could not comply with OPCAT requirements, how could we be sure that the NHRC, with its specialised department, will effectively prevent torture as prescribed by OPCAT? To address this question, this article investigates the previous NCATs' compliance with OPCAT requirements. It then analyses the NHRC as the newly designated NPM and interrogates its ability to meet OPCAT standards. The article concludes that several factors, such as the lack of adequate legal documentation establishing the 2009 and 2022 NCATs, insufficient resources, lack of functional independence, and limited funding, played a role in non-compliance. However, the NHRC already has an established structure and the capability to investigate human rights violations, albeit not with a preventive focus. Therefore, while the designation of the NHRC as the NPM through the 2024 order, along with its specialised department, meets specific standards, the clarity regarding the structure, funding, and unannounced visitation of this specialised department remains uncertain.

TITRE ET RÉSUMÉ EN FRANÇAIS

Une évaluation critique des mécanismes institutionnels nationaux pour la prévention de la torture au Nigéria

RÉSUMÉ: Conformément au Protocole facultatif à la Convention contre la torture (OPCAT), les mécanismes nationaux de prévention (MNP) sont tenus d'effectuer des visites régulières dans les centres de détention et de formuler des recommandations aux autorités afin de prévenir la torture. Après sa ratification de l'OPCAT, le Nigéria a mis en place son premier MNP, le Comité national contre la torture (NCAT), en 2009, et a promulgué en 2017 une loi interdisant la torture sans exception. Dans un souci de conformité avec les exigences de l'OPCAT, le Nigéria a dissous le NCAT de 2009 pour instaurer un nouveau NCAT en 2022. En 2024, la Commission nationale des droits de l'homme (CNDH) a été désignée comme MNP, avec un département spécialisé pour la prévention de la torture. Cette évolution soulève une question essentielle : si les précédents NCAT n'ont pas respecté les normes de l'OPCAT, comment garantir que la

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CNDH, avec son département spécialisé, parviendra à prévenir efficacement la torture, comme le prescrit l'OPCAT ? Cet article examine dans un premier temps la conformité des NCAT précédents avec les exigences de l'OPCAT. Il analyse ensuite le rôle de la CNDH en tant que MNP et évalue sa capacité à respecter les normes établies par l'OPCAT. L'article conclut que plusieurs facteurs, tels que l'absence des instruments juridiques solides pour les NCAT de 2009 et 2022, l'insuffisance des ressources, le manque d'indépendance fonctionnelle et un financement limité, ont contribué à leur non-conformité. Toutefois, la CNDH bénéficie déjà d'une structure opérationnelle et d'une capacité d'enquête sur les violations des droits humains, bien que son action ne soit pas spécifiquement axée sur la prévention de la torture. Dès lors, bien que la désignation de la CNDH comme MNP par l'ordonnance de 2024 et la création de son département spécialisé répondent à certaines exigences, des incertitudes demeurent quant à la clarté de sa structure, de son financement et de la mise en place de visites inopinées par ce département.

KEY WORDS: national preventive mechanism; prevention; torture; detention; National Committee Against Torture; National Human Rights Commission; Nigeria; OPCAT

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1 INTRODUCTION

The Nigerian Government signed the United Nations Convention against Torture (UNCAT) on 28 June 1988 and ratified it on 28 June 2001;[1] it ratified the Optional Protocol to the Convention against Torture (OPCAT) on 27 July 2009.[2] OPCAT imposed obligations on state parties to ensure that they established a functioning national preventive mechanism (NPM).[3] Two months after the OPCAT ratification, on 29 September 2009, the Federal Government

1 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 10 December 1984. Entry into force: 26 June 1987, by article 27(1). Registration 26 June 1987, No 24841, Status: Signatories: 84, Parties: 173 *United Nations Treaty Series*, vol 1465, 85. Signed by Nigeria on 28 July 1988 and ratified on 28 June 2001. See also, the United Nations treaty collection depository https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en (accessed 11 April 2022).

2 Federal Ministry of Justice 'Mandate of the national committee on torture' https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 26 July 2022).

3 Art 3 of OPCAT.

inaugurated the National Committee Against Torture (NCAT)[4] and in 2022 inaugurated another NCAT. The inaugural NCATs acted as an NPM in Nigeria as required under article 3 and part IV of the OPCAT.[5]

However, before NCAT, the National Human Rights Commission had been protecting and promoting human rights in Nigeria under Decree No 22 of 1995.[6] The government inaugurated the NHRC Governing Council eight months after its establishment. Furthermore, the law establishing the NHRC was amended in 2010,[7] and in 2024, with an order establishing the NHRC as the NPM in Nigeria with a specialised department.[8]

This article aims to analyse NCAT and NHRC, checking whether these institutions are independent and created by legal texts. Each institution must comply with the requirements set forth in part IV OPCAT. It is divided into three parts. The first part looks at Nigeria's NCAT with the mandate to visit any detention area in Nigeria. This part aims to understand why the NCAT lacks effectiveness and in doing so, outlines the process by which the NCAT was formed and if it was established by a statutory act or by the Constitution. It also analyses the functional, personnel and financial independence of NCAT. It provides a list of persons who are members of the NCAT and analyses whether members of the NPM can be functionally independent from the government. It discusses the roles and effectiveness of the NCAT. This role includes the visits conducted by the NCAT, recommendations, cooperation with the SPT and the drafting of legislation. The second part looks at the NHRC in Nigeria. While the NHRC was set up to protect and promote human rights in Nigeria, this part analyses if the NHRC as the new designated NPM in Nigeria will be able to function as an NPM. In order to determine whether the NHRC is an NPM, this part looks at whether it has the same mandates and other requirements as specified in articles 18 and 21 of OPCAT. The third part provides a conclusion and recommendation to the article.

4 SS Ameh (Chairman National committee Against torture) '4th Quarterly report of the National Committee Against Torture for the Period Ending 31st December 2014 to the United Nations Subcommittee against torture in Geneva, Switzerland'. Available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf (accessed 3 November 2024)

5 Federal Ministry of Justice 'Mandate of the national committee on torture' https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 26 July 2022).

6 Decree No 22 of October 1995. The military regime that is known for the abuse of human rights established a human rights institution. This was ironic as it is impossible for such an institution to function independently without state control or influence. It was later known as National Human Rights Commission Act Cap N46, Laws of the Federation of Nigeria, 2004.

7 National Human Rights Commission (Amendment) Act, 2010 (NHRC 2010 as Amended). See also, I Anaba 'Jonathan signs human rights commission bill into law' 28 March 2011 *Vanguard Newspaper* https://www.vanguardngr.com/2011/03/jonathan-signs-human-rights-commission-bill-into-law/ (accessed 14 December 2022).

8 Designation of the National Human Rights Commission as Nigeria Preventive Mechanism Order, 2024. S 1 No 21 of 2024. Available at https://www.apt.ch/sites/default/files/2024-09/NHRC%20NPM%20GAZETTE.pdf (accessed 3 November 2024).

2 THE NATIONAL COMMITTEE AGAINST TORTURE

The Anti-Torture Act 2017 failed to include the establishment of the NPM, apart from section 10, which provides that the Attorney General and other law enforcement or investigative agencies shall ensure the oversight of the implementation of the Anti-Torture Act 2017.[9] Furthermore, the Attorney General may assert that he oversees the implementation by indicating that the directors of NCAT and NHRC report to him. Section 10 did not mention the establishment of an oversight mechanism that would see to the eradication of torture or act as an agency that would serve as an NPM.

The objective of this part of the study is to examine whether the NCAT meets the requirements for functional independence, is staffed by professional experts, and complies with the Paris Principles, as well as the rules on visitation and recommendation mandate, as specified in part IV of OPCAT.

2.1 Functional independence of the NCAT

A key component of OPCAT's provision for the establishment of NPMs is to assure that they are functionally independent.[10] As explained by Nowak, functional independence must be based upon legislation that makes the NPMs stand out from the other branches of government, in order to maintain control over their institutions.[11] In general, the relevant legislation should be an act of parliament that creates NPMs.[12] As stated in the preliminary guidelines and the first annual report of the NPM, it is necessary for the state to establish the NPMs through legislation or within its constitution.[13] The NPM needs legislative backing to function properly and remain stable.[14] It also needs to be

9 Sec 10 of the Anti-Torture Act 2017.

10 Art 18 of OPCAT.

11 M Nowak & E McArthur *The United Nations Convention Against Torture: a commentary* (2008) 1075.

12 E Steinerte 'The changing nature of the relationship between the United Nations Subcommittee on Prevention of Torture and national preventive mechanisms: in search for equilibrium' (2013) 31(2) *Netherlands Quarterly of Human Rights* 132-1 9.

13 Committee against Torture. Fortieth session Geneva, 28 April-16 May 2008. First annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment February 2007 to March 2008 CAT/C/40/2 para 28. See also, Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The twelfth session, Geneva, 15-19 November 2010 'Guidelines on national preventive mechanisms' CAT/OP/12/5 para 7.

14 Subcommittee on Prevention of Torture Report on the visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras CAT/OP/HND/1 10 February 2010, para 262.

autonomous as an institution – a factor crucial to its success and stability.[15]

Both the 2009 and 2022 NCAT were established through terms of reference in order to fulfil the mandate of OPCAT, but no legislative text was attached to its establishment.[16] NCAT was established under the authority of the Federal Ministry of Justice, but the instrument of establishment[17] does not have legislative status because it is not an act of parliament or a part of the 1999 Constitution of Nigeria.[18] Amnesty International in 2014 noted that NCAT does not possess the legal independence necessary to fulfil any of its functions and mandates.[19]

As NCAT has no law establishing it, its involvement with the Federal Ministry of Justice suggests that it is an institution controlled by whoever heads the ministry.[20] The Attorney General of the Federal Ministry of Justice is appointed by the President, who is confirmed by the Senate. In light of the fact that there is no legislative text establishing the existence of the NCAT, the Attorney General may arguably be able to prevent it from performing its duties, compare to the NHRC Act 2010 (as amended) which prescribed how members can

15 As above.

16 Nigeria. Joint alternative report submitted in application of article 19 of the UN Committee against Torture and Cruel Inhuman and degrading treatment 72nd session of the UN Committee against Torture for the examination of Nigeria 2021 at 11.

17 The inaugural documents contain the Nigerian coat of arms, a symbol of the federal government. This document begins with the phrase 'Federal Ministry of Justice' followed by the phrase 'Mandate of the National Committee on Torture.' All capital letters are used. The document can only be accessed through the University of Bristol website. A concise outline of the mandate can also be found in the document provided by the former Chairman of the NCAT, Dr Samson Sani Ameh to the SPT in 2014. Dr Samson Sani Ameh NCAT 4th quarterly report of the National Committee Against Torture for the period ending 31st December 2014 to the United Nations Subcommittee against torture in Geneva, Switzerland' 2014 15 https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf (accessed 12 October 2022). This implies that the NCAT had no website either on its own or under the Ministry of Justice that could be accessed by the general public who want to file a complaint, and thus the NCAT mandate is only accessible to those who possess the necessary skills to search the internet. For example, South Africa, an African country like Nigeria, has an NPM website that can be accessed through https://sahrc.org.za/npm/index.php/about-the-npm. This website makes it easy for people to access information and provides a phone number for contact. However, the NCAT does not have a similar resource. Moreover, the annual reports received by the Subcommittee from National Preventive Mechanisms regularly update their websites; however, it indicates that Nigeria has not yet submitted a report. This information is available at https://web.dev.ohchr.un-icc.cloud/en/treaty-bodies/spt/annual-reports-received-subcommittee-national-preventive-mechanisms (accessed 3 November 2024).

18 The document that established the NCAT can be see here at https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 7 July/2022).

19 Amnesty International 'Torture in Nigeria; in summary' AFR 44/005/2014 https://www.amnesty.org/en/wp-content/uploads/2021/07/afr440052014en.pdf (accessed 10 July 2022).

20 Nigeria. Joint alternative report submitted in application of article 19 of the UN Committee against Torture and Cruel Inhuman and degrading treatment 72nd session of the UN Committee against Torture for the examination of Nigeria 2021 at 12.

be appointed and how they cease office, which the term of reference did not cover. This grants the AG broader powers than the NHRC.

OPCAT's torture prevention objective depends on an independent national and international body capable of visiting places where people are deprived of their liberties as a means of accomplishing this goal, countries that have ratified the OPCAT must establish national bodies to visit places where people are being deprived of their liberty.[21] The ostensible purpose of NCAT is to visit places of detention,[22] but since NCAT is not established by a legal text, it cannot function as required by article 18 of OPCAT.[23]

Moreover, article 18(3) obligates states to provide 'necessary resources for the functioning' of the NPMs.[24] According to Murray, and as noted above, the NPMs need 'the necessary resources' to function.[25] The functional independence of NPM is characterised by an adequately staffed and funded statutory establishment based on an act of parliament or the constitution.[26] The letter of reference did not specify how the NCAT is funded. Functional independence requires that an NPM have adequate staffing and provisions outlined in the statute that establishes the NPM regarding its funding.

2.2 Independence of personnel

According to article 18(2) of OPCAT, NPMs must have capable staff members who possess professional expertise,[27] in other words, experts with appropriate knowledge in relevant areas (as per the APT).[28] Through the Attorney General, the Nigerian Federal government inaugurated a newly appointed NCAT on 11 September 2022 with a broader mandate of preventing torture and liaising with NHRC in

21 Art 3 of OPCAT.

22 Federal Ministry of Justice Mandate of the national committee on torture https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 26 July 2022).

23 Amnesty International (n 19).

24 Art 18(3) of OPCAT.

25 R Murray 'National preventive mechanisms under the Optional Protocol to the Torture Convention: One size does not fit all' (2008) 26(4) *Netherlands Quarterly of Human Rights* 485, 496. (Among the resources that are required are offices, vehicles, furniture, computers, funds, and personnel. In spite of the fact that the necessary resources outlined in article 18(3) are a minimum requirement, many states argue that there is no additional funding available for NPMs Act.) As a result, the state is responsible for providing the necessary resources, which may be achieved by allocating funds to the NPMs through the appropriations process by the legislature.

26 Murray (n 25). The Term of Reference did not specify how the NCAT is funded. Functional independence requires that an NPM have adequate staffing and provisions outlined in the statute that establishes the NPM regarding its funding. For example, see the NHRC Act.

27 Art 18(2) of OPCAT.

28 Association for the Prevention of Torture (APT) and Inter-American Institute for Human Rights (IIHR) *Optional Protocol to the UN Convention against Torture implementation manual* (revised edition) 2010 91.

discharging its mandate, especially in the area of visitation to Correctional service facilities, to enable it to have first-hand information on the condition of inmate.[29] The newly appointed committee has a comprehensive mandate to engage and liaise with the Committee Against Torture and the regional human rights mechanisms. Its responsibilities include conducting follow-up actions, collecting data and information, and consulting with the NHRC as well as civil society organisations.[30] Among the newly appointed members are experts from a variety of fields, including human rights, police, academia, law, and non-governmental organisations (NGOs). They include the solicitor-general or the Permanent Secretary of the Ministry of Justice who serves as the chairperson, the Executive Secretary of the National Human Rights Commission who alternates as the chairperson; the Director of Citizens' Rights within the Ministry of Justice; the Director of Public Prosecutions of the Federation; The Director-General of the Legal Aid Council of Nigeria or any of the Director representatives; the Inspector-General of Police or any of his representatives not below the rank of Commissioner of Police; the Commandant-General of the Nigeria Security and Civil Defence Corps or any of his representatives but not below the rank of a commandant; the Director-General of the Department of State Service or any of his representatives not below the rank of a Director; and the Chief of Army Staff or any of his representatives not below the rank of colonel. In addition, the Chairman of the Economic and Financial Crimes Commission or any of his representatives not below the rank of a Director, and the President of the Nigerian Bar Association or any of his representatives act as members. Christy Mbonu Ezim, the Director-General of the Nigeria Institute of Advanced Legal Studies or any of staff of the Institute not below the rank of a director; the President of the International Federation of Woman Lawyer (FIDA) or any of her representatives; Avocats San Frontières, the Chairman of the Human Rights Agenda Network; Access to Justice; the Director of Nigerian Law School, Chibueze P Okoli also serve as members and the Director of Monitoring Department of the National Human Rights Commission serves as the Secretary.

Providing the necessary resources and selecting the appropriate members are specific responsibilities of each state's government.[31] As required by article 18(4), the government must take into account the Paris Principles when establishing NPMs.[32] The Paris Principles provide more guidance on how the members of a human rights institution should be appointed, instructing that representatives from a wide range of backgrounds should be appointed,[33] including NGOs,

29 A Oluwafemi 'FG sets up committee to monitor compliance with laws against torture' *The Cable* https://www.thecable.ng/fg-sets-up-committee-to-monitor-compliance-with-laws-against-torture (11 September 2022) (accessed 8 October 2022).

30 As above.

31 Murray (n 25) 485-97.

32 Art 18(4) of OPCAT.

33 Composition and guarantees of independence and pluralism Paris Principle 1.

members of parliament, lawyers, and government officials – but the latter should only serve as advisers.[34]

In accordance with the Paris Principles, the appointment of members must be outlined and stipulated in an official act or legal document,[35] which must also embody pluralism.[36] However, the appointments cited above cannot be said to be made through an official act or legal document.

As outlined in the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to the Czech Republic in 2002, an NPM should be distinct from the police service[37] an independent body that is not administratively or organisationally subordinate to any government ministry.[38] In summary, this suggests that the government should not interfere with the duties of the NPM, but should provide adequate resources and ensure that the NPM is governed according to the Act of Parliament establishing it.[39]

It can be asked whether all NPMs can be detached from the government. According to Murray, NPMs must maintain a close relationship with the government so that its recommendations and findings are implemented.[40] One benefit of an NPM is that it cannot be completely detached from the government as would be in the case of NGOs.[41] Murray recommends that NPMs be established by statutes or legal documents that take on a status that extends beyond those of NGOs.[42] This would bring them closer to the government while providing them with some influence.[43] While being an independent body does not mean the NPM must be 'friends' with the government,[44] it does mean that the NPM must be able to distance itself from the government while also engaging in constructive dialogue with the

34 Composition and guarantees of independence and pluralism Paris Principle 1(a)-(e).

35 Composition and guarantees of independence and pluralism in the Paris Principle 1(3).

36 As above.

37 Council of Europe 'Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002. Strasbourg, 12 March 2004 CPT/INF/(2004) 4 para 102. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680695650 (accessed 10 October 2022).

38 As above.

39 As above.

40 Murray (n 25) 485-500.

41 As above.

42 As above.

43 University of Bristol *The optional protocol to the UNCAT: Preventive mechanism and standards' conference report*; report on the First Annual Conference on the Implementation of the Optional Protocol to OPCAT. Law School, University of Bristol April 19-20, 2007 32 https://research-information.bris.ac.uk/ws/portalfiles/portal/190916323/First_Annual_Conference_on_the_implementation_of_OPCAT_19_20_April_2007_Bristol_UK_Final_Proceedings.pdf (accessed 10 October 2022).

44 As above.

government and monitoring detention centres.[45] This would enable the NPM to create a relationship and a partnership with the government that would produce lasting trust.[46] Thus, it is argued that the inclusion of the Chief of Army Staff, Inspector-General of Police, Director of Public Prosecutions, and Controller General of Corrections on the NCAT committee will provide a balance between NCAT's capacity as an NPM and the ability to maintain influence on government through these officials, which is not possible for an NGO. Nevertheless, when these government-appointed individuals are unable to distance themselves from the government's influence, the NCAT committee, as a whole, and its independence will be at risk.[47]

In addition, the Paris Principles stipulate that for an expert to be independent,[48] a legal document detailing their terms of service and terms of renewal must be provided.[49] However, it is not stated in the inaugural document of NCAT whether members can renew their positions or what the duration of the term of office will be.[50] Moreover, the document that created NCAT members is neither in a constitutional document, nor in a statute.[51]

2.3 Financial independence

In accordance with OPCAT article 18(3), state parties are required to provide 'necessary resources' for the proper functioning of NPMs.[52] OPCAT did not specify what 'necessary resources' entail, however, the NPMs guidelines indicate that adequate funding is required for the NPMs to perform their functions.[53] Having adequate funding allows NPMs to be financially autonomous, allowing them to hire their own

45 As above.

46 Murray (n 25) 485-500.

47 In addition, the government may appoint members from different NGOs who have previous experience in civil society organisations. As such, any recommendations made may not be implemented on time or have less influence on the government. In this regard, the thesis argues that government members should serve only as advisers to the NCAT rather than being members. The members should possess expertise in civil society organisations and human rights. The government members would have an influence on the government and would also create a relationship of trust between the government and the NCAT committee. See also, Composition and guarantees of independence and pluralism Paris Principle 1(e) Government departments (If these are included, their representative should participate in the deliberations only in an advisory capacity).

48 Composition and guarantees of independence and pluralism Paris Principle 1(3).

49 As above.

50 Federal Ministry of Justice 'Mandate of the National Committee on Torture' http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeria termsofreference.pdf (accessed 10 October 2022).

51 As above.

52 Art 18(3) of OPCAT.

53 Para 11 of the Guidelines on NPMs.

staff and direct their own activities.[54] Therefore, financial independence is a fundamental requirement for the NPM to function effectively, and without it, the NPM cannot make independent decisions or operate efficiently.[55]

According to the APT manual guide, the NPM must be able to develop its own budget that will enable it to function independently of the government.[56] This will enable it to make its own decisions.[57] Consequently, the founding documents establishing the NPMs must specify the sources of funding and how they should be spent.[58] In spite of this, there are no legislative documents establishing the NCAT. The former chairman of the NCAT, Sanni Ameh (Senior Advocate of Nigeria), in a technical consultation on implementing the Anti-Torture Act 2017 held in Abuja on an international day supporting victims of torture, in 2022, alleged that the NCAT lacked adequate financial resources to investigate and send periodic reports to the United Nations.[59]

The 2021 US Department of State's Country Reports on human rights alleged that the NCAT also lacked operational independence and legal backing, which had hindered the NCAT from working effectively.[60] This implied that NCAT, despite having broad mandates, lacked legal, operational and financial independence to perform any of its tasks. Arguably, this has resulted in a low number of visitations to prisons and none to any police cells.

2.4 Roles and effectiveness of NCAT

The question of the effectiveness of any human rights institution is closely related to the roles of the institution.[61] In accordance with OPCAT, the role of an NPM is diverse. NPMs are responsible for

54 United Nations 'Principles relating to the status of national institutions (The Paris Principles)' Adopted 20 December 1993 by the General Assembly resolution 48/134. https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris (accessed 14 August 2022) para 2.

55 Amnesty International 'Checklist for the effective implementation of the OPCAT establishment of National Preventive Mechanisms (NPMS)' 2 https://www.amnesty.org/en/wp-content/uploads/2021/06/ior500012014en.pdf (accessed 15 December 2022).

56 Association for the Prevention of Torture (APT) and Intern-American Institute for Human Rights (IIHR) *Optional Protocol to the UN Convention against Torture implementation manual* (revised edition) 2010 100.

57 As above.

58 As above.

59 S Ogunlowo 'We are suffering from lack of funding-FG's anti-torture committee' 21 June 2022 *Premium Times Newspaper* https://www.premiumtimesng.com/news/more-news/538425-we-are-suffering-from-lack-of-funding-fgs-anti-torture-committee.html (accessed 10 July 2022).

60 United State Department of State '2021 Country reports on human rights practices: Nigeria' https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/nigeria (accessed 10 July 2022).

61 Murray (n 25) 485-502.

conducting regular visits to detention centres[62] and making recommendations to the relevant authorities in order to improve the conditions of deprived individuals.[63] In addition, they must submit proposals for and comments on any draft legislation.[64] Further, it serves as a point of contact for the SPT[65] and prepares reports for the SPT on the state of affairs and advises the government when necessary.[66]

The mandates of NCAT envisage visitation to any place of detention as defined by OPCAT.[67] This includes prisons, immigration detention centres, police cells, and places where authorities hold people.[68] NCAT, in 2014, with the then chairman and other members, visited Minna Old Prison, Minna New Medium Security Prison, Kontagora Medium Security Prison, Bida Prison, New Bussa Prison, Lapai Prison and Kagara Prison.[69] While the efforts of NCAT are laudable, places of detention do not stop at prisons; they include police station cells where the use of torture is most perpetrated in Nigeria.[70]

The use of torture is said by Human Rights Watch to be a norm in interrogation rooms used by officers of the Nigeria Police Force.[71] NCAT visited some police cells and interviewed detainees about their living conditions.[72] According to the detainees, they were treated well.[73] In spite of this, the NCAT committee members observed that the surroundings were not conducive to the detainees' well-being.[74]

Moreover, only Niger state is mentioned in the report out of the 36 states in the Federation.[75] It is commendable that the efforts have been made, but there is still a lot more that needs to be done in order to prevent torture in Nigeria. For NCAT to fulfil its mandate and be effective as required by OPCAT, it must be able to visit other detention centres across the country as prescribed in article 4(2) of OPCAT.[76]

62 Art 19(a) of OPCAT.

63 Art 19(b) of OPCAT.

64 Art 19(c) of OPCAT.

65 Art 11(b) of OPCAT.

66 Art 11(b) of OPCAT

67 Federal Ministry of Justice Mandate of the National Committee on Torture http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 10 October 2022).

68 As above.

69 As above.

70 Human Rights Watch 'Rest in pieces: Police torture and deaths in custody in Nigeria' https://www.hrw.org/report/2005/07/27/rest-pieces/police-torture-and-deaths-custody-nigeria (accessed 14 August 2022).

71 As above.

72 Dr Samson Sani Ameh 'NCAT 4th quarterly report of the National Committee Against Torture for the period ending 31 December 2014 to the United Nations Subcommittee against torture in Geneva, Switzerland' 2014-2015 https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf (accessed 12 October 2022).

73 As above.

74 As above.

75 As above.

76 Art 4(2) of OPCAT.

Article 19(c) obligates each NPM the power to submit a proposal about a draft or existing law.[77] The NCAT is tasked with the responsibility to continuously review interrogation rules, methods, instructions and practice.[78] This implies that the NCAT must ensure that the interrogation rules comply with international law.[79] The purpose of reviewing all laws that deal with the practice and treatment of a person arrested is to ensure that torture is always prevented, demonstrating that the government has zero tolerance for the use of torture.[80]

The use of torture is prohibited, and the NCAT is tasked to report quarterly by briefing the Attorney General of the Federation on cases of torture and proposing administrative and judicial ways forward for eradicating torture in Nigeria.[81] This includes proposing laws prohibiting torture (Anti-Torture Act) and developing anti-torture policies for the Federation.[82] The NCAT with other civil society organisations and Bristol University, Nigeria Human Rights Commission, the United Nations Subcommittee on Prevention of Torture, Her Majesty's Inspectorate of Prisons, and Redress helped develop the Anti-Torture Act of Nigeria 2017.[83] The proposed Anti-Torture Bill in 'New Part V' described the establishment of the National Preventive Mechanism in Nigeria as well as the composition, appointment, duties, and funding of the NCAT.[84] Upon the enactment of the Anti-Torture Act 2017, the NCAT section was removed.[85]

NCAT is designed to ensure that the police and other law enforcement officers, medical personnel, and public officials have adequate knowledge and information on the prohibition of torture in Nigeria.[86] This includes custody officials in different prisons, interrogation officers in different law enforcement agencies in Nigeria and people in charge of treating any person arrested or detained in a prison or any other detention centre.[87]

77 Art 19(b) of OPCAT.

78 Federal Ministry of Justice Mandate of the National Committee on Torture http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 10 October 2022).

79 As above.

80 As above.

81 As above.

82 As above.

83 University of Bristol Law school 'Nigeria OPCAT project' https://www.bristol.ac.uk/law/research/centres/hric/projects/the-implementation-of-the-opcat-in-nigeria/ (accessed 11 October 2022).

84 Redress, University of Bristol 'Anti-Torture legislative frameworks in Nigeria' Report of round table discussion on the draft-anti-torture Bill. Sheraton Hotel, Abuja 26 February 2017. https://redress.org/wp-content/uploads/2017/12/ANTI-TORTURE-LEGISLATIVE-FRAMEWORKS-IN-NIGERIA.pdf (accessed 11 October 2022).

85 As above.

86 As above.

87 As above.

Nevertheless, Murray contends that another component that may contribute to an NPM's effectiveness is its visibility.[88] NCAT can receive, and in some circumstances, consider communications from those tortured and those with the knowledge of what will happen or when it happened. This communication can come from civil society organisations, individuals and various government institutions.[89] In spite of this, the NCAT does not have a presence in the entire country as its only secretariat is located at the headquarters of the NHRC. Also, the NCAT does not have a website where the public may report cases of torture.[90]

Furthermore, Murray asserts that, for NPMs to be effective, there must be a political will on the part of the government.[91] The government must support the work of the NPMs. A state is required to provide NPMs with access to information,[92] the place of deprived liberties,[93] access to private interviews with detainees without witnesses,[94] and the right to choose the location of the visit,[95] as specified in article 20 of OPCAT. The NCAT reports show it has visited various detention centres and has access to detainee information during interview processes.[96]

From September 8th to 19th, 2024, SPT visited Nigeria to assess the treatment of individuals in detention facilities. During its visit, the SPT noted that conditions in detention centres, including police cells, have been abysmal even after the OPCAT's ratification and the NCAT's establishment.[97]

In conclusion, the NCAT, meant to serve as an NPM, lacks an independent and functional preventive mechanism. It indicates that the 2009 and 2022 NCATs have not been independent, as they were not created through legal documents defining their functions, terms of

88 Murray (n 25) 502.

89 As above.

90 In contrast, the South African National Preventive Mechanism has a website where members of the public can contact them either by phone or by completing a form on the website. The website contains an NPM fact sheet that is available in all South African languages. https://sahrc.org.za/npm/index.php/about-the-npm (accessed 11 October 2022).

91 Murray (n 25).

92 Art 20(a) of OPCAT.

93 Art 12(c) of OPCAT.

94 Art 12(e) of OPCAT.

95 As above. See also, Council of Europe Report to the Bulgarian government on the visit to Bulgaria carried out by the European committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) from 17 to 26 April 2002 Strasbourg, 24 June 2004. CPT/Inf (2004) 21 paras 158 and 25, where it was concluded that the NPMs can visit places of detention centres unannounced and randomly.

96 Dr Samson Sani Ameh NCAT 4th quarterly report of the National Committee Against Torture for the period ending 31st December 2014 to the United Nations Subcommittee against torture in Geneva, Switzerland' (2014) 15 https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf (accessed 12 October 2022).

97 Office of the High Commissioner 'Nigeria: urgent measures needed to end torture and ill-treatment, say experts' 23 September 2024.

appointment, staff recruitment procedures, operational offices, visitation rights to detention facilities, and funding mechanisms. Nevertheless, it is imperative to know whether NCAT communicates and stays in contact with the SPT as specified in articles 20(f) and 11(b).

2.5 Cooperation between NCAT and SPT

Articles 11(b) and 12(c) of OPCAT set out the relationship between the two institutions. In article 11(b), the SPTs must be able to 'advise and assist state parties,' and in doing so, the SPTs must 'maintain direct contact', which could be confidential.[98] NCAT, through its then chairman, Samson Sane Ameh (SAN), submitted a report to the SPT in 2014 showing what the NCAT had done and what detention centres it had inspected.[99] According to the report, the NCAT has been mandated to receive communications from both individuals and civil society organisations.[100] It also visits places of detention, ensures that there is sufficient information regarding the prohibition of torture, and reviews laws and legislation.[101] The report indicates that Niger state is the only state among the 36 in which centres have been visited[102] and convicted inmates, unconvinced inmates, and inmates serving life sentences interviewed.[103]

The SPT first visited Nigeria in 2014 in accordance with its function to visit countries facing claims of torture.[104] The meeting in Abuja involving government officials, NCAT members and the NHRC, focused on how the SPT could help implement OPCAT in Nigeria.[105] In 2022, before the new inaugural NCAT, the chairman alleged that the committee could not meet, properly investigate, and send periodic reports to the United Nations due to a lack of funding. It implies that the NCAT lacks operational and functional independence, which does not comply with the OPCAT requirement.[106]

The NCAT, with other members of the Federal Ministry of Justice, entered into a dialogue with the UN Committee against Torture but Nigeria as a State, failed to submit its initial report in 2021.[107] During

98 Art 11(b) of OPCAT

99 Ameh (n 96).

100 As above.

101 As above.

102 As above.

103 As above.

104 Nigeria: 'UN torture prevention body concludes its high level advisory visit, as a first step to strengthen the national capacity to prevent torture' https://www.ohchr.org/en/press-releases/2014/04/nigeria-un-torture-prevention-body-concludes-its-high-level-advisory-visit (accessed 14 August 2022).

105 As above.

106 Ogunlowo (n 59).

107 In initial dialogue with Nigeria, experts of committee against torture ask about the fight against terrorism, and conditions of detention https://www.ungeneva.org/ar/news-media/meeting-summary/2021/11/loccasion-de-son-premier-dialogue-avec-le-nigeria-le-comite (accessed 10 July 2022).

the dialogue, the UN Committee against Torture experts raised the fact that whilst 'the Constitution created a right not to be subjected to torture, and the Anti-Torture Law 2017 specifically criminalised acts of torture perpetrated by public officials',[108] there were no specific provisions included in the Anti-Torture Act establishing that the crime of torture was not subject to a statute of limitations and that amnesties and pardons were prohibited for acts of torture.[109] Nigerian authorities were also asked whether they ensured that video recorders were used during the interrogation of suspects to show that the suspects were not tortured.[110] Nigeria had ratified OPCAT and established that NCAT could visit detention centres. However, the UN Committee against Torture questioned whether NCAT was effectively performing its role as an NPM.[111]

The Nigerian delegation responded by informing the UN Committee on Torture that the Federal Government was restructuring NCAT to make it more independent and responsive.[112] Most responses of the delegates focused more on prison decongestion in Nigeria rather than on statutory limitations, functions and roles of the NCAT and its effectiveness.[113] It was further claimed that the Anti-Torture Act 2017 applied all over the Federation.[114] The UN Committee on Torture and the Rapporteur replied that:

> ...it was good to pass laws, but it was better to act on them. The legal framework of Nigeria was not called into question: rather, the questions raised had been more about the implementations of those laws.[115]

State reporting under an international human rights treaty is important to ensure the accountability of each member country's government.[116] This enables the UN Committee to point the government's attention to areas that need improvement.[117]

In conclusion, although Nigeria established two NCATs through terms of reference that outline their mandates, these two NCATs were not created by an act of parliament. While they have visited some detention centres, their visitation efforts are limited due to a lack of financial and functional independence. Therefore, it is evident that the government lacks the political will to implement the mandates of the NCAT so that it can perform as prescribed by OPCAT.

108 As above. Question from Sebastien Touze, Committee Vice-Chairperson and Co-Rapporteur for Nigeria.

109 As above.

110 As above.

111 As above.

112 As above.

113 As above.

114 As above.

115 As above.

116 CD Creamer & BA Simmons 'Ratification, reporting, and rights: quality of participation in the Convention against Torture' (2015) 37(3) *Human Rights Quarterly* 579-580.

117 Creamer & Simmons (n 116) 584.

3 THE NHRC AS AN NPM IN NIGERIA

The OPCAT tasks member states with establishing or designating one or more independent NPMs within one year of the protocol's entry into force. Articles 19 to 22 outline several essential functions that an independent NPM must fulfil to operate effectively. Moreover, adhering to the Paris Principles is important in establishing the NPM.

To create an effective NPM, Nigeria established its NCAT in 2009 and reaffirmed its commitment in 2022. There is no one-size-fits-all model for NPMs, and each country must determine what works best for its circumstances. Although the Nigerian government has attempted to establish an independent NPM separate from the NHRC, these efforts have faced challenges, primarily due to a lack of funding and political will. As a result, it is reasonable to question whether the NHRC, designated as the NPM in Nigeria, will be effective in preventing torture.

The government set up the NHRC in 1995 to protect and promote human rights in Nigeria under Decree 22 of 1995 (1995 Act).[118] Eight months after its establishment, the government inaugurated the Governing Council with the power to oversee the institution. It acquired a rented office in 1997, established the first set of zonal offices in six geopolitical zones and in 1988, with the first two zonal offices in Lagos and Kano,[119] later extended to Port Harcourt, Enugu, Jos and Maiduguri.[120]

The 1995 Act establishing the NHRC was amended in 2010 and signed into law in 2011.[121] The NHRC amended Act 2010 created the general mandate of the NHRC, which is to deal with all matters relating to human rights in Nigeria.[122] Specifically, it allows the NHRC to visit persons, police cells, and any detention centres to determine the detention centres' condition and make recommendations to the appropriate authorities.[123] In 2024, an order designated Nigeria's NHRC as the NPM (Order 2024).[124] The section 1 of the Order 2024 specifies that section 1 of the NHRC Act of 2010 as amended, serves as Nigeria's NPM by articles 3 and 17 of the OPCAT.[125]

118 Decree No 22 of October 1995. The military regime that is known for its abuse of human rights established a human rights institution. This is ironic, because it is impossible for such an institution to function independently when under state control or influence. It was later known as National Human Rights Commission Act Cap N46, Laws of the Federation of Nigeria, 2004.

119 As above. Nigeria is divided into six geopolitical zones, created during General Sani Abacha's rule as an administrative grouping of Nigeria.

120 As above.

121 National Human Rights Commission (Amendment) Act, 2010 (NHRC 2010 as amended).

122 Secs 5(1) NHRC 2010 as amended.

123 Secs 6(1)(d) NHRC 2010 as amended.

124 Designation of the National Human Rights Commission as Nigeria Preventive Mechanism Order, 2024. S 1 No 21 of 2024.

125 As above

This section provides an overview of the NHRC and analyses if it is capable of serving as an NPM in Nigeria in accordance with OPCAT's requirements in Part IV.

3.1 The roles and the effectiveness of the NHRC as an NPM in Nigeria

Section 2(1) of the 2024 Order establishes a specialised department within the NHRC that possesses the authority and mandate of an NPM. This extends the NHRC's powers to include those of an NPM, as established by an act of Parliament rather than through a letter of reference. The Order 2024 is a significant departure from the 2009 and 2022 NCAT, which were established by a letter of reference.

According to section 3 of the 2024 Order, the NHRC is responsible for regularly inspecting and examining the treatment of individuals deprived of their liberty in places of detention, as outlined in article 4 of the OPCAT. Prior to this, section 6(1)(d) of the NHRC Act 2010, as amended, mandated the NHRC to visit detention facilities. As a result, the NHRC has established an annual prison audit to address human rights issues within the Nigeria Correctional Services.[126] It is unclear whether this includes visits to police cells in each police station in Nigeria. However, according to section 3 of the 2024 Order, the specialised department will need to fulfil its mandate of visitation as specified in article 4 of the OPCAT. This mandate includes police cells and other holding facilities where individuals are not free to leave at will under the authority of the law.[127]

Moreover, section 5(b) of the NHRC Act 2010 directs that the NHRC must be able to monitor and investigate any alleged human rights violation cases in Nigeria and is also obligated to recommend appropriate actions for prosecution to the President.[128] This suggests that the NHRC already has access to detention centres and holds

126 'NHRC flags off 2022 prison audit exercise, donates drugs to inmates.' 13 May 2022 https://www.nigeriarights.gov.ng/nhrc-media/news-and-events/341-nhrc-flags-off-2022-prison-audit-exercise-donates-drugs-to-inmates.html (accessed 19 May 2022). See also, 'NHRC chairperson commends officers of Kuje correctional service during 2022 facility audit 16 May 2022' https://www.nigeriarights.gov.ng/nhrc-media/news-and-events/343-nhrc-chairperson-commends-officers-of-kuje-correctional-service-during-2022-facility-audit.html (accessed 19 May 2022).

127 Art 4(2) of OPCAT.

128 In the 72nd section of the United Nations Committee against Torture, the NHRC submitted an individual report on the implementation of the UNCAT and OPCAT in Nigeria at 9. The NHRC in 2019 received 15 457 complaints of torture and in 2020 recorded 12 400 cases, making 27 858 in two years. The document was submitted to the researcher by Hillary Ogbonna and Halilu Adamu of the NHRC Abuja. However, this thesis concludes that while the provision is laudable, it is arguably not enough to recommend prosecution to the President. Moreover, the violation of human rights extends to the use of torture, which implies that the NHRC has the capacity to investigate cases of alleged torture but not to prevent the use of torture, as investigation may only be carried out after the use of torture has been perpetrated.

monitoring and investigation powers. Furthermore, section 3(b) of the 2024 Order grants the NHRC's specialised department the ability to obtain information regarding the treatment of individuals deprived of their liberty, as well as the conditions within the detention centres.

Section 6 of the NHRC Act 2010 includes further details of the mandate of the NHRC by stipulating that it should have the power to investigate and inquire,[129] introduce civil actions,[130] appoint interpreters,[131] decide on compensation or damages to be awarded to victims of human rights abuse,[132] summon and interrogate,[133] issue warrants and compel any person or authority to appear before it,[134] enter any property to obtain evidence of a violation of human rights,[135] and visit places of detentions or cells.[136] Though the NHRC has broad mandates, the specialised department, as outlined in section 3(c) of the 2024 Order, allows the NHRC to conduct private interviews with individuals deprived of their liberties, without the presence of witnesses or state authority. When a translator is required, one must be provided, in accordance with article 20(d) of the OPCAT. The purpose of conducting these interviews in private is to enable the detainee to speak freely and openly without fear of reprisals.

The NHRC must also cooperate, liaise, and participate with other local and international organisations.[137] The NHRC must also collect data, disseminate information,[138] publish information,[139] promote public discussion of human rights,[140] receive and investigate complaints,[141] examine existing legislation or any proposed Bills,[142] undertake research or coordinate any education programme to advance the promotion of human rights in Nigeria,[143] and act as a conciliator when appropriate,[144] referring human rights violation to the Attorney General,[145] and, when appropriate, can seek leave of the court to hear matters on human rights violations.[146] Additionally, in section 3(d)(ii) of the 2024 Order, the specialised department is tasked with

129 Sec 6(1)(a) of the NHRC 2010 as amended.
130 Sec 6(1)(b) of the NHRC 2010 as amended.
131 Sec 6(1)(c) of the NHRC 2010 as amended.
132 Sec 6(1)(e). See also, Decision on 2020/IIP-SARS/ABJ/120 where the petitioner was awarded five million naira compensation for the violation of his rights by the police.
133 Sec 6(2)(b) of the NHRC 2010 as amended.
134 Sec 6(2)(c), (d) & (e) of the NHRC 2010 as amended.
135 Sec 6(2)(a) of the NHRC 2010 as amended.
136 Sec 6(1)(e) of the NHRC 2010 as amended.
137 Sec 5(g) See also, sec 6(1)(f) of the NHRC 2010 as amended.
138 Sec 5(h) of the NHRC 2010 as amended.
139 Sec 5(i) of the NHRC 2010 as amended.
140 Sec 5(m) of the NHRC 2010 as amended.
141 Sec 5(j) of the NHRC 2010 as amended.
142 Sec 5(k) of the NHRC 2010 as amended.
143 Sec 5(n) of the NHRC 2010 as amended.
144 Sec 5(q) of the NHRC 2010 as amended.
145 Sec 5(p) of the NHRC 2010 as amended.
146 Sec 5(r) of the NHRC 2010 as amended.

recommending improvements to the conditions of individuals deprived of their liberty.

Section 5(c) extends the mandate of the NHRC to assist the victims of human rights violations in seeking redress and remedies. The NHRC in 2020 and 2021 acted as part of the independent investigation panel on human rights violations by the defunct Special Anti-Robbery and other units of the NPF.[147] The panel hears matters of police brutality and awards compensation to victims. In Decision 2020/IIP-SARS/ABJ/15, the panel awarded the sum of five million naira to the petitioner, who was a victim of police brutality.[148]

In sections 5(d) and (e), the NHRC is mandated to conduct research on human rights, and serves as a policy adviser to the Federal Government, states and local governments, especially when formulating laws for human rights protection and promotion in Nigeria. It further states that the NHRC may publish reports and then submit them to the President, National Assembly, judiciary, and state and local government regarding issues of human rights protection and promotion in Nigeria.

NHRC was assigned the task of preparing Nigeria's National Plan of Action for the Promotion and Protection of Human Rights.[149] The Action Plan was conceived as a result of a Declaration of the 1993 World Human Rights Conference in Vienna,[150] by which each state government was tasked with developing an action plan that showed various steps to be taken in order to improve the protection and promotion of human rights.[151] The Action Plan was initiated in 2000 in consultation with NGOs and the National Assembly.[152] The NHRC

147 O Ajayi 'NHRC inaugurates an independent investigative panel on allegations of violations by the defunct SARS' (3 November 2020) *Naira metrics online newspaper* https://nairametrics.com/2020/11/03/nhrc-inaugurates-independent-investigative-panel-on-allegations-of-violations-by-the-defunct-sars/ (accessed 18 May 2022). See also, F Olokor 'EndSARS panel resumes sitting today as NHRC secures funding' (1 March 2022) *Punch Newspaper* https://punchng.com/endsars-panel-resumes-sitting-today-as-nhrc-secures-funding/ (accessed 18 May 2022).

148 The independent investigation panel on human rights violations by the defunct SARS and other units of the Nigeria police force (2020) sitting at the Federal Capital Territory, Abuja. Decision 2020/IIP-SARS/ABJ/15. See also, the Decision on 2020/IIP-SARS/ABJ/120 where the petitioner was awarded five million naira in damages for the violation of his rights by the police. These cases were furnished to me by members of the NHRC.

149 National Action Plan for the promotion and protection of human rights 2022-2026 https://www.nigeriarights.gov.ng/activities/nap/201-draft-national-action-plan-2021-2025.html (accessed 18 October 2022).

150 United Nations Vienna Declaration and Programme of Action adopted 25 June 1993 by World Conference on Human Rights in Vienna https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action (accessed 18 October 2022).

151 Article 83 of the Vienna Declaration and Programme of Action.

152 *Federal Republic of Nigeria National action plan for the promotion and protection of human rights in Nigeria 2009-2013* https://www.ohchr.org/sites/default/files/Documents/Issues/Education/Training/actions-plans/Excerpts/Nigeria09_13.pdf (accessed 18 October 2022).

presented the final draft document to the government in 2004 for approval.[153]

The Action Plan is divided into five categories.[154] These are civil and political rights; the right to development; rights of person with disabilities; women's, children's and youth's rights; peace and a protected environment, and economic, social and cultural rights.[155] The Plan outlines the government's responsibilities, the strategies it must employ to address human rights issues, and the agencies responsible for implementing and monitoring the programme.[156]

Section 5(f) of the NHRC has the mandate to create public awareness by organising local and international seminars and conferences on human rights issues in Nigeria. This awareness includes meeting with civil society organisations, schools, correctional centres, and social media. In 2021, as part of the awareness mandate, the NHRC issued a press release in 2019 to affirm that freedom from torture was a non-derogable right in Nigeria.[157] In July 2021, the NHRC with the NCAT trained 190 police officers under the Anti-Torture Act of 2017 and other legislation that prohibits the use of torture in Nigeria.[158]

In conclusion, the mandates of the NHRC include the ability to visit places where liberties are deprived, conduct private interviews, and access information related to individuals who are deprived of their liberties. However, one might question why other factors, such as research and the right to contact the Subcommittee on Prevention of Torture, are not included in the 2024 Order. Nevertheless, a careful reading of the NHRC's broad mandates suggests that it indeed has the authority to conduct research and collaborate with other bodies. Therefore, the question remains whether the NHRC can operate as outlined in articles 18 to 21 of OPCAT.

3.2 NHRC's functional independence

Article 18(1) of OPCAT requires the state to guarantee the NPM's functional independence.[159] However, the meaning of functional independence was not defined in article 18. As outlined in the Practical Guide of the Office of the High Commissioner, functional independence implies a legislative mandate, operational independence, and financial

153 As above.

154 As above.

155 As above.

156 As above.

157 Press release issued by the Executive Secretary, National Human Rights Commission, 24 April 2019 https://www.nhrc.gov.ng/nhrc-media/press-release/61-press-release-issued-by-the-executive-secretary-national-human-rights-commission.html (accessed 18 May 2022).

158 'NHRC trains 190 police officers on Anti-torture legislation' *Vanguard Newspaper* 22 July 2021 https://www.vanguardngr.com/2021/07/a2j-nhrc-trains-190-police-officers-on-anti-torture-act-legislation/ (accessed 18 May 2022).

159 Art 18(1) of OPCAT.

independence.[160] Legislative mandates include the establishment of an NPM by an act of parliament or in the state constitution.[161] The statutory document would probably include such information as visiting rights, access to information, communications with the SPT, independent experts, work stations, terms of office, and an election or appointment system for NPM members.[162]

During the military regime of General Sani Abacha, the NHRC was established under Decree 22 of 1995.[163] This period was characterised by human rights violations, unlawful detentions and the use of force by various security agencies.[164] It was not the intention of the military regime to create a human rights institution that would address the needs of the people.[165] Instead, it was a political uproar that led to the establishment of the National Human Rights Commission.[166] The NHRC did not have legitimacy and credibility under the military regime, even though it was established by a decree making it notionally independent.[167]

The Amended Act 2010 gives the NHRC functional independence. This is because it specifies that it is established as a corporation with perpetual succession and a common seal, and which can sue and be sued.[168] Section 1 buttresses Newark's assertion that the NPMs must be independent bodies free from government interference or control.[169] Additionally, the 2024 Order in section 2(2)(a) and (b) states that the specialised department shall have operational independence to perform its duties. This operational independence also entails the appropriate allocation of resources necessary for it to carry out its functions, projects, and programs.

160 United Nations Human Rights, Office of the High Commissioner 'Preventing torture: the role of national preventive mechanisms' A Practical Guide: Professional Training Series No 21 15 https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf (accessed 17 October 2022).

161 As above.

162 As above.

163 Decree No 22 of October 1995. The military regime that is known for the abuse of human rights established a human rights institution. This was ironic as it is impossible for such an institution to function independently without state control or influence. It was later known as National Human Rights Commission Act Cap. N46, Laws of the Federation of Nigeria, 2004.

164 N Mbelle 'The national human rights commission of Nigeria: valuable, but struggling to enhance relevance' (2005) 48(3) *Centre for Conflict Resolution* 33, 37.

165 As above.

166 As above.

167 As above.

168 Sec 1 of the NHRC 2010 as amended.

169 M Nowak & E McArthur *The United Nations Convention Against Torture* (2008) 1075.

Article 18(3) of OPCAT and the Paris Principle conclude that a state member must provide all the necessary resources for an NPM to function efficiently.[170] These resources include a number of office locations, personnel, financial resources, and most importantly, accessibility to the nation's citizens. The NHRC established one office per state to reach people at the grassroots.[171] According to the NHRC, it would have preferred to have had offices in all local government jurisdictions; however, due to resource limitations, state offices had to suffice.[172]

3.3 NHRC's independence of personnel

The NHRC consists of 16 members as a council[173] made up of a retired judge of the Supreme Court, a representative from the Federal Ministry of Justice, Foreign and Internal Affairs, human rights organisations, media practitioners, legal practitioners and three others with a variety of interests and a secretary.[174]

Upon the Attorney General of the Federation's recommendation and confirmation from the Senate, the President of the Republic of Nigeria appoints the members of the Council[175] who serve for a term of four years,[176] which may be renewed.[177] Except for the chairman and secretary-general, each member of the council works part-time and the council meets once a month for three days.[178] NHRC Council members may be removed by consultation with the National Assembly under section 4(1) of the 2010 Amended Act if the President determines that

170 Art 18(3) of OPCAT. See also, United Nations 'Principles relating to the status of national institutions (The Paris Principles)' Adopted 20 December 1993 by General Assembly resolution 48/134. https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris accessed 14 August 2022. The Paris Principles required that each human rights institution must be competent and responsible and must be guaranteed independence. The Paris Principle 'Composition and guarantees of independence and pluralism principle' 2.

171 National Human Rights Commission https://www.nhrc.gov.ng/map.html (accessed 18 October 2022).

172 Mbelle (n 164) 43.

173 'NHRC governing council members inaugurated' 3 August 2021 https://nhrc.gov.ng/nhrc-media/news-and-events/192-nhrc-governing-council-members-inaugurated.html (accessed 18 October 2022).

174 'NHRC governing council members inaugurated' 3 August 2021 https://nhrc.gov.ng/nhrc-media/news-and-events/192-nhrc-governing-council-members-inaugurated.html (accessed 18 October 2022). The current council members are: Dr Salamatu Husseini Suleiman as the chairperson, Tony Ojukwu (Executive Secretary), Joseph Mmamel, Ahmad Fingilla, Kemi Asiwaju-Okenyodo, Abubakar Muhammed, Femi Okewo, Sunday Etim Daniel, Agabaidu Jideani, Nella Andem-Rabana, Azubuike Nwakewenta, Jamila Isah, Idayat Hassana, Jeddy Agba J, the representative of foreign affairs and Dafe Adesida, representing Ministry of Interior.

175 Sec 2(3)(b) of the NHRC amended 2010.

176 Sec 3(1) of the NHRC amended 2010.

177 As above.

178 Mbelle (n 164) 40.

it is not in the public interest for members to continue in their positions.[179] Specifically, the 2010 amended act stipulated that a member of the council may be removed by the President on confirmation of a simple majority of the Senate.[180] Members may only be removed by the President if they are incompetent, bankrupt, convicted of a felony, or otherwise behave improperly.[181]

In terms of section 7 of the NHRC amended Act 2010, the President appoints the executive secretary to the Commission with approval from the Senate.[182] The executive secretary acts as the chief executive officer and the accountant general of the commission – a legal practitioner with over 20 years of post-qualification experience in human rights cases?[183] The executive secretary is appointed for five years and can be re-appointed for a second term based on the Attorney General's recommendations.[184] He or she is in charge of the day-to-day running of the Commission.[185]

Prior to the NHRC amended Act 2010, the United Nations Special Representative of the Secretary-General, a human rights defender, visited Nigeria and raised the issue of the independence of the NHRC.[186] Although it is based on a legal document, it cannot be said to be independent.[187] This was apparent in various events in 2006. Bukhara Bello, the then executive secretary as a member of the NHRC Council, was removed from office by the then Minister of Justice on the allegation of criticising the national security agencies for the constant harassment and intimidation of journalists in the country.[188] In 2009, the executive secretary Behind Ajani was removed from office by letter from the then Attorney General of the Federation.[189]

Section 8 gives the NHRC the power to appoint anybody it deems fits and to transfer members of staff from the public service of the Federation with the required skills to help and assist the NHRC.[190] The NHRC may determine an employee's remuneration, and has the power

179 Sec 4(2) of the NHRC as amended 2010.

180 As above.

181 As above.

182 Sec 7(1)(c) NHRC as amended 2010.

183 Sec 7(1)(a) NHRC as amended 2010.

184 Sec 7(2) NHRC 2010 as amended.

185 Sec 7(3) NHRC 2010 as amended.

186 Frontline Protection of Human Rights Defenders 'Nigeria: defending human rights: Not everywhere not every right' International Fact-Finding Missions Report April 2010 at 18.

187 Frontline Protection of Human Rights Defenders 'Nigeria: defending human rights: Not everywhere not every right' International Fact-Finding Missions Report April 2010 at 18.

188 Amnesty International Nigeria: Government interference with the independence of the national human rights commission 26 June 2006 AFR 44/012/2006 https://www.amnesty.org/en/documents/afr44/012/2006/en/ (accessed 20 May 2022).

189 As above.

190 Sec 8(1) NHRC 2010 as amended.

to pay such employees.[191] The NHRC has the power to regulate the conditions of staff promotion, salaries, dismissals, appointments, pensions, and gratuities. The pension must be in accordance with the Pensions Act.[192]

Section 18 of the NHRC 2010 restricts the arrest or institution of a civil claim against the executive secretary or any of the staff while discharging their duties.[193] However, for a civil claim to be instituted on other grounds against the members of the NHRC, it must be commenced within three months after the act, and in the case of damage or injury, it must be within six months.[194] This is in accordance with the Public Offices Protection Act, which seeks to protect public officers in the course of their official duties.[195]

3.4 NHRC's financial independence

The NHRC maintains a fund for its day-to-day running allocated from the Consolidated Revenue Fund of the Federation.[196] The funds emanate from the Federal Government, which pays and credits the NHRC.[197] The House of Representatives committee on Human Rights oversees the financial management of the NHRC.[198]

Chief Tony Ojukwu, executive secretary of the National Human Rights Commission, addressed the chairman and members of the House of Representatives Human Rights Committee to actualise the human rights fund Bill.[199] The Bill established the NHRC human rights fund in the annual budget of the Federal Government.[200] According to Chief Tony Ojukwu, the Bill's signing enabled the NHRC to better fulfil its mandates and increase its reputation as an independent body.[201] In addition, it addressed the issue of inadequate funding, which had hindered the NHRC since its inception in 1995.[202]

191 Sec 8(2) NHRC 2010 as amended.

192 Sec 9, 10 & 11 NHRC 2010 as amended.

193 Sec 18 of the NHRC 2010 as amended.

194 Sec 18(2), (3) & (4) of the NHRC 2010 as amended.

195 Cap P41, Laws of the Federation 2004.

196 Sec 12(1) & (2) NHRC 2010 as amended.

197 Sec 12(3) NHRC 2010 as amended.

198 National Human Rights Commission 'Ojukwu tasks NASS on human rights funds, increased budget' 13 October 2022. https://nhrc.gov.ng/nhrc-media/news-and-events/393-ojukwu-tasks-nass-on-human-rights-funds-increased-budget.html (accessed 19 October 2022).

199 As above.

200 As above.

201 L Baiyewu 'Senate amends NHRC Act, creates rights fund in annual budget' 5 April 2022 *The Punch Newspaper* https://punchng.com/senate-amends-nhrc-act-creates-rights-fund-in-annual-budget/ (accessed 19 October 2022).

202 M Olugbode 'New law to enhance national human rights commission's performance' *This Day Newspaper* https://www.thisdaylive.com/index.php/2022/04/11/new-law-ll-enhance-national-human-rights-commissions-performance/ (accessed 19 October 2022).

The NHRC also has the liberty to receive gifts, lands, and funds from individuals or philanthropists; however, the gift must not be inconsistent with or prevent the NHRC from its mandate or delivering its functions.[203] The NHRC's independence is further strengthened by being able to borrow from any sources in order to meet its mandates., It can invest any surplus, subject to the requirement of the Trustee Investments Act or any other securities Act in Nigeria.[204]

Section 15 establishes the Human Rights Fund, which enables the NHRC to research any human rights issues and facilitate meetings with other non-governmental organisations, civil society, or other relevant stakeholders.[205] The federal state and local governments and national and multinational companies are able to contribute to this fund on a tax-deductible basis.[206]

The NHRC is obliged to submit an annual estimate of its expenditure and income to the Federal Executive Council before 30 September of every year for an audit conducted by an auditor from the list issued by the Auditor-General of the Federation.[207] Once the account has been audited, the NHRC is obliged to submit a report showing the activities of the NHRC during the previous year to the National Assembly and the President.[208]

3.5 Cooperation with the SPT

The NPMs must have adequate cooperation with the SPT In April 2014, the SPT visited Nigeria to discuss the establishment of an independent NPM.[209] The discussion assured the SPTs that the Nigerian Government would establish an NPM. During the visit, the NHRC was also met by the SPT, which advised the NHRC on the steps needed for Nigeria to comply with its requirements under OPCAT.[210] The NHRC has since then published no communication with the SPTs and it would seem that the NHRC did not directly communicate with the SPT. However, with the newly established specialised department in Order 2024, it can be argued that it will communicate more effectively with the SPT.

203 Sec 13 of the NHRC 2010 as amended.

204 Sec 14 NHRC 2010 as amended.

205 Sec 15 of the NHRC 2010 as amended.

206 Sec 15(3) of the NHRC 2010 as amended.

207 Sec 16(1), (2) & (3) of the NHRC 2010 as amended.

208 Sec 17 of the NHRC 2010 as amended.

209 United Nations 'Torture and inhuman treatment' https://www.ohchr.org/en/taxonomy/term/1328?page=20 (accessed 23 May 2022).

210 As above.

In the 72nd section of the United Nations Committee against Torture, the NHRC submitted an individual report on implementing the UNCAT and OPCAT in Nigeria.[211] In the report, the NHRC was held to have demonstrated adequate cooperation with the country's civil society organisations and other relevant stakeholders.[212] From 2006 to 2008, the NHRC partnered the Network of Police Reform in Nigeria (NOPRIN) to carry out hearings on extrajudicial killings by the police. From 2016 to 2017, the NHRC collaborated with the Nigeria Bar Association and civil society organisations in the public hearings on police brutality by the Special Anti-Robbery Squad.[213]

The NHRC cooperates with different civil society organisations, but it does not enjoy that cooperation with the SPT. If the NHRC were to approach the SPT in terms of article 20(f) of OPCAT for information and a meeting, it is argued that SPT would provide them with what they need to perform its mandate.

The cooperation with civil society organisations has probably not included visitations to police cells but has rather focused on awareness creation. Although the Prisoner's Rehabilitation and Welfare Action (PRAWA)[214] constantly visits prisons, there is a lack of adequate visits to police cells by the NHRC.

In conclusion, the NHRC is arguably the best model for the Nigerian NPM, as it already has an established structure and has been investigating human rights. The NHRC was established by an Act of Parliament that outlines its funding, staff appointments, operations, and mandate. Furthermore, the creation of a specialised department via Order 2024 for the NPM indicates an expansion of the NHRC's mandate to include the prevention of torture and dialogue, which are the main focuses of the OPCAT. It represents a significant shift for the NHRC, as its focus has primarily been on addressing complaints that require investigation rather than prevention of torture.

4 CONCLUSION

By enshrining an NPM into a legislative text or in the Constitution, the institution is given adequate power and autonomy to perform its

211 In the 72nd session of the United Nations Committee against Torture, the NHRC submitted an individual report on the implementation of the UNCAT and OPCAT in Nigeria at 5. The document was submitted to the researcher by Hillary Ogbonna and Halilu Adamu of the NHRC Abuja. https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NGA/INT_CAT_NHS_NGA_47047_E.docx (accessed 23 May 2022).

212 As above.

213 As above.

214 There are many NGOs that are capable of visiting prisons and detention centres. Although many of these NGOs, such as PRAWA and FIDA have visited places of detention in the past, they are not considered NPMs in accordance with OPCAT PART IV. An examination of NGOs as NPMs is outside the scope of this work. See also, FIDA Nigeria outreach to Bauchi State Correction Centre 21 June 2021 https://fida.org.ng/2022/06/fida-nigeria-outreach-to-bauchi-state-correctional-centre/ (accessed 29 November 2022).

functions.[215] The concept of independence refers to being free from interference by the government.[216] The NCAT was established on 29 September 2009 with an inaugural letter of reference that is not legally binding.[217] In spite of the fact that the letter of reference specifies the mandate of the NCAT, the body has not been established by the Constitution or an Act of Parliament.[218] Moreover, as part of the mandates of the NCAT to visit places of deprived liberties, the NCAT visited some prisons and police stations.[219] However, the definition of deprived liberty does not end in prisons but includes police cells where torture is typically administered to detainees to obtain evidence in Nigeria.[220] This implies that the visitation mandates must include that NCAT takes necessary steps to visit other detention centres within the country, especially across all the local governments of the federation.

The provisions of OPCAT emphasise that the NPMs must be independent entities. The 2009 NCAT of Nigeria, through the former chairman, alleges that it cannot perform most of the NCAT functions due to the non-availability of funds,[221] which it sees as crucial, to control its own activities and be independent of the government.[222] It is not clear how NCAT receives its funding, or the criteria used for its council members' appointment. Moreover, one may think the 2022 NCAT will be established through an Act of Parliament; however, it was established through a letter of reference, though with a mandate that focuses more on engagement with regional and human rights mechanisms.

Article 18(4) of OPCAT requires state parties to take into account the Paris Principles in establishing an NPM[223] to clarify the concept of national human rights institutions by providing minimum criteria on

215 As above.

216 Paris Principle 'Composition and guarantees of independence and pluralism' Principle 3. The principle provides that 'In order to ensure a stable mandate of members of the national institution, without which there can be no real independence …' The NCAT though has a mandate in the inaugural document, but this can be removed by the Attorney General of the Federation who inaugurated them.

217 Federal Ministry of Justice 'Mandate of the National Committee on Torture' http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/nigeriatermsofreference.pdf (accessed 10 October 2022).

218 As above.

219 Dr Samson Sani Ameh 'NCAT 4th quarterly report of the National Committee Against Torture for the period ending 31st December 2014 to the United Nations Subcommittee against torture in Geneva, Switzerland' (2014) 15 https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Nigeria2014.pdf (accessed 12 October 2022).

220 Amnesty International *Under embargo until May 13th* AFR 44/005/2014. https://www.amnesty.org/en/wp-content/uploads/2021/07/afr440052014en.pdf (accessed 20 October 2022).

221 Paris Principle 'Composition and guarantees of independence and pluralism' Principle 3.

222 As above.

223 Art 18(4) of OPCAT.

their status and role as advisory bodies.[224] In accordance with the Paris Principles, when a state party creates a NHRC, it must be incorporated in its Constitution or legislation.[225] The NHRC was created by the 2010 NHRC Act as an independent, incorporated body that has the authority to act in accordance with the law that established it.[226] The provisions of section 2, read with section 5, gives the NHRC a clear and reasonable jurisdiction that entails broad mandates to deal with matters relating to the protection and promotion of human rights in Nigeria.[227] The NHRC in section 6 has the mandate to visit places, prisons and persons deprived of their liberties in any of the correctional or detention centres in Nigeria.[228] The mandate to visit and make recommendations to appropriate authorities aligns with the mandate of an NPM under article 18 of OPCAT, which allows the NPM to visit places where people are being deprived of their liberties and to make a recommendation to the appropriate authorities about the condition of the people at the detention centres.[229]

Moreso, the NHRC Amended Act of 2010 legitimises the NHRC's contracts with the previous NCAT, which was established through the Letter of Reference. The designation of the NHRC by the 2024 Order indicates that this specialised department operates under the governance of the NHRC Amended Act of 2010, as outlined in section 1 of the 2024 Order. Although the NHRC has been visiting places of detention even before the 2024 Order was issued, the NHRC Amended Act of 2010 does not fully meet the expectations set by the OPCAT regarding preventive mechanisms, which is the primary focus of OPCAT.

However, the new 2024 Order extends the NHRC's focus to include preventive measures aimed at reducing torture. Furthermore, to align with OPCAT, establishing a separate department must have its staff, budget, and resources. The 2024 Order does not specify how this specialised department obtains its staff and budget. However, section 2(2)(a) and (b) implies that the NHRC, with the applicable guidelines for the constitution and operation of an NPM, will take necessary measures to ensure the allocation of appropriate resources. As provided in the 2010 amended act, the NHRC is funded by the consolidated fund of the federal government.[230] The NHRC receives funds from the Federal Government, which pays or credits the NHRC.[231]

224 United Nations 'Principles relating to the status of national institutions' (The Paris Principles) adopted on 20 December 1993 by the General Assembly in Resolution 48/134.

225 Paris Principle 'Competence and responsibilities' Principle 2.

226 Secs 2 of the NHRC 2010 as amended.

227 Secs 5 of the NHRC 2010 as amended.

228 Secs 6(1)(d) of the NHRC 2010 as amended.

229 Art 19(a) & (b) of OPCAT.

230 Sec 12(1) & (2) NHRC 2010 as amended.

231 Sec 12(3) NHRC 2010 as amended.

4.1 Possible challenges and recommendations

The primary purpose of OPCAT is to prevent torture and other forms of ill-treatment. State parties are obligated to establish an effective NPM that can help prevent torture. However, the concept of torture prevention requires a multidimensional approach, which extends beyond merely visiting detention centres, and brings into play the political, social, legal, and judicial contexts in Nigeria.

The inaugural NCAT in 2009 and the subsequent one in 2022 did not meet the qualifications of an NPM as required by OPCAT. However, with the designation of the NHRC as an NPM through Order 2024, the Nigerian government has incorporated these mandates into an Act of Parliament. This designation ensures that the specialised department can visit places of detention. Nevertheless, challenges may arise in implementing this framework, particularly in respect of political will. One of the major issues faced by the previous two NCATs was, indeed, the lack of political commitment from the government.

An independent NPM requires unrestricted access to locations where individuals may be deprived of their liberties. To effectively carry out its mandate, the NPM must have the ability to choose freely when and where to make visits, including conducting inspections at night without prior announcement. This means that the specialised department should be able to visit various facilities such as correctional services, police cells, immigration holding facilities, Economic and Financial Crimes Commission holding cells, civil defence centres, and military detention facilities without any prior notice.

This unannounced access aims to ensure that the NPM can assess the conditions faced by individuals deprived of their liberties. According to the Nigeria Correctional Service website, there are 253 custodial centres in Nigeria.[232] A critical question arises: Can the specialised department visit all these facilities without prior notice? For such access to be possible, there must be political will, which includes the Federal Government, through the Ministry of Interior, granting the specialised department unlimited access to all relevant facilities.

To effectively implement the mandate for the specialised department on visitations, it is essential to gather staff with diverse expertise. This team should not only consist of lawyers but also include professional doctors, nurses, social workers, investigators, child specialists, psychologists, and editorial staff. The SPT has emphasised this need, stating that prevention requires a comprehensive examination of rights and conditions from the moment of deprivation of liberty until the point of release.[233]

One of the major factors that limited the 2009 NCAT in carrying out its mandate was a lack of funding. Section 2(2)(b) of Order 2024 states that the NHRC shall allocate appropriate resources to the specialised

232 'Nigerian Correctional Service' available at https://www.corrections.gov.ng (accessed 3 November 2024).

233 SPT, Report of the visit of the SPT to Sweden (2008) (CAT/OP/SWE/1) at 36.

department according to applicable guidelines, enabling it to conduct its activities. However, the question remains: What are the applicable guidelines? It is suggested that the allocation of resources may need to adhere either to the NHRC Act of 2010 or through another framework. The NHRC maintains a fund for its day-to-day running allocated from the Consolidated Revenue Fund of the Federation.[234] The funds emanate from the Federal Government, which pays and credits the NHRC.[235] For the specialised department to perform effectively, it is crucial that the allocation of resources is not curtailed and is in accordance with an Act of Parliament. This approach will allow the department to budget appropriately and fulfil its mandates.

234 Sec 12(1) & (2) NHRC 2010 as amended.
235 Sec 12(3) NHRC 2010 as amended.

La spécificité africaine du droit international des investissements : allégorie d'un paradigme régional de promotion des droits humains ?

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RÉSUMÉ: Cet article explore le régime du droit international des investissements en Afrique et fournit une analyse des pratiques actuelles en matière de traités en Afrique. Il développe une approche de droits humains intégrée à la réforme du droit international des investissements en Afrique. L'analyse propose une réflexion sur la manière dont le concept des droits de l'homme a pénétré le discours et la pratique conventionnelle du droit international des investissements en Afrique – depuis les premières formulations d'un «droit de réglementer» dans les textes sous-régionaux, jusqu'à l'incorporation rhétorique d'obligations et de responsabilités sociales pour les investisseurs dans le discours dominant à l'échelle continentale, aboutissant à l'articulation d'une approche de droits humains intégrée au droit international des investissements fondée sur les spécificités et pratiques panafricaines. L'article procède à une analyse des divers textes nationaux, sous-régionaux et continentaux assurant une cristallisation des droits humains dans le cadre du droit international des investissements africains. Il conclut avec quelques propositions sur le rôle important que pourrait jouer une focalisation sur la doctrine morale et les systèmes de valeurs d'origine africaine relatifs aux droits humains dans l'interprétation du droit international des investissements en Afrique.

TITLE AND ABSTRACT IN ENGLISH

The African specificity of international investment law: allegory of a regional paradigm for the promotion of human rights?

ABSTRACT: This article critically examines the international investment law framework in Africa, offering a comprehensive analysis of contemporary treaty practices across the continent. It advances an integrated human rights approach to the reform of international investment law in Africa. The discussion highlights the progressive incorporation of human rights into the discourse and treaty practices of international investment law in Africa – beginning with early sub-regional treaty provisions recognising a 'right to regulate', progressing to the rhetorical integration of social obligations and investor responsibilities at the continental level, and culminating in the articulation of a distinctly pan-African, human rights-centered approach to investment law reform. The article undertakes a detailed examination of national, sub-regional, and continental instruments, illustrating how human rights considerations have been systematically embedded within the African international investment law framework. It concludes by arguing that African moral doctrines and value systems related to human rights hold significant potential for influencing the interpretation and application of international investment law in Africa, thereby reinforcing a context-sensitive and rights-respecting legal order.

MOTS-CLÉS: droits humains ; droit international des investissements ; droit de réglementer ; responsabilité sociale des entreprises ; panafricanisme

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1 INTRODUCTION

Le domaine du droit international des investissements (DII), originairement lié à la protection diplomatique, est traditionnellement centré sur la préservation des intérêts des investisseurs étrangers lors de leurs placements dans les pays hôtes.[1] Actuellement, l'accent est désormais placé non seulement sur la protection de l'investisseur et de son investissement, mais également sur la protection contre les actions des investisseurs. Cet article porte une attention particulière sur la conduite des investisseurs en matière de respect des droits de l'homme, afin d'assurer la prévention des atteintes aux droits de l'homme causées par les entreprises dans le cadre des investissements étrangers. Ce changement peut être attribué à divers facteurs concomitants. Parmi ceux-ci, l'un des plus significatifs est l'évolution des normes relatives aux entreprises et aux droits de l'homme qui ont gagné en importance juridique ces dernières années, principalement grâce aux Principes directeurs des Nations Unies sur les entreprises et les droits de l'homme de 2011.[2] Bien que ces principes ne soient pas contraignants, ils ont largement influencé la pratique des Etats et ont été largement adoptés par ceux-ci, le monde des affaires et les organismes de normalisation aux niveaux national et international. Par conséquent, l'accent est désormais mis sur la clarification des responsabilités dans le cadre des opérations liées à l'investissement étranger et sur la

1 F Marella *Protection internationale des droits de l'homme et activités des sociétés transnationales* (2017).

2 Rapport du Représentant spécial du Secrétaire général sur la question des droits de l'homme et des sociétés transnationales et autres entreprises, A/HRc.11/13, 22 avril 2009 ; Principes directeurs des Nations Unies, principe 13 ; Principes directeurs des Nations Unies, principe 29 ; A Ramasastry 'Corporate social responsibility versus business and human rights: bridging the gap between responsibility and accountability' (2015) 14 *Journal of Human Rights* 237-259 ; Principes directeurs de l'OCDE à l'intention des entreprises multinationales, chapitre sur les intérêts des consommateurs, para 3 ; Les normes de performance de la Société financière internationale en matière de durabilité environnementale et sociale, 2012 ; les organisations internationales de normalisation, ISO 26000 – Responsabilité sociale.

responsabilisation des sociétés multinationales en cas de violations des droits de l'homme.[3]

En effet, au niveau international plusieurs normes sont pertinentes pour commencer à assurer la protection des droits humains (DH) dans la mise en œuvre d'un projet d'investissement en engageant les États à œuvrer pour garantir ces normes et les entreprises internationales à collaborer pour les respecter. Le Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC) de 1966 énonce les responsabilités des États en matière de protection du droit au travail, des conditions de travail équitables et favorables, incluant des conditions de travail sûres et saines, ainsi que le droit à la propriété, à la formation de syndicats, à la sécurité sociale, à l'éducation, à un niveau de vie décent, à la meilleure santé physique et mentale possible, et au bénéfice des avancées scientifiques.

Le PIDESC préconise aux États d'assurer l'égalité des chances pour tous les individus, hommes et femmes, dans l'exercice de tous les droits économiques, sociaux et culturels, en intégrant une approche de genre pour traiter les impacts des activités commerciales sur les femmes et les filles.[4] L'article 3 de la Convention de 1979 sur l'élimination de la discrimination à l'égard des femmes interdit toute forme de discrimination envers les femmes et les obstacles à leur participation égale avec les hommes dans la vie politique, sociale, économique et culturelle de leur pays.[5]

Au niveau continental, la Charte africaine des droits de l'homme et des peuples affirme le droit de chaque individu à la dignité et invite les États à prendre toutes les mesures nécessaires pour protéger les droits humains de leur population.[6]

Plus précisément, en mars 2023, la Commission africaine des droits de l'homme et des peuples (CADHP) a adopté la résolution n° 550 axée sur les entreprises et les droits de l'homme, appelant les États membres à mettre en place un cadre politique de l'Union Africaine (UA) sur les entreprises et les droits de l'homme pour garantir la protection, notamment des droits à la santé par les entreprises.[7]

La CADHP a également adopté en 2023 une résolution sur une approche basée sur les droits de l'homme pour la mise en œuvre et le suivi de l'Accord sur la Zone de libre-échange continentale africaine (ZLECAf), mettant l'accent sur l'intégration des droits de l'homme dans les négociations et la mise en œuvre de cet accord, ainsi que sur la

3 Groupe de travail intergouvernemental à composition non limitée des Nations Unies chargé d'élaborer un instrument juridiquement contraignant pour les sociétés transnationales et autres entreprises en matière de droits de l'homme.

4 ONU (2017). Observation générale n° 24 (2017) sur les obligations de l'État dans le contexte des activités commerciales.

5 Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (1979).

6 Préambule, Charte africaine des droits de l'homme et des peuples.

7 Commission africaine des droits de l'homme et des peuples (CADHP) (2023) Résolution sur les entreprises et les droits de l'homme en Afrique CADHP/Res.550 (LXXIV).

reconnaissance et la protection des groupes vulnérables et des acteurs des micro, petites et moyennes entreprises, et sur l'évaluation des implications sur les droits de l'homme pour identifier et combler les lacunes dans le respect des normes de la Charte africaine.[8]

De plus, les États ont l'obligation de protéger la santé dans les activités économiques, comme stipulé dans le Protocole à la Charte africaine des droits de l'homme et des peuples relatifs aux droits de la femme en Afrique, ainsi que dans les Objectifs de développement durable (ODD), notamment l'ODD 3 sur la santé et le bien-être, l'ODD 5 sur l'égalité des sexes, l'ODD 8 sur l'emploi décent et l'ODD 10 sur la réduction des inégalités intra et interétatiques.

L'État est tenu d'appliquer les traités et conventions internationales relatives aux DH et veiller à ce que les droits des citoyens soient mis en œuvre dans les lois nationales protégées et respectées.

Sur cette même lancée, l'Union africaine a mis en place diverses initiatives afin de favoriser la souveraineté des États dans la réglementation des investissements étrangers, notamment dans certains secteurs clés tels que l'éducation et la santé,[9] afin de permettre à l'Etat d'accueil de l'investissement étranger d'avoir une marge de manœuvre plus élevée pour assurer le respect des DH. En dehors de ces initiatives, il urge de considérer la marge traditionnelle reconnue aux Etats dans la mise en œuvre des traités d'investissement et commerciaux en ce qui concerne les exceptions générales et les exceptions en matière de sécurité, calquées sur les articles XX et XXI de l'accord général sur les tarifs douaniers et le commerce.

Ainsi, à titre d'exemple le Traité de la CAE met en avant la promotion des intérêts communs des peuples ainsi que le rôle des femmes dans le développement culturel, social, politique, économique et technologique, tout comme le traité du COMESA qui prévoit également des mesures de sécurité et des restrictions commerciales en cas d'impact sur la santé ou la vie des êtres vivants, obligeant les États à collaborer en matière de santé et d'environnement. En sus, ces traités engagent les États membres à respecter les principes de démocratie, d'état de droit, de responsabilité, de transparence, de justice sociale, d'égalité des chances, de parité hommes-femmes, ainsi que la promotion et la protection des droits tels que définis dans la CADHP. Les traités régionaux impliquent des bases solides pour la mise en œuvre des droits de l'homme dans le cadre du projet d'intégration régionale sur le continent.

En effet, théoriquement, en incitant les États membres à prendre en compte ces normes dans leurs pratiques législatives et conventionnelles, l'investisseur étranger sera ainsi tenu de respecter à

8 CADHP (2023) Résolution sur une approche basée sur les droits de l'homme pour la mise en œuvre et le suivi de l'Accord sur la Zone de libre-échange continentale africaine - CADHP/Res.551 (LXXIV).

9 CADHP (2019). Résolution sur l'obligation des États de réglementer les acteurs privés impliqués dans la fourniture de services de santé et d'éducation - CADHP/Rés. 420 (LXIV) 2019; Alliance africaine pour la lutte antitabac (ATCA) (2021). Indice d'interférence de l'industrie du tabac en Afrique 2021.

la fois les lois poursuivant un objectif social et environnemental de son pays d'accueil et de son pays d'origine.

Ainsi un État mettant en place une loi contraignant ses investisseurs nationaux à se conformer à des normes sociales précises pour encadrer certaines activités économiques, les obligera à appliquer les mêmes règles une fois leurs investissements implémentés hors du territoire national. Cependant, dans la pratique, il reste difficile de tenir les entreprises responsables des violations des droits de l'homme, en particulier dans le cas des investisseurs étrangers dont les filiales opèrent principalement ailleurs que dans l'État hôte, ou dans divers pays à la fois.

Ceci, combiné à des capacités souvent limitées des tribunaux nationaux où les infractions ont lieu, entraîne une disparité de traitement selon le degré de consolidation de l'état de droit du pays. Malgré les efforts pour réglementer les opérations des sociétés mères et filiales à l'étranger, il s'agit d'un domaine du droit en évolution avec des lois nationales différentes les unes des autres.

En outre, la légitimité des mécanismes de règlement des différends entre investisseurs et États (RDIE), ainsi que la volonté des États de réformer le système, ont également diminué.[10] En réponse, les accords internationaux d'investissement (AII) conclus récemment ont tendance à inverser le paradigme en prévoyant un espace pour l'État hôte de règlementer pour l'intérêt général et la protection des droits de l'homme ainsi que des devoirs pesant désormais sur les investisseurs dans la mise en œuvre de leurs investissements vis-à-vis de l'État et des populations.

Certains accords d'investissement, en dehors d'obligations d'investisseurs vis-à-vis de la population de manière générale, ajoutent des devoirs spécifiques vis-à-vis de certains groupes déterminés, notamment les communautés locales directement affectées ou concernées par l'investissement. La relation entre le droit international des investissements et les droits de l'homme suscite des débats controversés dans les milieux politiques et universitaires, notamment depuis le rapport de 2003 du Haut-commissaire des Nations Unies aux droits de l'homme sur «Les droits de l'homme, le commerce et l'investissement».[11]

Dans ce rapport, il a été recommandé aux États de conserver une marge de manœuvre politique suffisante pour promouvoir et protéger les droits de l'homme, ainsi que de clarifier les obligations des

10 Groupe de Travail III de la CNUDCI sur la réforme du règlement des différends entre investisseurs et États, disponible en ligne sur : https:// uncitral.un.org/en/working_groups/3/investor-state (consulté le 11 novembre 2024) ; J Chaisse & R Donde 'The state of investor-state arbitration – a reality check of the issues, trends, and directions in Asia-Pacific' (2018) 51 I*nternational Lawyer* 47-67.

11 Sous-Commission de la promotion et de la protection des droits de l'homme, Droits de l'homme, commerce et investissement, Rapport du Haut-Commissaire aux droits de l'homme, E/CN.4/Sub.2/2003/9, 2 juillet 2003.

investisseurs dans ce domaine lors de la rédaction des accords d'investissement.[12]

Plusieurs travaux examinent des questions similaires et se demandent si les traités d'investissement et les pratiques arbitrales limitent les États dans la promotion des droits de l'homme.[13]

Le débat a surtout porté sur l'impact de l'interprétation et de l'application des termes des accords d'investissement sur la capacité des États à réglementer et à conserver leur marge de manœuvre politique, également appelée le «droit de réglementer».[14]

Une partie de la doctrine affirme que les accords internationaux d'investissement et l'utilisation de l'arbitrage limitent la capacité des États à poursuivre des politiques en faveur des droits de l'homme et que les accords d'investissement risquent donc d'entrer en conflit avec les droits de l'homme, puisque ces derniers nécessitent des mesures étatiques que les premiers pourraient contrarier.[15]

Cette déclaration a été contestée par une partie de la doctrine qui a déclaré que l'arbitrage en matière d'investissement ne crée pas de réels conflits entre la protection des droits de l'homme et les obligations des accords d'investissement, car les traités relatifs aux droits de l'homme ne nécessitent pas de mesures spécifiques qui seraient incompatibles avec les accords d'investissement.[16] De plus, certains chercheurs ont souligné les similitudes entre les principes de protection des investissements et les droits de l'homme et ont soutenu qu'ils remplissent des fonctions similaires. Selon eux, les deux régimes juridiques se complètent mutuellement.[17]

En 2017, le débat s'est intensifié avec l'émergence de nouvelles approches en matière d'arbitrage et de traités d'investissement, ainsi que dans la réflexion et la rédaction de traités relatifs aux droits de l'homme, notamment l'africanisation du droit international des

12 *Ibid.*

13 P-M Dupuy, E Petersmann & F Francioni (eds) *Human rights in international investment law and arbitration* (2009) ; M Jacob 'International Investment Agreements and Human Rights' (2010) INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010.

14 D Gaukrodger 'The balance between investor protection and the right to regulate in investment treaties a scoping paper' (2017) OECD Working Papers on International Investment, No 2017/02; C Titi *The right to regulate in international investment law* (revisited) (2022).

15 M Hirsch 'Interactions between investment and non-investment obligations' in P Muchlinski and others (eds) *The Oxford handbook of international investment law* (2008) 154 179.

16 JD Fry 'International human rights law in investment arbitration: evidence of international law's unity' (2006) 18 *Duke Journal of Comparative & International Law* 77 149.

17 F Francioni 'Access to justice, denial of justice and international investment law' in P-M Dupuy, E Petersmann & F Francioni (eds) *Human rights in international investment law and arbitration* (2009) 63-81; P-M Dupuy & JE Viñuales 'Human rights and investment disciplines: integration in progress' in M Bungenberg and others (eds) *International investment law* (2015) 1739-1767.

investissements.[18] Ces changements portent principalement sur les obligations des investisseurs en matière de droits de l'homme, mises en évidence par plusieurs écrivains encourageant une refonte globale du système en intégrant les approches TWAIL (*Third World Approaches to International Law*/Approches tiers-mondistes du droit international).[19] Parmi toutes les jurisprudences des tribunaux d'investissements ayant eu un impact négatif,[20] ou positif[21] sur l'interprétation des valeurs non marchandes dans le cadre d'un investissement, deux affaires sud américaines *Urbaser* et *Bear Creek,*[22] ont vu les actions d'un investisseur au cours de son investissement examinées en fonction des circonstances spécifiques de chaque affaire. Même si les tribunaux n'ont pas rendu de décision défavorable dans les deux cas concernant le comportement concret de l'investisseur, il était clairement établi que les actions des investisseurs étaient perçues comme problématiques et elles ne l'étaient pas au regard du lien entre l'investissement et l'atteinte aux droits de l'homme. La complexité de cette approche réside toutefois dans le fait qu'elle est basée sur la langue du traité en vigueur et sur la volonté ainsi que la capacité des arbitres à tenir compte des arguments liés aux droits de l'homme et à reconnaître que le tribunal d'arbitrage soit compétent pour traiter les plaintes concernant les violations des droits de l'homme des entreprises, entreprises. Dans le cas de *Eco Oro*, l'interprétation arbitrale a en effet donné raison à l'investisseur car la rédaction du texte applicable n'était pas spécifique au cas de figure présenté à eux.[23] Le tribunal a estimé que *Eco Oro* avait en sa possession certains droits

18 MM Mbengue & S Schacherer 'The "africanization" of international investment law: the Pan-African investment code and the reform of the international investment regime' (2017) 18 *The Journal of World Investment & Trade* 3 414-448.

19 O Olabode 'A TWAIL approach to reforming the international investment regime' (2023) WTI Working Paper No 14/2023 *;* E Jha 'TWAIL and investment law – the perpetual struggle' (2022) 5 *NLIU Law Review* 2 15-33.

20 *Biloune and Marine Drive Complex Ltd. c. Ghana où le Tribunal* a décidé qu'il 'n'[avait] pas compétence pour traiter, en tant que cause d'action indépendante, une allégation de violation des droits de l'homme', Sentence de la CNUDCI sur la compétence et la responsabilité, 27 Octobre 1989 ; *dans Pac Rim Cayman LCC c. la République de El Salvador*, Affaire CIRDI n° ARB/09/12, décision, 14 octobre 2016, le tribunal considéra qu'il n'était 'pas nécessaire' de tenir compte des arguments contenus dans un dossier d'amicus curiae, notant que les auteurs n'avaient 'pas connaissance de la masse de preuves factuelles présentées dans la troisième phase du présent arbitrage, notamment lors de l'audience' (para 3.30).

21 *Veolia Propreté c. Egypte*, affaire CIRDI n° ARB/12/15, décision, 25 mai 2018 ; *Phillipe Morris c. Uruguay*, affaire CIRDI n° ARB/10/7, décision en rectification, 26 septembre 2016 ; *Patrick Mitchell c. Congo*, Affaire CIRDI n°ARB/99/7, décision en annulation, 1 Novembre 2006 (La contribution au développement économique de l'État hôte comme critère autonome de la définition de l'investissement étranger direct).

22 *Bear Creek Mining Corporation c. République du Pérou* (affaire CIRDI n° ARB/14/21), sentence du 30 novembre 2017, opinion individuelle de Philippe Sands ; *Urbaser S.A. et Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa c. République argentine*, affaire CIRDI n° ARB/07/26, sentence du 8 décembre 2016.

23 *Eco Oro Minerals Corp. c. Colombie*, CIRDI no arb/16/41, décision sur la compétence, la responsabilité et les directives sur le quantum, 21 septembre 2021 (*Eco Oro*).

acquis susceptibles d'être soumis à une expropriation. En raison de l'étendue et des impacts incertains des activités minières sur les páramos, le tribunal a jugé que les actions de la Colombie étaient raisonnables et proportionnées.[24] Néanmoins, la Colombie faisait valoir que l'article 2201 de l'Accord de libre-échange, qui comporte une exception générale pour les mesures visant la protection de la santé et de la vie des individus et des animaux, la préservation des végétaux ainsi que la conservation des ressources naturelles épuisables, biologiques ou non biologiques, devait être interprété de manière à exclure sa responsabilité envers une indemnisation. Cependant, la majorité des arbitres a rejeté cet argument, considérant que l'article 2201(3) était de nature «permissive», permettant à la Colombie de mettre en place ou d'appliquer des mesures pour la préservation de l'environnement, à condition que ces mesures ne soient ni arbitraires, ni discriminatoires sans justification, ni une restriction déguisée à l'investissement international. Selon les arbitres, si les parties avaient eu l'intention que cette disposition exclue l'obligation de verser une indemnisation, elles auraient formulé la disposition de manière similaire à celle utilisée dans l'annexe 811 sur les pouvoirs décisionnels.[25] La majorité des arbitres ont donc estimé que globalement, c'était la stratégie colombienne de délimitation du páramo qui affectait *Eco Oro* sans offrir de justification légitime[26] se déclarant ainsi compétents et condamnant la Colombie.

Cela souligne l'importance des réformes des traités d'investissement qui restent nécessaires pour assurer la cohérence et pour fournir aux tribunaux une base juridique claire pour l'élaboration d'une future jurisprudence sur les droits de l'homme et l'investissement. De telles réformes comprendraient des modifications des règles de fond ainsi que des paramètres procéduraux du mécanisme de règlement des différends, y compris la qualification des arbitres.

Bien que les différentes approches relatives aux DH dans le cadre du droit international des investissements aient été l'objet de nombreux débats publics et universitaires, les récents développements au niveau continental dans la pratique de l'arbitrage d'investissement, dans l'élaboration des traités, ainsi que dans le domaine des droits de l'homme suggèrent que cela pourrait évoluer et que la pertinence pratique de la relation entre les droits de l'homme et de l'investissement pourrait augmenter, notamment en Afrique.

L'adoption du Protocole sur l'investissement (PI) de la ZLECAf de 2023 est en effet la toute dernière étape visant à promouvoir la transformation structurelle du continent et à renforcer le rôle de l'investissement dans la protection des droits humains à travers des initiatives telles que la croissance verte et le développement durable, tout en progressant dans les réformes des politiques d'investissement, de la gouvernance et de la coopération déjà entamées au sein des communautés économiques régionales africaines. En intégrant les

24 *Eco Oro*, para 654.
25 *Eco Oro*, para 831.
26 *Eco Oro*, para 821.

objectifs de réforme des traités d'investissement et les meilleures pratiques de l'UA, des communautés économiques régionales et de la Conférence des Nations Unies sur le Commerce et le Développement (CNUCED), le PI réaffirme implicitement les principes du Cadre de politique d'investissement pour le développement durable de la CNUCED, en intégrant les «droits de l'homme relatifs à l'investissement» en tant que droits fondamentaux en matière de protection de l'environnement, de la santé et du travail dans le cadre de l'activité d'investissement.

Dans le but d'harmoniser les règles d'investissement, le PI définit sa corrélation avec d'autres protocoles et accords internationaux d'investissements (AII) conclu entre des nations africaines, en mettant particulièrement l'accent sur la résiliation des traités bilatéraux d'investissements (TBI) au sein de l'Afrique et sur l'alignement des instruments des communautés économiques régionales (CER) déjà en vigueur,[27] cela permettra de créer un cadre favorable à l'implantation des DH dans le cadre de la ZLECAf.[28]

Cet article procédera à une analyse comparative et légistique de l'intégration des principes DH dans le cadre de la communautarisation au niveau sous-régional et continental africains. La légistique implique une analyse approfondie et une réflexion sur les processus de création et d'application du droit, en proposant des solutions concrètes, en préconisant des normes et en envisageant l'avenir. En outre, elle englobe non seulement la rédaction des textes juridiques, mais aussi tous les autres éléments intervenant dans l'élaboration du droit.[29] La légistique examine le texte normatif en fonction de son objectif déclaré. Elle se compose de deux aspects complémentaires : la légistique substantielle et la légistique formelle. La première concerne le contenu de la matière à réglementer et la manière de concevoir l'action normative, tandis que la seconde se concentre sur la structuration de l'intervention normative.[30]

La particularité de la communautarisation du droit des investissements en Afrique réside principalement dans le remplacement de la législation des textes des communautés économiques et régionales africaines, ce qui permet de réduire les conflits de lois récurrents dans les relations juridiques. Cette tendance générale au développement du droit des investissements dans les organisations régionales s'inscrit dans un contexte marqué par le développement global du continent africain.

En effet, les 5 textes régionaux qui seront étudiés sont ceux de la SADC, CEDEAO, CAE et COMESA, ces 4 textes sous régionaux africains sont ceux qui intègrent et mettent en œuvre pleinement les

27 Art 49, Protocole sur l'investissements (PI) de la ZLECAf.

28 C Dommen & C Changwe Nshimbi, 'The Continental Free Trade Area (CFTA) in africa – a human rights perspective' (2017) Friedrich-Ebert-Stiftung & UN Economic Commission for Africa publications.

29 B Barraud *La légistique* (2016).

30 A Flückiger *Les racines historiques de la légistique en Suisse* (2007) Séminaire de la Commission européenne à Bruxelles.

droits de l'homme et devront servir d'exemple aux autres CER dans un but d'harmonisation.

Ensuite, cet article analysera les perspectives de la consolidation continentale en cours depuis la mise en place du PI, qui vise à harmoniser et uniformiser la régulation des investissements étrangers intra-africains selon une conception panafricaine.

À la lumière de cette interaction, cet article examine la façon dont les DH, notamment les normes relatives aux entreprises et aux droits de l'homme, ont été intégrées dans le cadre du droit international des investissements en Afrique lors de la communautarisation au niveau sous-régional de la régulation des investissements étrangers intra-africains.

Ainsi, l'émergence d'un nouveau paradigme africain en matière de protection des droits humains mis en exergue par l'implémentation des principes DH dans les textes communautaires sous régionaux africains se manifeste lors des interactions entre la protection des droits des citoyens africains et la régulation d'investissements étrangers.

Dans un premier temps, cet article offre une vue d'ensemble des moyens de garantir les DH en introduisant le droit de réglementer tout en maintenant un cadre protecteur de responsabilisation pour les investisseurs dans un dilemme stabilité-flexibilité[31] et analyse la mise en place des mesures et des procédures spéciales relatives aux investissements étrangers et aux DH en Afrique. Il montre ensuite comment une africanisation[32] du droit international des investissements engendre un paradigme élargi de protection des droits humains pour tous les investissements étrangers, qu'ils soient intra ou extra-africains.

De plus, cet article analyse dans quelle mesure la responsabilité de l'État de protéger les droits de l'homme et la responsabilité des entreprises de respecter les droits de l'homme ont été intégrées dans les accords internationaux d'investissement récents.[33] Enfin, il met en évidence la spécificité africaine du droit international des investissements en tant que paradigme régional visant à promouvoir les droits humains dans le cadre de la régulation des investissements étrangers et les moyens de renforcer la réforme en cours. Pour étudier l'interaction entre les droits de l'homme et le droit international des investissements, il est essentiel de souligner le rôle des États africains dans le cadre d'une réglementation des investissements étrangers en faveur de la consolidation des principes de droits humains (2) menant à la responsabilisation des investisseurs étrangers (3) et aboutissant à l'émergence d'un paradigme panafricain de l' «humanisation» du droit international des investissements (4).

31 L Mouyal *International investment law and the right to regulate. A human rights perspective* (2016).

32 O Akinkugbe 'Africanization and the reform of international investment law' (2021) 53 *Case Western Reserve Journal of International Law* 7 12.

33 TG Nelson 'Human rights law and BIT protection: areas of convergence' (2013) 1 TDM.

2 PROTECTION DU DROIT DE RÉGLEMENTER EN FAVEUR DES DROITS HUMAINS EN AFRIQUE

Le droit international des investissements n'est plus un domaine purement économique s'exerçant en autarcie, il ne peut être pleinement respecter l'éthique sans une interférence et une inter-normativité avec d'autres droits internationaux ni sans référence aux principes du droit international général.

L'importance d'une compréhension des rouages du droit international des droits humains en arbitrage des investissements devient de plus en plus évidente ces dernières années.

Tout comme d'autres systèmes juridiques, le système d'investissement international comporte des règles et des principes qui entrent en conflit ou se chevauchent avec d'autres domaines du droit, octroyant aux parties en litige la possibilité de caractériser les différends, conduisant ainsi à l'application de règles différentes pour une même situation.

Plus nous progressons dans l'analyse du droit international des investissements, plus nous rencontrons des obstacles. Il est indéniable que ce domaine du droit international est complexe et exigeant. Pour résoudre ces difficultés, il est impératif de rechercher la cohérence et la certitude juridique à travers l'interprétation harmonieuse rendue plus facile grâce au caractère discrétionnaire des normes conventionnelles communes aux États africains en matière de DH et d'investissement, et le résultat final devrait aboutir à une hiérarchisation, afin d'aboutir au grand projet phare de l'Agenda Africain 2063. En effet, même une interprétation harmonieuse nécessite que chaque disposition soit interprétée à la lumière des autres et donc subordonnée à celles-ci.[34]

2.1 Une «humanisation» du renouvellement normatif du DII africain

En effet, tous les États membres de l'Organisation des Nations Unies, ont approuvé au moins un des neuf principaux traités concernant les droits de l'Homme et au moins un des neuf protocoles facultatifs.[35] Cela implique que les États ont une obligation et une responsabilité de respecter, protéger et mettre en œuvre les droits de l'Homme en vertu du droit international.

L'obligation de respecter et de protéger impose aux États de garantir une protection des individus ou groupes d'individus contre les violations des droits de l'homme. En ce qui concerne l'obligation de mettre en œuvre, les États doivent prendre des mesures positives pour

34 FJ Hendrik & M Happold 'The human rights defence in international investment arbitration: exploring the limits of systemic integration' (2019) 68 *International & Comparative Law Quarterly* 741–59.

faciliter l'exercice des droits de l'homme sur leur territoire. La protection effective des droits de l'homme repose en effet, principalement sur le droit national, il est donc crucial de garantir que les lois nationales offrent un niveau élevé de protection des droits de l'homme.

Tandis que certains États ont tenté de segmenter le droit international des investissements afin d'établir un ensemble uniforme de règles juridiques, espérant que le droit se perfectionnera au fil du temps par le biais de la jurisprudence en matière d'arbitrage des traités d'investissement. La tendance en Afrique converge vers une codification communautaire sous régionale des principes DH en tant que manifestation des relations juridiques entre le droit des investissements et d'autres systèmes juridiques.

Cette nouvelle codification permet une protection globale effective des droits de l'Homme, y compris le droit du travail et le droit de l'environnement, faisant passer le droit de réglementer d'un concept faible à une réalité contraignante dans les Accords.[36] Le Marché commun de l'Afrique orientale et australe (COMESA), fut en 2007 le premier texte régional africain démontrant de la tendance communautaire d'une intégration des droits de l'homme dans les accords d'investissement.[37]

Par la suite, plusieurs textes sous régionaux relatifs à la régulation des investissements intra-régionaux en Afrique ont progressivement inclus des éléments d'une approche axée sur les DH en consolidant

35 Convention internationale sur l'élimination de toutes les formes de discrimination raciale 21 déc 1965 CERD Pacte international relatif aux droits civils et politiques 16 déc 1966 CCPR Pacte international relatif aux droits économiques, sociaux et culturels 16 déc 1966 CESCR Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes 18 déc 1979 CEDAW Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants 10 déc 1984 CAT Convention relative aux droits de l'enfant 20 nov 1989 CRC Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille 18 déc 1990 CMW Convention internationale pour la protection de toutes les personnes contre les disparitions forcées 20 déc 2006 CED Convention relative aux droits des personnes handicapées 13 déc 2006 CRPD Protocole facultatif se rapportant au Pacte relatif aux droits économiques, sociaux et culturels 10 déc 2008 CESCR Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques 16 déc 1966 CCPR Deuxième Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques, visant à abolir la peine de mort 15 déc 1989 CCPR Protocole facultatif à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes 10 déc 1999 CEDAW Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés 25 mai 2000 CRC Protocole facultatif à la Convention relative aux droits de l'enfant, concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants 25 mai 2000 CRC Protocole facultatif à la Convention relative aux droits de l'enfant établissant une procédure de présentation de communications 19 déc 2011 CRC Protocole facultatif se rapportant à la Convention contre la torture et autres peines ou traitements cruels inhumains ou dégradants 18 déc 2002 SPT Protocole facultatif se rapportant à la Convention relative aux droits des personnes handicapées 12 décembre 2006.

36 Titi (n 14).

37 Préambule et art 7, Accord revisité de la zone d'investissement commune du COMESA (ZICc.CCIA) de 2007 notamment.

principalement le droit des États d'accueil à réglementer pour cause d'intérêt public.[38]

L'Acte additionnel sur les investissements de la Communauté économique des États de l'Afrique de l'Ouest (CEDEAO) est encore plus renforcé, exigeant des États membres de se doter de lois nationales pour la protection de l'environnement, du travail et des droits de l'homme, avec des lois du travail conformes à la déclaration de l'Organisation Internationale du Travail (OIT) de 1998 sur les principes et droits fondamentaux du travail.[39] Il dispose également que les États membres doivent mettre en œuvre des lois nationales sur les évaluations d'impact des conséquences sociales, sanitaires et environnementales des investissements étrangers et veiller à ce qu'ils respectent les normes minimales établies par la Communauté en la matière.[40]

De plus, le Code d'investissement de la CEDEAO, autorise les États également à négocier et à conclure des contrats de service public, qui peuvent être révisés ou renégociés conformément aux lois nationales et aux normes juridiques internationales.[41]

Bien que la formulation de ces dispositions puisse légèrement différer entre les instruments, et que les lois nationales varient d'un État à l'autre également, ces instruments peuvent obliger également les États parties à garantir que leurs «lois, politiques et actions» soient conformes aux traités relatifs aux droits de l'homme auxquels ils ont adhéré,[42] dont notamment la Charte africaine des droits de l'homme et des peuples.

Dans la pratique, une refonte complète des lois et politiques nationales peut néanmoins représenter une charge importante pour les États parties. Quant à l'évaluation de la conformité des lois et politiques, cela peut s'avérer problématique mais les examens réguliers des lois et politiques des États par les comités des traités des droits de l'homme entraînent généralement de nombreuses recommandations aux États sur la manière dont ils pourraient mieux aligner leurs lois et politiques sur leurs obligations conventionnelles afin de guider les États dont l'ensemble des lois et politiques n'est pas conforme à ses obligations conventionnelles en matière de droits de l'homme.

Ces instruments régionaux contenant des dispositions consolidant le droit des États de réglementer sont une manifestation de la présence des DH au sein de l'intégration économique africaine et qui est le point

38 C Baltag, R Joshi & K Duggal 'Recent trends in investment arbitration on the right to regulate, environment, health and corporate social responsibility: too much or too little?' (2023) 38 *ICSID Review - Foreign Investment Law Journal* 2 381-421.

39 Art 21(1), 21(2) & 21(4), Acte additionnel de la CEDEAO A/SA.3/12/08 (Acte additionnel de la CEDEAO) portant adoption des règles communautaires sur l'investissement et les modalités de leur mise en œuvre signé le 19 décembre 2008, entré en vigueur le 19 janvier 2009.

40 Art 21(3), Acte additionnel de la CEDEAO.

41 Art 16, ECOWIC.

42 Art 21(5) Acte additionnel de la CEDEAO ; Art 15(6), TBI Maroc-Nigéria.

de départ de la construction d'un modèle panafricain économique établi sur des principes DH.

De surcroît, dans une perspective de stabilisation des acquis en matière de protection des DH, l'acte additionnel sur l'investissement de la CEDEAO et l'Annexe 1 Coopération sur l'investissement du Protocole de la Communauté de développement de l'Afrique australe (SADC) sur la finance et l'investissement conviennent qu'il est inapproprié de réduire les protections nationales en matière de travail, de santé publique et de sécurité pour promouvoir les investissements étrangers.[43]

Enfin, dans le but d'encourager les États à mieux négocier les futurs traités, des modèles d'accords visant à sensibiliser en vue d'une meilleure intégration des principes DH en matière de protection de l'environnement et du travail se retrouvent dans le modèle d'Accord sur les investissements de la SADC.[44]

Suivant ces dispositions, l'on considère que les investisseurs devraient être appelés à respecter les normes internationales en matière de droits de l'homme, d'environnement et de travail adoptées par l'État hôte par le biais de leur participation à des accords internationaux.[45]

De même, le modèle de traité d'investissement de la Communauté d'Afrique de l'Est (CAE) de 2016 dispose que le droit de réglementer de l'État hôte doit garantir que le développement économique de son territoire soit compatible avec les buts et principes du développement durable et les objectifs de politique sociale et économique.[46] Les États d'accueil veillent donc à ne pas renoncer aux droits du travail notamment ceux relatifs au travail des enfants, ni les droits environnementaux ni assouplir la législation en vigueur pour encourager l'établissement, le maintien ou l'expansion d'un investissement sur leur territoire, territoire.

Le modèle encourage en outre les États à mettre en place des actions appropriées afin de corriger les inégalités économiques héritées de l'histoire et affectant des groupes ethniques ou culturels.[47]

D'autre part, au niveau continental, le préambule du PI de la ZLECAf vient reconnaître l'apport significatif que les investissements étrangers peuvent apporter à la réduction de la pauvreté et au développement humain, ainsi que l'importance de l'inclusivité en encourageant les investissements bénéficiant aux zones économiquement défavorisées, aux Petites et Moyennes Entreprises (PME), aux communautés locales, aux peuples autochtones, aux groupes marginalisés, notamment les femmes et la jeunesse. Ce

43 Art 20, Acte additionnel de la CEDEAO ; art 15(3), TBI Maroc-Nigéria ; art 11, Annexe 1 Coopération sur l'investissement du Protocole de la SADC sur la finance et l'investissement.

44 Art 22, Modèle de TBI de la SADC.

45 Commentaire du modèle TBI de la SADC 36.

46 Art 15, Le modèle de traité d'investissement de la CAE de 2016.

47 Art 16, Le modèle de traité d'investissement de la CAE de 2016.

préambule réaffirme également le droit inhérent des États parties de légiférer sur leur territoire et d'introduire des mesures pour réaliser leurs objectifs de politique publique nationale, promouvoir le développement durable et protéger des objectifs légitimes tels que la santé publique, la sécurité nationale, l'environnement, la préservation des ressources naturelles, les normes de travail, l'intégrité et la stabilité du système financier et la moralité publique.[48]

En outre, l'article 35 du PI incite les États à améliorer leurs lois et réglementations nationales dans le but de les aligner avec les normes internationales en matière de protection des DH afin que les évaluations d'impact environnemental et social des investisseurs étrangers s'y fondent au moment de leur établissement.

Le PI tend à harmoniser les textes sous régionaux des CER n'ayant pas encore mis en place des accords d'investissement, ou les relations juridiques entre deux États africains n'appartenant pas à la même CER en garantissant que l'impact positif de tous les futurs investissements intra-africains ne se fera pas au détriment du droit des pays africains à réglementer et à prendre des mesures légitimes pour protéger leurs objectifs de politique publique.

En premier lieu, le principe du droit inaliénable des peuples de disposer librement de leurs richesses et ressources naturelles est consacré par l'article 21(1) de la Charte Africaine, étant à la fois la prolongation et l'élément central du droit à l'autodétermination tel que stipulé par l'article 20. Les droits et privilèges qui en découlent appartiennent aux peuples. Conformément à la deuxième phrase de l'article 21(1) et (4), les États ont simplement délégué leur rôle en matière d'exercice de ce droit. Il est clairement indiqué dans l'article 21 que ce rôle dévolu aux États doit être assumé dans l'intérêt exclusif des populations. Enfin, la dernière disposition de l'article 21(5) énonce explicitement que les populations des États Parties à la Charte africaine ont le droit de «bénéficier pleinement des avantages tirés de leurs ressources nationales».

Le fondement de ce droit implique que les populations aient un accès sécurisé à l'utilisation et à l'exploitation de leurs richesses et ressources naturelles. Par conséquent, les «populations» et les individus ont le droit de subsister de la terre, de la végétation, des sources d'eau et des ressources aquatiques, d'y avoir accès, de les exploiter et de les utiliser, des ressources dont ils dépendent pour leur survie et leurs moyens de subsistance. Ce droit de vivre de la terre et des autres ressources, de les exploiter ou de les utiliser, qui constitue un

48 Voir article 25 portant sur les normes minimales sur l'environnement, le travail et la protection des consommateurs : Le Protocole habilite les États parties à assurer la protection de l'environnement, du travail et des consommateurs, en tenant compte des politiques nationales, des meilleures normes internationaux et des accords internationaux pertinents auxquels elles sont parties. En plus de continuer à améliorer leurs normes dans le cadre de leurs lois et réglementations nationales. Le Protocole interdit en outre aux gouvernements d'associer ou de renoncer aux normes nationales, ou de se conformer aux lois sur l'environnement, le travail et la protection des consommateurs et aux normes minimales internationales.

élément du droit à la propriété garanti par l'article 14 de la Charte, n'est pas conditionné par son origine coutumière ou légale. Ce droit permet également aux populations et aux individus de bénéficier d'un soutien adéquat leur permettant d'accéder à ces ressources, de les exploiter et de les utiliser de manière durable, contribuant à améliorer leurs conditions de vie. Les protections et droits énoncés dans les paragraphes précédents représentent les garanties positives et éléments substantiels de l'article 21 de la Charte africaine. En outre, l'article 21 prévoit des garanties négatives, notamment en garantissant qu'aucun individu ne devrait être privé, pour quelque raison que ce soit, des protections, droits et avantages découlant du droit de disposer des richesses et des ressources nationales. De plus, l'article 21 protège les ressortissants d'un État ainsi que les communautés locales contre tout acte, condition ou accord compromettant ou entravant leur droit de disposer des richesses et ressources naturelles.

De la sorte, on peut conclure qu'il est fortement attendu des États d'accueil africains qu'ils exercent pleinement leur pouvoir de réglementer les investissements intra-africains, démontrant ainsi une consécration des obligations DH claires à l'endroit des investisseurs est un changement de paradigme qu'il importe de souligner au niveau africain.

2.2 Un «équilibrage» entre droits économiques et DH dans le cadre du règlement des différends d'investissements en Afrique

Toutes les dispositions citées précédemment visent à contraindre les investisseurs à gérer ou à exploiter leurs investissements de manière à ne pas entraver l'État hôte ou l'État d'origine dans l'accomplissement de ses obligations en vertu des instruments internationaux relatifs à l'environnement, au travail ou aux droits de l'homme auquel il est partie à des fins de bien être public.[49] Malgré que la référence aux DH dans le cadre de l'arbitrage a pu surmonter certaines fois l'indétermination de certains traités à assurer l'équilibre entre les DH et les préoccupations liées aux investissements,[50] l'essence de ces dispositions viserait à éviter une situation similaire à celle de l'affaire *Urbaser c. Argentine,*[51] car même si l'approche progressiste des tribunaux d'investissement illustre le potentiel traitement des futurs différends relatifs au DH, le différend instigué par un investisseur en

49 V Korzun 'The right to regulate in investor-state arbitration: slicing and dicing regulatory carve-outs' (2017) 50 *Vanderbilt Journal of Transnational Law* 2 355-414.

50 S Steininger 'What's human rights got to do with it? An empirical analysis of human rights references in investment arbitration' (2018) 31 *Leiden Journal of International Law* 1-26, 1.

51 *Urbaser c. Argentine*, sentence, para 1156 ; X Qian 'Challenges of water governance (and privatization) in China-traps, gaps, and law' (2018) 47 *Georgia Journal of International and Comparative Law* 49-91.

vue d'empêcher l'État de remplir ses obligations en matière de droits de l'homme envers ses citoyens a été porté devant le tribunal.

Le but de la réforme du droit international des investissements serait d'empêcher tout recours ayant pour motif le droit légitime de réglementer des États dans un but d'intérêt général.

Car dans l'affaire, *Urbaser c. Argentine*, Argentine a cherché à obtenir réparation de ces investisseurs en déposant une demande reconventionnelle basée sur des allégations d'abus des droits humains commis contre des citoyens argentins. Bien que le tribunal ait affirmé sa compétence sur la demande reconventionnelle et ait conclu que les États, les individus et autres parties privées avaient une obligation de s'abstenir de violer les droits humains, il n'a pas été en mesure de trouver une obligation positive au titre du droit international exigeant des investisseurs d'aligner leurs politiques avec le droit international des droits humains.[52] À la lumière des évolutions récentes du droit international des droits humains, les tribunaux pourraient bientôt bénéficier d'une orientation accrue et d'une clarification des obligations des investisseurs en vertu du droit international.

De manière alternative, les dispositions africaines pourraient imposer aux investisseurs le respect des normes reproduites dans les instruments internationaux auxquels l'État hôte ou l'État d'origine est partie. En outre, ces obligations sont généralement accordées aux États, cependant, il existe des clauses passerelles entre l'accord ZLECAf et la Charte africaine et la jurisprudence de la Cour dont les arbitres ou juges doivent tenir compte.

En effet, le draft 0 du PI comprenait des dispositions pour la résolution des différends entre les investisseurs et les États[53], malgré une critique croissante voire un rejet du recours au RDIE émanant de certains États,[54] pour son atteinte potentielle au DH,[55] en outre, le PI version finale consacre l'arbitrage interétatique.[56]

Selon l'Annexe 1 du draft 0 du PI, les investisseurs auraient la possibilité de formuler des réclamations en se basant sur diverses règles d'arbitrage (telles que le Centre international pour le règlement des différends relatifs aux investissements (CIRDI) et son mécanisme additionnel, la Commission des Nations Unies pour le droit commercial international (CNUDCI) ainsi que toute institution ou centre d'arbitrage africain), en attendant la finalisation de l'Annexe 1 du PI, en outre il existe actuellement une articulation entre ce mécanisme spécial

52 S Schacherer '*Urbaser c. Argentine*' in B Osterwalder & MD Brauch (eds) *Droit international de l'investment et développement durable : principales affaires des années 2010* (2018) 25-30.

53 Draft 0, Protocole panafricain d'investissement, 2022.

54 Cas de l'Afrique du Sud.

55 J Alvarez 'The use (and misuse) of European human rights law in investor-state dispute settlement' in F Ferrari (ed) *The impact of EU law on international commercial arbitration* (2017).

56 Art 44, Protocole sur l'investissement de la ZLECAf (PI).

et le protocole relatif aux règles et procédures de règlement des différends de la ZLECAf.[57]

Il est possible durant la phase de négociation du mécanisme de règlement des différends du PI d'avoir recours à ce mécanisme spécial également.

La finalisation du mécanisme de règlement des différends du PI demeure attendue, car en dépit des recommandations contenues dans le modèle de TBI de la SADC[58] et dans le PAIC,[59] les règlements concernant les demandes reconventionnelles ne sont pas encore devenus une pratique courante établie en Afrique.

Les traités d'investissement qui autorisent expressément les demandes reconventionnelles sont rares, se limitant seulement à quelques traités actuellement en vigueur,[60] néanmoins l'accord d'investissement du COMESA 2007 dans son article 28(9) et le TBI Maroc – Cap Vert de 2023 dans son article 28 incluent une disposition relative à ces demandes reconventionnelles.

Dans ce contexte, l'inclusion d'une disposition relative aux demandes reconventionnelles dans l'annexe finalisée sur le règlement des différends comme initialement prévu dans les articles 9 et 10 de l'annexe 1 du Draft 0,[61] représenterait une avancée significative pour le règlement des différends africain et serait un autre signe que le PI finalisé se classerait parmi les AII de nouvelle génération les plus avancés.

L'intégration systémique devient obligatoire afin d'offrir une réponse claire et harmonieuse dans le cadre des arbitrages africains après la mise en place du PI, ce qui rend la compréhension de ce qui serait attendue d'un investisseur dans la pratique plus limpide.

Ainsi, il serait toujours envisageable que l'invocation d'une telle disposition dans le cadre d'un arbitrage d'investissement s'opère à travers le renvoi à une norme DH admise par un Etat, ou par référence à une disposition dans le préambule d'un texte régional, ou des Accord ou Protocole internationaux auxquels l'État hôte adhère, et où il y aurait potentiellement un manquement.

Et c'est ainsi que le nouveau contexte africain de l'arbitrage d'investissement peut pallier d'éventuelles dérives d'interprétation car l'intégration d'une formulation contraignante directe du droit de réglementer dans le langage de rédaction des textes.

Cette formulation est pertinente dû au fait notamment que l'interprétation des arbitres, et donc des obligations qui découlent des accords, ne peut évoluer que favorablement à la protection des

57 Art 27, Protocole relatif aux règles et procédures de règlement des différends de la ZLECAf.

58 Art 19.2, TBI modèle de la SADC.

59 Art 43, PAIC.

60 Art 17(1)(a)(ii)) , TBI Iran-Slovaquie de 2016 ; art 28.4, TBI Argentine-Émirats arabes unis de 2018.

61 Annexe 1, art 9 et 10, Draft 0 du PI.

principes DH au fil du temps, contrairement à la pratique arbitrale internationale.[62]

Dans l'ensemble, l'accent est mis sur les principes DH et un cadre juridique est établi pour la responsabilité des entreprises en matière de protection des DH. Le fait que les textes régionaux fassent référence aux obligations conventionnelles de l'État hôte en matière de DH pourrait suggérer que ce traité serait applicable en vertu desdits textes. Cependant, tout différend devrait respecter les conditions juridictionnelles habituelles. Même si l'investissement relève d'un instrument juridique d'investissement régional africain et des règles d'arbitrages régionales qui lui sont applicables, il devrait démontrer qu'il s'agit d'un «différend juridique découlant directement d'un investissement».[63]

La tendance actuelle indique un intérêt croissant d'une volonté africaine de doter les États des mêmes droits que les investisseurs, ces dispositions reflètent l'affermissement du pouvoir de réglementation tant des États que des CER en matière d'investissement afin de remplir leur devoir de protéger les droits de l'homme dans le cadre des investissements étrangers en incorporant des dispositions qui placent les principes DH comme des responsabilités et/ou des attentes des États et des investisseurs.

L'obligation des États de protéger les droits de l'homme se manifeste généralement à travers la perte du pouvoir de toute-puissance d'antan des investissements, qui se traduit à travers deux aspects.

Premièrement par les dispositions explicites dans les textes régionaux relatifs au DH, via lesquelles les tribunaux d'investissements pourront toujours déterminer si un investisseur a respecté les lois locales protégeant les DH lorsque l'Accord d'investissement le prescrit.

Car la collaboration internationale représente un aspect du droit des peuples à exercer pleinement leur souveraineté sur leurs richesses et ressources naturelles. Il est essentiel que l'exercice de ce droit ne compromette pas les engagements découlant de la coopération internationale, en particulier ceux issus des accords portant sur les ressources transfrontalières. Il convient de souligner que la cession ou l'exploitation des ressources naturelles doit être menée dans une optique de développement durable et de respect de l'environnement. Les obligations découlant des accords commerciaux et d'investissement international, ainsi que des accords bilatéraux d'investissement, ne doivent être reconnues que si elles sont basées sur les principes du respect mutuel, de l'équité et du droit international, conformément à l'article 21(3).

De même, les obligations issues de ces accords qui vont à l'encontre du droit des peuples à disposer de leurs richesses et ressources naturelles ne sauraient être protégées par l'article 21(3). Il est

62 E de Brabandere 'Human rights and international investment law' in M Krajewski & R Hoffmann (eds) *Research handbook on foreign direct investment* (2019)

63 Art 25, Convention CIRDI.

important de noter que le droit des peuples à disposer de leurs richesses et ressources naturelles tel que prévu à l'article 21(3) est soumis à l'article 21(5), qui impose aux États l'obligation de protéger préventivement leur population contre toute forme d'exploitation économique étrangère.

Par conséquent, les accords bilatéraux et multilatéraux qui ne respectent pas les dispositions de l'article 21(5) et qui sont signés entre États ou avec des institutions financières internationales devraient être réexaminés ou renégociés. Les négociations de ces accords devraient inclure des garanties minimales prévues dans l'article 21 de la Charte africaine, en particulier en ce qui concerne la responsabilité des acteurs économiques internationaux quant aux conséquences de leurs activités sur les droits de l'homme et des peuples, ainsi que le respect des obligations fiscales et des normes environnementales internationalement acceptables. Toute clause exonérant ces acteurs de leur responsabilité ou ne les obligeant pas à rendre compte des conséquences nuisibles de leurs activités sur les droits de l'homme et des peuples ou sur l'environnement serait considérée comme contraire aux garanties prévues par l'article 21 de la Charte africaine.

Deuxièmement par la responsabilisation des actes des investisseurs en instaurant des obligations à ces derniers soit de manière incitative via la responsabilité sociale des entreprises (RSE) ou de manière plus contraignante via la facilitation des actions en justice contre les investisseurs pour les atteintes aux DH commises dans l'Etat hôte.

3 RESPONSABILISATION DES INVESTISSEURS ET PROTECTION DES DROITS HUMAINS EN AFRIQUE

L'obligation des entreprises de respecter les DH, réside dans la nécessité pour elles de mettre en place des mesures adaptées afin de prévenir, d'atténuer et, le cas échéant, de remédier aux atteintes aux DH.[64]

Comme on a pu le constater précédemment, en Afrique, les Accords d'investissements exigent désormais que les investisseurs et leurs investissements respectent les lois locales en général, et exigent également la conformité aux lois spécifiques telles que celles relatives aux DH.[65] La référence aux lois locales veille à ce que les tribunaux puissent considérer ces lois comme faisant partie du droit applicable.[66] Cette approche est conforme à l'article 42(1) de la convention pour le Règlement des Différends Relatifs aux Investissements entre États et Ressortissants d'autres États (Convention CIRDI), qui autorise le tribunal à appliquer le droit national sauf accord contraire des parties.

64 Principes 11 et 17, Principes directeurs des Nations Unies.

65 Par exemple, art 11(1), Acte additionnel de la CEDEAO.

66 E de Brabandere 'Human rights and international investment law' (2018) 75 *Grotius Centre working paper series* 1-23.

3.1 L'appréhension de la Responsabilité Sociale des Entreprises par l'approche DH africaine du DII

De ce fait, de nombreux accords d'investissement internationaux africains récemment établis, ont emboité le pas de cette tendance africaine d'intégration des principes DH aux Accords d'investissement, notamment ceux conclus par la Guinée, le Burkina Faso, la Côte d'Ivoire, le Mali, le Bénin, le Cameroun, le Nigeria[67] et le Sénégal,[68] qui ont commencé à intégrer des clauses faisant référence à la Responsabilité Sociale des Entreprises (RSE) ou encourageant l'application des principes tripartites de l'OIT, mais seulement en tant que recommandations non contraignantes à l'intention des investisseurs en matière de pratiques visant à responsabiliser leurs pratiques et les inciter à s'adapter aux principes DH.

Cependant, le degré d'engagement de chaque État peut varier au sein d'un même accord.[69] Par exemple, dans l'accord bilatéral d'investissement entre Singapour et le Nigeria, le Nigeria est incité à encourager les entreprises à adopter des pratiques de RSE, la démarche ici est incitative et tendrait à avoir plus d'impact, tandis que Singapour se contente de «réaffirmer l'importance» d'encourager ces pratiques sans pour autant mettre en place un aspect juridique qui puisse avoir un impact pour l'État.

Bien que ces clauses demeurent du *soft law* dans tous les cas et ne contraignent généralement pas les États signataires, leur inclusion témoigne d'une prise de conscience de l'importance d'une conduite responsable des entreprises en Afrique dans le cadre des investissements étrangers, ainsi que du rôle des États dans la protection contre les violations des DH liés aux entreprises. Ces dispositions visent à promouvoir les pratiques de RSE chez les investisseurs selon une approche descendante.[70]

L'expression «doit s'efforcer» implique que des efforts doivent être faits, mais en pratique, elle demande simplement à l'investisseur de faire de son mieux, notamment dans l'intégration volontaire des normes RSE. En d'autres termes, ces dispositions sont envoyées aux États, qui sont appelés à promouvoir les pratiques de RSE des

67 TBI Singapour Nigéria.

68 ALE Canada-Colombie, signé le 21 novembre 2008, entré en vigueur le 15 août 2011; TBI Canada-Serbie, signé le 1er septembre 2014, entré en vigueur le 27 avril 2015 ; TBI Canada-Mongolie, signé le 8 septembre 2016, entré en vigueur le 24 février 2017 ; TBI Canada-Guinée, signé le 27 mai 2015, entré en vigueur le 27 mars 2017 ; TBI Canada-Burkina Faso, signé le 20 avril 2015, entré en vigueur le 11 octobre 2017 ; TBI Canada-Côte d'Ivoire, signé le 30 novembre 2014, entré en vigueur le 14 décembre 2015 ; TBI Canada-Mali, signé le 28 novembre 2014, entré en vigueur le 8 juin 2016 ; TBI Canada-Bénin, signé le 9 janvier 2013, entré en vigueur le 12 mai 2014 ; TBI Canada Cameroun, signé le 3 mars 2014, entré en vigueur le 16 décembre 2016 ; TBI Canada-Sénégal, signé le 27 novembre 2014, entré en vigueur le 5 août 2016.

69 Baltag, Joshi & Duggal (n 38).

70 N Monebhurrun 'Mapping the duties of private companies in international investment law' (2017) 14 *Brazilian Journal of International Law* 55-57.

investisseurs agissant sur leur territoire. Cependant, ces exigences ne sont pas contraignantes pour les investisseurs. Même si les États parties réaffirment l'importance d'encourager volontairement les pratiques de RSE, en l'absence de réglementation nationale contraignante, les investisseurs restent libres de choisir de les mettre en œuvre ou non.

En revanche, dans le contexte intra-africain régional, plusieurs Accords régionaux d'investissements imposent des obligations contraignantes aux investisseurs, de plus, dans certains cas les investisseurs doivent réaliser des évaluations d'impact avant et après la mise en place de leurs investissements.[71] La question des obligations des entreprises avait déjà été abordée dans des instruments tels que Community Investment Code of The Economic Community of The Great Lakes Countries (1982) et Charter on a regime of multinational industrial enterprises of eastern and southern Africa states (1990).

L'Acte additionnel de la CEDEAO contient des obligations strictes et est probablement l'accord d'investissement le plus contraignant actuellement en vigueur en termes d'obligations des investisseurs, disposant ainsi que les investisseurs doivent gérer et exploiter leurs investissements de manière à respecter les obligations en matière de droits de l'homme, les normes de travail, ainsi que les obligations environnementales et sociales régionales, auxquelles les États d'accueil et/ou d'origine sont parties.[72]

En outre, avant de réaliser leurs investissements, les investisseurs doivent effectuer une évaluation d'impact environnemental et social et, ce faisant, doivent se conformer aux critères de sélection nationaux ainsi qu'aux processus d'évaluation requis par le droit national.[73]

L'acte additionnel de la CEDEAO inclut une disposition se concentrant sur la phase de pré-investissement. L'article 18 précise que si l'absence d'une évaluation d'impact préalable par un investisseur est matériellement pertinente pour un différend, cela sera pris en compte lors de l'évaluation du bien-fondé ou des dommages d'une réclamation. Cela confère une importance juridique accumulée aux évaluations d'impact préalables en soulignant les conséquences réelles pour l'investisseur en cas de non-réalisation de cette évaluation.[74]

Les évaluations d'impact environnemental et social doivent être accessibles à la communauté locale et aux autres parties impliquées avant la réalisation de l'investissement.[75] De plus, les investisseurs, leurs investissements et les autorités de l'État hôte doivent appliquer le principe de précaution aux évaluations d'impact. Une fois l'investissement réalisé, les investisseurs ont des obligations post-investissement, telles que se conformer à la Déclaration de l'OIT sur les principes fondamentaux et le droit au travail, et atteindre les objectifs

71 Art 11(1), Acte additionnel de la CEDEAO.
72 Art 14(2), Acte additionnel de la CEDEAO.
73 Art 12(1), Acte additionnel de la CEDEAO.
74 Art 8(6), Acte additionnel de la CEDEAO ne prévoit cependant pas le RDIE.
75 Art 12(2), Acte additionnel de la CEDEAO.

de développement.[76] Des obligations strictes en matière de droits de l'homme sont également imposées aux investisseurs, notamment le respect des droits de l'homme sur le lieu de travail et dans la communauté, l'abstention d'actes violant ces droits et le respect des droits de l'homme en période de paix ou de troubles sociopolitiques.[77]

L'article 8 de l'Annexe 1 Coopération sur l'investissement du Protocole de la SADC sur la finance et l'investissement, assigne aux investisseurs la responsabilité de respecter les lois, les règlements et les lignes directrices politiques et administratives de l'Etat d'accueil durant tout le processus d'investissement.[78]

Par ailleurs, les investisseurs opérant dans la région de la CEDEAO sont encouragés à favoriser et à s'impliquer dans la RSE en prenant en considération les plans et les priorités de développement des États hôtes, ainsi que les besoins des communautés locales.[79] Il est essentiel qu'ils respectent toutes les normes et meilleures pratiques internationales, régionales et nationales en matière de gouvernance d'entreprise, conformément aux standards internationaux reconnus et adoptés au sein de la CEDEAO.[80] Les investisseurs ont la responsabilité de s'abstenir de tout acte de corruption, que ce soit avant ou après leur établissement, en s'interdisant de fournir des avantages financiers illégitimes à un agent public d'un État membre ou à un proche d'un fonctionnaire ou d'une entité. Au contraire, ils sont encouragés à collaborer avec les autorités locales pour éliminer la corruption de la sphère publique.[81]

De plus, les investisseurs sont tenus de respecter certains devoirs d'ordre politique et social, tels que le respect de la souveraineté nationale et la conformité aux lois, règlements et pratiques administratives en vigueur dans les États hôtes. En toutes circonstances, ils doivent se garder de tout comportement nuisible à l'ordre public ou contraire à l'éthique.[82]

Avant de réaliser un investissement dans un pays hôte et pendant sa mise en œuvre, le Code des investissements de la CEDEAO oblige les investisseurs à mener une étude d'impact environnemental et social sur l'environnement naturel et la population locale de la région en question. Cette démarche répond à des exigences légales visant à gérer les risques environnementaux sur le territoire du pays d'accueil.[83]

L'Accord du COMESA de 2007 dans son article 7, appelle à l'élaboration de normes minimales communes relatives à l'investissement dans des domaines tels que les évaluations d'impact

76 Art 14(4) & 16(1), Acte additionnel de la CEDEAO.
77 Art 14, Acte additionnel de la CEDEAO.
78 Art 8, Annexe 1 Coopération sur l'investissement du Protocole de la SADC sur la finance et l'investissement.
79 Art 34, Code d'investissement de la CEDEAO (ECOWIC).
80 *Ibid*.
81 *Ibid*.
82 Art 32, ECOWIC.
83 Art 27, ECOWIC.

environnemental et social, les normes du travail, le respect des droits de l'homme.

En outre, l'Accord revisité du COMESA est beaucoup plus élaboré, responsabilisant les investisseurs du COMESA et leurs investissements concernant la protection des consommateurs.[84] En outre, les investisseurs du COMESA et leurs investissements doivent, dans l'exercice de leurs activités, protéger l'environnement et, lorsque ces activités causent des dommages à l'environnement, prendre des mesures raisonnables pour le restaurer autant que possible et pour assurer qu'une juste compensation soit versée aux personnes touchées par les dommages environnementaux.[85]

Les investisseurs issus du COMESA ou leurs investissements doivent se conformer aux critères de sélection et aux processus d'évaluation environnementale et sociale applicables à leurs investissements proposés avant leur établissement, comme l'exigent les lois de l'État hôte pour un tel investissement. Les évaluations d'impact requises doivent inclure des évaluations des impacts sur les droits de l'homme des personnes dans les zones potentiellement affectées par l'investissement.[86]

Deux législations nationales de pays de la CAE, celles du Kenya et de la Tanzanie, rendent désormais directement responsables les acteurs privés de violations des droits de l'homme.[87] Ces pays ont intégré dans leur législation des exigences de diligence raisonnable en matière de droits de l'homme. Ces mesures comprennent des dispositions légales strictes d'une part et un plan d'action plus flexible d'autre part. En outre, le Kenya a été l'un des premiers pays africains à adopter les Principes directeurs des Nations unies sur les droits de l'homme dans son cadre juridique.

Depuis l'adoption du Code Panafricain d'investissements (PAIC) en 2016, les États africains ont signé un total de soixante dix-huit AII, dont douze sont des TBI intra-africains.[88]

84 Art 30, Accord revisité du COMESA.

85 Art 31, Accord revisité du COMESA.

86 *Ibid*.

87 Le parlement de la République Unie de Tanzanie a adopté entre le 9 juillet et le 28 septembre 2021 une série de modifications de plusieurs lois ayant trait au devoir de vigilance et la régulation de l'environnement des affaires. De manière générale, *The Written Laws (Miscellaneous Amendments)* Act 3 (2021) a modifié 11 lois, y compris The Companies Act (CAP.212) ; Kenya, Office of the Attorney General and Department of Justice, sessional Paper 3 of 2014 on National Policy and Action Plan on Human Rights (2014).Voir également Rapport du Groupe de travail sur la question des droits de l'homme et des sociétés transnationales et autres entreprises, Doc off CDH NU, 41e sess 2019, Doc NU/A/HRc.41/43/add.2 (2019) ; Kenya, Mwongozo: The Code of Governance for State Corporations, Public Service Commission (PSC) & State Corporations Advisory Committee (2015).

88 TBI Congo - Maroc (2018), TBI Cap Vert - Guinée équatoriale (2019), TBI République centrafricaine - Rwanda (2019), TBI République démocratique du Congo - Rwanda (2021). TBI Maroc - Soudan du Sud (2017), TBI Maroc - Zambie (2017), TBI Cap Vert - Maurice (2017), TBI Kenya - Maurice (2019) . TBI Maroc-Cap Vert (2023) ; TBI Angola - Cap-Vert (2022) ; TBI Cap Vert - Sao Tomé et Principe (2019) ; TBI Congo-Maroc (2018).

Seuls trois des douze accords bilatéraux intra-africains ont intégré de manière explicite les principes DH, à savoir le TBI entre la République centrafricaine et le Rwanda de 2019, celui entre la République démocratique du Congo et le Rwanda de 2021 et celui entre le Maroc et le Cap Vert de 2023. Ces TBI ont adopté une approche complète qui combine les dispositions du modèle de TBI de la SADC et du Code Panafricain d'investissements. Ils établissent des normes minimales en matière de droits de l'homme en tant que obligations post-établissement,[89] ce qui est en accord avec les standards du modèle de TBI de la SADC.[90] De plus, une obligation d'effectuer une évaluation d'impact sur les droits de l'homme avant l'établissement a été incluse ainsi qu'un niveau minimal d'engagement envers les droits de l'homme[91] durant la phase d'investissement,[92] à l'image du TBI modèle de la SADC.[93]

Dans le cadre du TBI entre la République démocratique du Congo et le Rwanda, l'article 27.1 sous-entend que les investisseurs ne peuvent pas être tenus responsables de la violation de leurs obligations en matière de droits de l'homme, restreignant ainsi les litiges liés aux investissements uniquement aux différends résultant de la non-conformité de l'État à ses engagements conventionnels.[94] Les instruments d'investissement énoncent des obligations contraignantes en matière de droits de l'homme pour les investisseurs ; toutefois, le mécanisme de règlement des différends ne mentionne pas les violations de ces obligations comme étant des litiges liés aux investissements pouvant être portés directement par les victimes devant une instance arbitrale.

En outre, ne permettre qu'aux investisseurs d'engager des procédures d'arbitrage, laisse entendre que les cas de non-respect des droits de l'homme par les investisseurs sont implicitement exclus de la clause d'arbitrage.[95] Par conséquent, bien que des engagements en matière de droits de l'homme aient été imposés aux investisseurs, la violation de ces engagements ne relève pas de la catégorie de différends liés aux investissements pouvant être portés devant un tribunal arbitral.

Le TBI Maroc-Cap Vert, démontre de cette tendance désormais ancrée dans la pratique africaine d'intégrer la responsabilité sociale des entreprises dans tous les nouveaux accords d'investissement additionnée au droit de réglementer des Etats.

L'illustration de cette nouvelle tendance à intégrer le principe DH apparaît bien avant la mise en place du Code panafricain

89 Art 14, TBI République centrafricaine-Rwanda ; art 13, TBI République démocratique du Congo-Rwanda ; art 20, TBI Maroc – Cap Vert.

90 Art 15, TBI modèle de la SADC.

91 Art 16, TBI République centrafricaine-Rwanda; art 15, TBI République démocratique du Congo-Rwanda.

92 Art 20, TBI Maroc-Cap Vert.

93 Art 13, TBI modèle SADC.

94 Art 27, TBI République démocratique du Congo-Rwanda.

95 Art 23, TBI République centrafricaine-Rwanda.

d'investissement avec le TBI Maroc-Nigéria qui imposait diverses obligations aux investisseurs, et mettait en place des procédures d'évaluation environnementale conformément à la législation de l'État hôte ou de l'État d'origine, en accordant toujours la priorité à la norme la plus stricte et effectuer une évaluation d'impact social basée sur les critères établis par le Comité mixte,[96] de mettre en place un système de gestion environnementale et de garantir le respect des droits de l'homme et des normes de travail fondamentales conformément aux réglementations en vigueur dans l'État hôte ou d'accueil[97] et enfin de respecter des normes élevées en matière de responsabilité sociale en adhérant à la Déclaration de principes tripartite sur les entreprises multinationales et la politique sociale.[98]

Au niveau continental, l'ultime innovation entérinant l'intégration du principe DH dans les accords d'investissements est la mise en place du PI. Ce dernier reprends la tendance de rédaction juridique relative aux obligations des investisseurs, présente dans les TBI intra-africains Tout d'abord dans son article 33 portant sur l'éthique des affaires, droits de l'homme et normes du travail,[99] qui insiste sur le fait que les investisseurs et leurs investissements doivent respecter des normes élevées d'éthique des affaires, de droits de l'homme liés aux investissements et de normes du travail, et en particulier soutenir et respecter la protection des droits de l'homme internationalement reconnus ; veiller à ne pas se rendre complices de violations des droits de l'homme ; se conformer aux normes de l'Organisation internationale du travail (OIT), notamment la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail, et aux législations nationales du travail ; ne pas recourir au travail des enfants ni au travail forcé ou obligatoire ; éliminer la discrimination en matière d'emploi et de profession ; s'abstenir de toute action discriminatoire ou disciplinaire à l'encontre des employés qui soumettent des rapports au conseil d'administration de la société ou aux autorités publiques compétentes sur des pratiques qui violent les lois nationales, le PI ou d'autres normes de gouvernance d'entreprise auxquelles la société est soumise ; et agir conformément aux pratiques commerciales, de marketing et de publicité équitables dans leurs relations avec les consommateurs et doivent garantir la sécurité et la qualité des biens et services qu'ils fournissent.

Ensuite, l'article 35 du PI, entérine l'importance de la responsabilisation des investisseurs les obligeant d'une part à la soumission de leurs évaluations d'impact environnemental et social aux autorités compétentes et les incitent à les rendent disponibles et accessibles aux communautés locales et aux peuples autochtones et à toute autre partie prenante sur le territoire de l'État hôte, tout en se conformant aux lois et réglementations nationales pertinentes des États hôtes d'autre part.

96 Art 14(1) et 14(2), TBI Maroc-Nigéria.

97 Art 18, TBI Maroc-Nigéria.

98 Art 24, TBI Maroc-Nigéria.

99 Voir travaux du professeur Benjamin Sa Traoré sur la question Business and Human Rights et la responsabilité des entreprises.

La formulation très spécifique de ces articles du PI, démontre l'effort africain en vue de changer le paradigme du droit international des investissements vers une reconnaissance des «Droits de l'homme liés spécifiquement à l'investissement», et non les Droit de l'Homme en général, ce qui peut limiter la portée d'une protection effective des DH qui ne seraient pas forcément liés directement à l'investissement, et porter préjudice lors de la phase d'interprétation comme ce fut le cas pour l'affaire *Eco Oro* citée précédemment.[100]

Néanmoins, en affirmant ainsi une approche de protection des DH dans le cadre spécifique de la réforme africaine du droit international des investissements, cette formulation ne peut prêter à une divergence d'interprétations dans les cadres d'atteintes directes aux DH par l'investissement.

Le rôle des États et des CER est de mettre en conformité leurs textes soit de manière générale afin de laisser un champ d'interprétation aux arbitres ou au contraire de manière plus restrictive afin de souligner fermement les DH en tant que droit suprême dans tous les cas de figures.

Cette démarche est nécessaire afin que tous les investisseurs étrangers intra africains se conforment de manière explicite au respect des DH, et ce qu'ils soient directement liés à l'investissement ou non, dans le cadre de la mise en œuvre d'une ZLECAf plus durable.[101]

Néanmoins, le point positif reste que même si l'État n'a pas forcément une législation nationale protégeant pleinement les DH conformément à l'article 35 qui permettra de réaliser une étude d'impact complète, l'investisseur est toujours obligé de se conformer aux dispositions relatives aux DH liés à l'investissement de l'article 33.

En outre, si la Charte africaine place les États comme les principaux détenteurs d'obligations, une reconnaissance de la responsabilité des sociétés, notamment les multinationales, ont des envers les titulaires de droits existe également.[102] Ces responsabilités découlent de la constatation que le non-respect de ces obligations peut entraîner, en matière de droits humains, un vide où ces entités agissent en ignorant les droits de l'homme. Selon la Charte africaine, les obligations de ces entités envers les détenteurs de droits ont un fondement juridique clair. L'article 27 de la Charte africaine définit les devoirs des individus, et son paragraphe 2 prévoit l'obligation d'exercer les droits «en tenant dûment compte des droits d'autrui». Il est évident que, si cette obligation peut être imposée aux individus, il existe une justification morale et juridique encore plus solide pour imposer ces obligations aux sociétés et aux entreprises.

100 *Eco Oro Minerals Corp c. Colombie* (n 23).

101 UNCTAD Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations (2021).

102 Discours prononcé au cours de l'Assemblée générale inaugurale de la Coalition africaine pour la responsabilité d'entreprise – Commissaire Solomon Ayele Dersso, Président du Groupe de travail sur les industries extractives.

La première de ces obligations est une obligation négative directe basée sur le principe de «ne pas nuire» ou sur une formulation positive du principe de vigilance. Cela signifie que les compagnies et les sociétés devraient veiller à ce que leurs actions ou opérations ne causent pas de dommages, voire la restriction ou la négation des droits garantis par la Charte africaine.[103] Elles doivent non seulement s'abstenir de commettre des actes délibérés qui constituent ou entraînent des violations, mais aussi s'assurer en permanence que leurs actes ou opérations respectent pleinement les droits de l'homme et des peuples reconnus internationalement, ainsi que les normes du travail et de l'environnement, afin de prévenir tout incident susceptible de causer des dommages ou de nier les droits des individus, notamment en période de conflit.[104]

Nous constatons qu'il existe une perméabilité entre le libre-échange et les droits de l'homme en Afrique en raison de l'héritage historique qui donne lieu à une approche globale continentale compacte et non compartimentée à savoir pas d'écart entre le libre-échange et la protection des DH.

Autrement dit, l'héritage historique africain, et les coutumes ancestrales permettent une intégration progressive et malléable des DH au sein du droit international des investissements par le biais du modèle de libre échange intra-africain.

En outre, un discours juridique aussi précis et explicite ne laisse aucune place à des nuances lors du processus d'interprétation durant la phase de règlement des différends d'investissements qui survient en cas de non-respect par les investisseurs étrangers de leurs obligations en vertu des Accords.

3.2 La consolidation de la Responsabilité Sociale des Entreprises par l'approche DH africaine du DII

Si de plus en plus d'accords d'investissements incluent des recommandations voire des obligations contraignantes pour les investisseurs, il est crucial de considérer les conséquences et retombées d'un non-respect de ces obligations pour un investisseur. La gravité des conséquences pourrait renforcer le caractère contraignant de telles dispositions en pratique, et les procédures judiciaires résulteraient

103 Le devoir de respecter et d'avoir de la considération pour autrui et de maintenir les relations visant à promouvoir, sauvegarder et renforcer le respect mutuel et la tolérance est prévu par l'article 28 de la Charte africaine. Voir également ACHPR/Res. 367 (LX) 2017, Résolution relative à la Déclaration de Niamey visant à garantir le respect de la Charte africaine dans le secteur des industries extractives. Les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme (Principes de Ruggie) confirment, en le Principe 11, que les entreprises 'devraient éviter de porter atteinte aux droits de l'homme d'autrui et remédier aux incidences négatives sur les droits de l'homme dans lesquelles elles ont une part'. Voir également ACHPR/Res. 367 (LX) 2017, Résolution relative à la Déclaration de Niamey visant à garantir le respect de la Charte africaine dans le secteur des industries extractives.

104 Art 27(1) et (2) et 28 de la Charte africaine.

probablement devant les tribunaux nationaux, régionaux ou internationaux d'investissements.

Tout d'abord, les conséquences de la violation des obligations de l'investisseur peuvent avoir un impact sur la prise de décision arbitrale tant sur le fond que sur le dédommagement, le montant de la réclamation de l'investisseur peut en être impacté. Les tribunaux ont souvent pris en considération le comportement de l'investisseur lorsque l'État a soutenu que ce dernier avait contribué à la violation,[105] ou n'avait pas atténué les pertes subies.[106]

Dans le contexte sous régional intra-africain, des dispositions contraignantes se retrouvent dans l'Acte additionnel de la CEDEAO, dont l'article 17 dispose que : «Les investisseurs peuvent être soumis à des actions civiles en responsabilité dans le cadre de la procédure judiciaire de leur État d'origine pour des actes ou des décisions liées à leur investissement qui ont entraîné des dommages importants, des blessures ou des préjudices corporels, voire la perte de vie dans l'État hôte». Cette mesure vise à garantir que les investisseurs étrangers qui portent atteinte aux DH ne restent pas impunis.

Selon l'article 18, lorsqu'un État membre d'accueil ou un intervenant dans une procédure de règlement des différends en vertu de l'Acte additionnel allègue qu'un investisseur n'a pas respecté son obligation relative à l'évaluation d'impact préalable à l'établissement, le tribunal qui entend un tel différend doit examiner si cette violation, si elle est prouvée, est matériellement pertinente pour les questions qui lui sont soumises et, dans l'affirmative, quels effets atténuants ou compensatoires cela peut avoir sur le bien-fondé d'une réclamation ou sur les dommages-intérêts accordés en cas d'octroi d'une telle indemnisation.

Au niveau continental, selon l'article 47 du PI portant sur la responsabilité des investisseurs, les investisseurs sont conformément aux lois et réglementations nationales passibles d'actions civiles en responsabilité dans le cadre du processus judiciaire de leur État d'origine pour les actes, décisions ou omissions faits dans l'État d'accueil en relation avec l'investissement lorsque ces actes, décisions ou omissions entraînent des dommages, des blessures corporelles ou des pertes de vies humaines dans l'État d'accueil. Il est en outre possible d'engager des actions civiles contre les investisseurs et leurs investissements devant les tribunaux nationaux de l'État d'accueil.[107]

En outre, l'Annexe 1 du draft 0 du PI prévoyait la possibilité de demandes reconventionnelles de la part des États en cas de violations par les investisseurs de leurs obligations en vertu du Protocole d'investissement (telles que celles en matière de protection de DH). Ainsi, si la version finale de l'Annexe maintien cette disposition,

105 *Copper Mesa Mining Corporation c. République de l'Équateur*, CPA n° 2012-2, sentence, 15 mars 2016.

106 *Middle East Cement Shipping and Handling Co. SA c. la République arabe d'Égypte*, affaire CIRDI n° ARB/99/6, sentence, 12 août 2002.

107 Art 47, PI.

engager un différend en vertu du PI exposerait les investisseurs au risque de contre-demandes reconventionnelles.

D'autre part, le Code panafricain des investissements et le modèle de TBI de la SADC sensibilisent également les États à la nécessité de responsabilisation de l'investisseur en cas de manquement aux principes de DH et sa traduction devant le tribunal arbitral en utilisant une demande reconventionnelle,[108] en mettant l'accent sur la nécessité de respecter les droits des populations locales et en évitant l'accaparement des terres.[109]

En outre le modèle de TBI de la SADC sensibilise davantage à encourager les actions civiles des victimes de violations des droits de l'homme et appui l'octroi de permissions aux États d'intenter des actions civiles ou pénales contre les investisseurs soit devant les tribunaux de l'État hôte,[110] soit devant les tribunaux de l'État d'origine de l'investisseur.[111] De surcroît, l'article 17.2 du modèle de TBI de la SADC met en avant la nécessité pour les États d'origine de veiller à une interdiction formelle d'utilisation de contraintes procédurales ou juridictionnelles, comme la règle du forum *non conveniens*, qui pourrait entraver la résolution de litiges concernant les actes ou décisions des investisseurs. Il est donc hautement plausible que le principe général de cette disposition soit intégré dans l'Annexe 1 du PI actuellement en cours de négociation.

Néanmoins, en l'absence d'un mécanisme permettant d'assister les victimes dans le processus de l'action civile ou pénale devant les tribunaux nationaux, l'une des faiblesses de l'accès aux tribunaux nationaux dans les pays hôtes et d'origine reste les obstacles substantiels, procéduraux et financiers pour les victimes des violations des droits de l'homme.

Car en effet, l'expérience devant les tribunaux internationaux d'investissement prouve que la reconnaissance de l'atteinte aux DH subie ne mène pas systématiquement au dédommagement des victimes directes.

En outre, en l'absence d'une connaissance de la coutume africaine, malgré les efforts de mise en place de la diligence raisonnable, il reste difficile de prouver que les DH ont été violés lors du processus d'implémentation d'un investissement.

Il demeure laborieux de prouver que les décisions de réalisation d'investissement peuvent avoir un intérêt économique sous-jacent dont le but tendrait à bafouer les DH sur le continent africain, tel l'accaparement de l'héritage tangible non enregistré, ou l'implantation dans les terres ancestrales autochtones, d'où l'intérêt d'une procédure au niveau régional ou continental qui serait à même d'interpréter les pratiques ancestrales africaines et reconnaître le droit foncier des peuples autochtones.

108 Art 43.2, Projet de PAIC; art 43, Modèle de TBI de la SADC.
109 Article 23(1) et 23(2), PAIC.
110 Articles 17 et 19.3, Modèle TBI SADC.
111 Article 19.4, Modèle TBI SADC.

L'apport majeur du traité révisé du COMESA réside dans le fait que les investisseurs doivent rendre les évaluations d'impact environnemental et social accessibles aux communautés locales, ou à d'autres zones ayant des intérêts potentiellement affectés, de manière efficace et suffisamment opportune pour permettre de faire des commentaires à l'investisseur, à l'investissement et/ou au gouvernement avant l'achèvement des processus de l'État hôte pour l'établissement d'un investissement.[112] Cela est une innovation car la phase de pré-établissement de l'investissement n'a pas de contrainte directe au niveau de la protection des DH de la part de l'investisseur et cet élément n'entre pas souvent dans le processus de règlement des différends de manière en tant qu'objet principal du différend.

Au niveau international, des tribunaux internationaux d'investissements, ont déjà examiné des questions relatives à une conduite abusive de la part d'investisseurs dans le contexte de la compétence et/ou de l'admissibilité d'une plainte,[113] et il a été en outre possible de déterminer si un investissement a été accordé de manière frauduleuse. Les tribunaux internationaux d'investissement concluent donc que les investisseurs ne devraient pas être protégés par un traité si leurs investissements ont été obtenus de manière inappropriée.[114]

En outre l'intégration d'une évaluation préalable de l'impact sur les DH spécifique au système africain, pourrait constituer une caractéristique essentielle qui tendra à se développer aux autres textes régionaux et nationaux africains par le biais d'une influence entre les systèmes juridiques, permettant ainsi aux investisseurs intra-africains de contribuer au respect des principes DH et aux pays hôtes de prendre des décisions éclairées fondées sur une analyse approfondie des incidences potentielles de l'implantation des investissements étrangers sur les DH. De plus, cette approche permettrait aux investisseurs d'identifier les zones à risque de violations des DH et de mettre en œuvre des mesures préventives pour accroître leur propre RSE.

En général, la majorité des processus de règlement des différends d'investissement ne concernent que la phase initiale globale de l'enclenchement du processus d'investissement,[115] ceci est particulièrement vrai en ce qui concerne l'exigence de légalité, les investissements doivent être réalisés en conformité avec les lois

112 Art 31, Accord révisé du COMESA.

113 *Hesham Talaat M. Al-Warraq c. Indonésie*, CNUDCI, sentence finale, 15 décembre 2014, paragraphes 645 et 646 : *Niko Resources (Bangladesh) Ltd. c. la République populaire du Bangladesh et al.*, affaire CIRDI n° ARB/10/ 11 et affaire CIRDI n° ARB/10/18, Décision sur la compétence, 19 août 2013, para 477 ; *Glencore Finance (Bermuda) Limited c. État plurinational de Bolivie*, affaire CPA n° 2016-39, ordonnance de procédure n° 2.

114 *Churchill Mining PLC et Planet Mining Pty Ltd c. République d'Indonésie*, affaires CIRDI n° ARB/12/14 et 12/40, sentence, 6 décembre 2016, para 528.

115 *Bernhard von Pezold et autres c. République du Zimbabwe*, affaire CIRDI n° ARB/10/15, sentence, 28 juillet 2015, para 420 ; *Gustav FW Hamester GmbH & Co KG c. République du Ghana*, affaire CIRDI n° ARB/07/24, sentence, 18 juin 2010, para 127 ; *Vladislav Kim et autres c. République d'Ouzbékistan*, affaire CIRDI n° ARB/13/6, décision sur la compétence, 8 mars 2017, para 374 à 377.

locales.[116] Lorsque cela n'est pas respecté, l'investissement est considéré comme en dehors de la protection de l'Accord d'investissement et, par conséquent, du champ d'application du système d'arbitrage qu'il contient, mais ces éléments demeurent vague et objet aux divergences d'interprétation car non spécifique au DH, d'où encore une fois la pertinence de l'intégration des obligations en matière de respect des DH pour les investisseurs qui sont clairement exprimées dans le PI et doivent être uniformisées dans tous les textes régionaux et nationaux dans les 5 à 10 années à venir.

En effet les problèmes liés aux DH sont plus susceptibles d'émerger et d'avoir des preuves pendant la phase d'investissement. L'illégalité ou tout comportement impliquant des questions de DH peut être pris en compte pendant la phase de fond,[117] et la compétence ou l'admissibilité d'une demande de règlement de différend d'investissement devant un tribunal international peut s'en voir affectée, d'où l'intérêt de la mise en place des processus de règlement des différends d'investissements au niveau régional et continental africain ayant trait à interpréter les dispositions des textes régionaux selon une perspective africaine.

Car, les conséquences juridiques d'une telle conduite dépendent grandement des circonstances de chaque cas, notamment de l'aspect contraignant ou non du texte applicable, de la gravité de la conduite par rapport à l'atteinte aux standards de protections d'investissements,[118] du rôle des parties et de leurs potentielles manœuvres frauduleuses,[119] du lien avec les allégations d'investissement et la compétence du tribunal,[120] et du moment où la conduite a eu lieu.[121]

En définitive, une conduite considérée comme inappropriée ou illégale peut avoir un impact sur la compétence d'un tribunal,[122] la recevabilité des réclamations,[123] et les critères relevés,[124] le fond du litige[125] ou le montant accordé en cas de succès.[126]

116 *Plama Consortium Ltd. c. République de Bulgarie*, affaire CIRDI n° ARB/03/24, sentence, 27 août 2008, para 138 ; *Phoenix Action, Ltd. c. République tchèque*, affaire CIRDI n° ARB/06/5, sentence, 15 avril 2009, para 101 ; *Gustav FW Hamester GmbH & Co KG c. République du Ghana*, affaire CIRDI n° ARB/07/24, sentence, 18 juin 2010, para 124.

117 *Gustav FW Hamester GmbH & Co KG c. République du Ghana*, affaire CIRDI n° ARB/07/24, sentence, 18 juin 2010, para 124.

118 *Azurix c. Argentine*, CIRDI ARB/01/12, sentence, 14 juillet 2006.

119 *Yukos Universal Limited c. Russie*, PCA AA 227, sentence, 18 juillet 2014.

120 *Roussalis c. Roumanie*, CIRDI ARB/06/1, sentence, 7 décembre 2011.

121 *Técnicas Medioambientales Tecmed SA c. Mexique*, CIRDI ARB(AF)/00/2, sentence, 29 mai 2003.

122 *Mondev International Ltd c. USA*, CIRDI ARB(AF)/99/2, sentence, 11 Octobre 2002.

123 *Copper Mesa Mining Corp c. Equateur,* PCA 2012-2, sentence, 15 mars 2016.

124 *Houben c. Burundi*, CIRDI ARB/13/7, Sentence, 12 janvier 2016.

125 *Frontier Petroleum c. République Tchèque*, UNCITRAL, sentence, 12 novembre 2010.

126 *Churchill Mining PLC et Planet Mining Pty Ltd c. République d'Indonésie*, affaires CIRDI n° ARB/12/14 et 12/40, sentence, 6 décembre 2016, para 494.

L'émergence de l'atteinte au DH dans le cadre des différends d'investissement devant les tribunaux internationaux d'investissement[127] a vu la prise en considération du comportement de l'investisseur dans le cadre de la détermination du champ d'application et de la protection de l'Accord d'investissement applicable. Comme l'a affirmé le tribunal dans l'affaire *Hamester c. Ghana,*[128] un investissement ne sera pas protégé s'il a été acquis de manière contraire aux principes nationaux ou internationaux de bonne foi, par des moyens frauduleux ou dans une perspective trompeuse, ou s'il constitue un abus du système de protection des investissements internationaux prévu par la Convention CIRDI.[129] Il en est de même s'il a été réalisé en violation de la législation de l'État hôte.[130] En outre, les textes régionaux africains, beaucoup plus contraignants accroîtront l'impact positif déjà initié au niveau international quitte à servir d'inspiration quant à la prise en compte effective des principes DH dans le cadre du règlement des différends d'investissements, notamment concernant l'admissibilité des demandes reconventionnelles et la consolidation des actions en civile en responsabilité dans le cadre du processus judiciaire des États d'origine ou des États d'accueil, pour les actes qui entraînent des dommages humains dans l'État d'accueil. Par conséquent, l'interprétation, l'exécution et l'application des dispositions des textes africains y compris les obligations des investisseurs en matière de droits de l'homme dans un cadre d'arbitrage africain, seront interprétées conformément à l'objectif global de développement durable qui englobe les différentes sphères de la protection des DH dans toutes les phases du cycle de l'investissement.

L'article 21 de la Charte propose des garanties procédurales pour assurer une mise en œuvre efficace de la RSE. La première garantie procédurale concerne la tenue de consultations effectives et sincères ainsi que la participation rigoureuse à la prise de décisions concernant les projets de prospection et d'extraction des ressources naturelles. Cela permet aux personnes affectées vivant dans les zones où ces projets sont envisagés d'avoir accès à toutes les informations nécessaires avant la finalisation du projet, notamment les conclusions des évaluations d'impact environnemental, social et sur les droits de l'homme. Ces informations doivent être facilement accessibles et disponibles dès le début et pendant toute la durée du projet.

De plus, toujours conformément à l'article 21(2), les populations dont les terres, les ressources en eau ou les moyens de subsistance ont été perturbés ou altérés par des actions de spoliation ont droit à des mesures visant à restaurer leur droit de propriété, ainsi qu'à des

127 P Butler 'Human rights in international commercial and investment arbitration' in S Kröll, AK Bjorklund & F Ferrari (eds) *Cambridge compendium of international commercial and investment arbitration* (2023) 139-185.

128 *Gustav FW Hamester GmbH & Co KG c. République du Ghana* (n 117).

129 *Azurix c. Argentine*, CIRDI No ARB/01/12, Décision en annulation, 1 septembre 2009.

130 *Phoenix Action Ltd c. République Tchèque*, CIRDI ARB/06/5, sentence, 15 avril 2009.

compensations complètes, efficaces et appropriées. Ces compensations doivent non seulement couvrir les répercussions socio-économiques de ces actes, mais aussi les coûts d'opportunité et les impacts sociaux négatifs. Il est impératif de mettre en œuvre toutes les mesures nécessaires pour faciliter la réinstallation et assurer la pleine réhabilitation des moyens de subsistance des populations affectées.

En appliquant les obligations prévues par la Charte africaine aux compagnies, et compte tenu du pouvoir considérable dont elles disposent, en particulier les multinationales, par rapport au pouvoir exercé par les individus, les compagnies sont donc soumises à un niveau de devoir correspondant plus élevé, que ce soit en termes de vigilance raisonnable ou de réparation.[131]

Elles doivent faire preuve de vigilance en ayant une compréhension claire de la nature et de l'impact de leurs activités, prendre les mesures nécessaires pour que leurs activités n'aient pas d'effets négatifs sur les droits de l'homme, et mettre en place des mécanismes pour corriger les impacts négatifs de leurs activités ou actions sur les droits humains. En outre, elles doivent veiller à une gestion responsable de la chaîne d'approvisionnement pour garantir que leurs actions et décisions ne produisent pas d'effets négatifs en aval, sur la chaîne d'approvisionnement. Afin d'évaluer l'ampleur de l'impact de leurs activités, les entreprises devraient évaluer, avec la participation des communautés locales, les effets de ces activités sur les droits de l'homme, en veillant à ce que ces évaluations soient suffisamment consultatives et prennent en compte les droits des personnes et des groupes vulnérables.

En cas de violations découlant des activités ou actions des sociétés, diverses sanctions administratives, civiles et pénales sont appliquées. Sur le plan administratif, elles seront tenues de payer toute amende ou de prendre toute mesure administrative prévue par la loi ou par l'accord de licence. Lorsque les activités des industries extractives entraînent la dégradation de l'environnement, celles-ci doivent indemniser de manière satisfaisante les personnes affectées pour tous les préjudices matériels et moraux subis, notamment en cas de dommages irréparables à la santé, et pour assainir et réhabiliter l'environnement affecté.

En termes de responsabilité pénale, la nature des actes pour lesquels les sociétés peuvent être tenues responsables est notamment définie par le Protocole de l'UA portant amendements au protocole portant statut de la Cour africaine de justice et des droits de l'homme, adopté lors du Sommet de juin 2014 de l'UA à Malabo, en Guinée équatoriale,[132] il s'agit notamment des actes suivants : (a) conclusion d'un contrat d'exploitation des ressources en violation du principe de souveraineté des peuples sur leurs ressources naturelles ;

131 Cette démarche résulte de l'application logique des obligations énoncées par la Charte africaine sur les entités morales.

132 Le Protocole de Malabo illustre un type d'accord entre les États africains concernant les types d'actes pouvant entraîner la responsabilité pénale des entreprises.

(b) conclusion d'un contrat d'exploitation des ressources naturelles avec les autorités étatiques en violation des procédures légales et réglementaires de l'État concerné ; (c) conclusion d'un contrat d'exploitation des ressources naturelles en recourant à des pratiques de corruption ; (d) conclusion d'un contrat d'exploitation des ressources naturelles dont les termes sont manifestement léonins ; (e) exploitation des ressources naturelles sans contrat avec l'État concerné ; (f) exploitation des ressources naturelles en ne respectant pas les normes de protection de l'environnement et de la sécurité des populations et du personnel ; et (g) violation des normes et règles établies par le mécanisme compétent de certification des ressources naturelles.

Les sociétés assument également des obligations négatives indirectes. Ainsi, elles sont responsables des activités ou actions de ceux qui agissent en leur nom ou pour leur compte, notamment les compagnies privées de sécurité auxquelles elles font appel pour assurer la sécurité de leurs infrastructures et de leur personnel. Elles doivent également veiller à ce que ces activités ou actions menées en leur nom ou pour leur compte ne causent pas de dommages ou n'aient pas pour effet de compromettre la jouissance des droits protégés. Lorsque ces activités ou actions restreignent ou compromettent les droits protégés par la Charte africaine, la compagnie au nom de laquelle ou pour le compte de laquelle ces activités ou actions ont été menées doit en assumer la responsabilité administrative, civile et/ou pénale, selon le cas.

En attribuant compétence à la Cour pour traiter d'une variété étendue de crimes internationaux, dont les graves violations des investisseurs des DH, le Protocole de Malabo va pouvoir instaurer dès sa mise en œuvre, un dispositif régional destiné à compléter et renforcer les initiatives de réforme du DII tout en affirmant le rôle de l'Afrique dans le domaine de la justice internationale.

En plus des obligations négatives, dans certaines circonstances, les investisseurs assument également certaines obligations positives découlant des droits de l'homme et des peuples prévus par la Charte, en général, et des articles 21 et 24, en particulier, telles que les obligations fiscales et de transparence découlant des opérations menées dans le cadre de leurs activités,[133] et les obligations positives concernant les impacts sociaux et économiques des opérations des industries extractives ou d'autres compagnies de la communauté hôte, notamment sur les droits des personnes concernées à la terre et aux ressources naturelles.[134]

En menant leurs opérations, ces investisseurs doivent informer de manière satisfaisante et consulter de manière substantielle les

133 Dans le cadre de l'Initiative pour la transparence dans les industries extractives, ces mesures sont perçues comme des engagements volontaires en matière de transparence.

134 Art 27 de la Charte africaine ; voir également ACHPR/Res. 367 (LX) 2017, Résolution relative à la Déclaration de Niamey visant à garantir le respect de la Charte africaine dans le secteur des industries extractives.

personnes touchées au sujet de chacune de leurs activités ou des décisions pouvant avoir un impact important sur les populations, et mettre en œuvre ces activités en tenant compte des préoccupations de ces populations et des mesures de précaution nécessaires pour atténuer ces impacts.[135]

À cet égard, les investisseurs devraient également réaliser, avec la participation et la représentation des communautés locales touchées, les études d'impacts environnementaux, sociaux et des droits de l'homme nécessaires avant d'entreprendre toute action susceptible d'avoir des conséquences négatives sur les populations touchées.

Les répercussions sociales et économiques des activités des sociétés et la nature du pouvoir qu'elles exercent créent pour ces sociétés des obligations les obligeant à contribuer à la satisfaction des besoins de développement des communautés hôtes.[136] Ces obligations sont de nature légale et ne se limitent pas à des considérations de responsabilité sociale des entreprises[137] préconisées généralement. Elles incluent notamment le soutien à l'emploi local et à la diversification de l'économie pour réduire la dépendance vis-à-vis des industries extractives comme seule source de revenus, ainsi que des projets de développement éducatif, sanitaire, agricole ou pastoral, tout en facilitant l'accès aux infrastructures et équipements miniers. Il existe également une obligation, une fois que les industries extractives ont cessé leurs activités, de soutenir la transition des personnes touchées vers de nouveaux moyens de subsistance.

En se basant sur ces mêmes articles de la Charte, la Commission a développé une jurisprudence remarquable concernant les obligations des acteurs non étatiques, telles que les entreprises, en ce qui concerne les droits de l'homme et l'environnement. La Commission soutient que la Charte oblige les entreprises à respecter rigoureusement les droits de l'homme, les droits des peuples et l'environnement à travers ses articles 21, 24, 27, 28 et 29.

135 Art 9 de la Charte africaine, Principes de Ruggie, Principe 11 ; ACHPR/Res. 367 (LX) 2017.

136 Voir art 27. En témoignent les meilleures pratiques appliquées en Afrique du Sud, un pays dont la Loi sur l'exploitation des minerais et du pétrole (Loi 28 de 2002) prévoit, aux termes de ses articles 23(h), 24(3), 25(2), 28(2) et 85(3), entre autres dispositions, qu'une compagnie minière doit soumettre un plan social et concernant la main d'œuvre avant de solliciter l'octroi d'une licence d'exploitation minière. Les plans sociaux et du travail sont considérés comme relevant de la responsabilité sociale d'entreprise.

137 Dans le contexte de la Charte africaine, qui impose des devoirs à tous les individus, et compte tenu des ressources à la disposition des industries extractives, ainsi que de la portée et de la nature des communautés qui dépendent du secteur des industries extractives, les dispositions de la Charte africaine, en particulier les articles 27 à 29 doivent être interprétés comme imposant aussi des droits aux compagnies.

Deux affaires méritent d'être soulignées sur ce sujet: l'affaire *SERAC*[138] et l'affaire *Kilwa*.[139] Dans l'affaire *SERAC*, la plainte soutenait que le gouvernement du Nigeria était directement impliqué dans l'exploitation pétrolière via une société d'État, la Nigeria National Petroleum Company, qui détenait une participation majoritaire dans un consortium avec la Shell Petroleum Development Corporation. Les activités de ce consortium avaient entraîné de graves dommages environnementaux et des problèmes de santé pour la population Ogoni en raison de la contamination de l'environnement.[140] La Commission a déclaré que les gouvernements ont le devoir de protéger leurs citoyens non seulement en mettant en place des lois appropriées et en les appliquant efficacement, mais également en les protégeant contre des activités préjudiciables qui pourraient être perpétrées par des entités privées.[141] La Commission a explicitement reconnu que les compagnies pétrolières avaient gravement affecté le bien-être des Ogonis, en violant les obligations de la Charte et les principes internationalement reconnus, et a appelé le gouvernement nigérian à garantir une compensation adéquate pour les victimes des droits bafoués.[142]

Dans l'affaire *Kilwa*, un groupe du Mouvement révolutionnaire de libération du Katanga est entré dans la ville de Kilwa, en République démocratique du Congo (RDC), sans affronter les militaires et la police locale, car ces derniers n'ont pas opposé de résistance. Néanmoins, la société Anvil Mining, une société australienne, a fourni du matériel et de la nourriture à la 62e brigade d'infanterie des forces armées de la RDC à Pweto, ainsi que de l'argent pour les aider à réprimer le mouvement insurrectionnel. Au cours d'une attaque lancée par ces forces armées, de graves violations des droits de l'homme ont eu lieu.[143]

Dans cette affaire, la mention explicite de la responsabilité des entreprises[144] pour les violations des droits garantis par la Charte représente un progrès positif.[145] La Commission a clairement différencié les obligations des États et des entreprises en ce qui concerne les droits de l'homme selon la Charte. Les États ont deux types d'obligations. Tout d'abord, il découle de la jurisprudence *SERAC* que

138 Affaire *SERAC*, CADHP, Commission africaine des droits de l'homme et des peuples, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) c. Nigeria*, (Décision du 27 octobre 2001), 30e sess ordinaire, Communication 155/96.

139 Affaire *Kilwa*, CADHP, *Institute for Human Rights and Development in Africa and Others c. Democratic Republic of the Congo*, (Décision du 9 juin 2016), Communication 393/10.

140 Affaire *SERAC* (n 138).

141 *Ibid.*

142 *Ibid.*

143 Affaire *Kilwa* (n 139).

144 *Ibid.*

145 Bulletin d'information du Groupe de Travail sur les Industries Extractives, l'environnement et les violations des Droits de l'Homme, n° 1, octobre 2018 à la p 2 [Bulletin d'information]. Le Groupe de Travail sur les Industries Extractives, l'Environnement et les Violations des Droits de l'Homme en Afrique a été créé par la résolution CADHP/Res 148 (XLVI) 09, adoptée lors de la 46e session ordinaire de la Commission tenue du 11 au 25 novembre 2009 à Banjul, Gambie.

les États ont une obligation générale de protection. Cela signifie que les États doivent prendre toutes les mesures nécessaires pour protéger les droits de l'homme contre les violations commises par des tiers, y compris donc les entreprises.[146] La référence fréquente de la Commission à la notion d'acteurs privés doit être comprise de manière large, incluant les entreprises.[147]

Le Groupe de travail sur les industries extractives, l'environnement et les violations des droits de l'homme estime que les sociétés doivent également respecter les devoirs des individus énoncés dans les articles 27 à 29 de la Charte.[148] En raison de leur immense pouvoir comparé à celui des individus, elles devraient être soumises à un niveau accru d'obligation de diligence et de protection.[149] Deuxièmement, les États doivent faire respecter les droits de l'homme garantis par la Charte par les entreprises et les tenir responsables en cas de violation, en les obligeant à réparer les dommages.

Selon la Commission, les États ne sont pas les seuls responsables des conséquences sur les droits de l'homme.[150] En se basant sur l'idée que «l'État est obligé de protéger les détenteurs de droits contre d'autres acteurs»,[151] la Commission affirme que les États doivent maintenir et renforcer un système de réglementation efficace pour s'assurer que les acteurs privés respectent les droits de l'homme.[152] Ainsi, les États doivent garantir des mécanismes appropriés de responsabilité, d'indemnisation des victimes et le droit à un recours.

Dans l'affaire *Kilwa*, la Commission a demandé explicitement au gouvernement de la RDC de rendre Anvil Mining responsable et de réparer les dommages. Les entreprises sont tenues de respecter le principe de la diligence raisonnable, même si la responsabilité finale de réparation revient à l'État. Selon la Commission, les entreprises ont des obligations envers les détenteurs de droits, qui trouvent leur fondement à l'article 27(2) de la Charte.[153] Ces obligations peuvent être négatives ou positives. Sur un plan négatif, les entreprises ont l'obligation directe de «ne pas nuire» et une obligation indirecte en cas de dommages causés par leurs activités compromettant les droits de l'homme

146 *Ibid.*

147 *Ibid.*

148 *Ibid*, 8.

149 *Ibid.*

150 Affaire *SERAC* (n 138), para 56.

151 *SERAC*, para 46.

152 UA, Commission africaine des droits de l'homme et des peuples, Résolution sur la nécessité d'élaborer des normes relatives aux obligations des États de réguler les acteurs privés intervenant dans la fourniture de services sociaux (2020) CADHP/Res. 434 (XXVI1) [Résolution sur la nécessité d'élaborer des normes relatives aux obligations des États]. Elle a été adoptée à la 27e session extraordinaire tenue à Banjul du 14 février au 4 mars 2020. Dans le contexte de cette résolution, la Commission mène une étude conformément à son mandat sur 'Observation générale de la CADHP sur les obligations des États de réguler les acteurs privés intervenant dans la fourniture des services sociaux'.

153 Discours prononcé au cours de l'Assemblée générale inaugurale de la Coalition africaine pour la responsabilité d'entreprise par le Commissaire Solomon Ayele Dersso, Président du Groupe de travail sur les industries extractives.

protégés par la Charte.[154] Du côté des obligations positives, les entreprises doivent respecter leurs devoirs fiscaux et de transparence conformément aux articles 21 et 24 de la Charte, ainsi que les obligations d'information et de consultation des personnes touchées par leurs activités.

Dans l'affaire *Kilwa*, la Commission a souligné l'importance que les entreprises du secteur minier mènent leurs activités en respectant les droits des communautés locales et évitent de violer ces droits. Elles ne doivent pas soutenir ou participer à des violations des droits de l'homme. Outre l'obligation de diligence raisonnable, les entreprises doivent contribuer à la réparation des victimes.[155] À la suite de la décision *Kilwa*, la Commission a demandé à Anvil Mining Company de reconnaître sa responsabilité publiquement et de contribuer à la réparation des victimes.[156]

La refonte panafricaine du droit international des investissements offre un cadre clair et contraignant en ce qui concerne la responsabilité des entreprises en matière de protection des DH, obligeant les investisseurs à respecter des obligations substantielles en la matière. Cette approche africaine de l'investissement international vise à consolider la conceptualisation d'un principe DH inhérent au continent africain dans le cadre de l'opérationnalisation de la refonte panafricaine du droit international des investissements.

4 MISE EN ŒUVRE D'UN PARADIGME PANAFRICAIN DE L' «HUMANISATION» DU DROIT INTERNATIONAL DES INVESTISSEMENTS

Dans la sphère académique, le débat perdure quant à l'intégration des DH dans le développement durable. Certains auteurs considèrent que les droits de l'homme font partie du processus de développement durable. Une approche durable de la réforme du droit international axée sur les DH vise à assurer la durabilité du développement, tout en soulignant l'importance d'augmenter la protection des DH dans ce cadre.[157] En outre, les différents rôles assumés par les DH dans le cadre du droit international des investissements dépendent de la définition donnée au concept sous-jacent de DH lui-même.[158]

154 UA, Commission africaine des droits de l'homme et des peuples, Résolution sur l'élaboration des Lignes Directrices pour la soumission de rapports d'État en ce qui concerne les industries extractives (2016) CADHP/Res. 364 (LIX) [Résolution sur l'élaboration des lignes directrices]. Elle édicte les principes de l'établissement des rapports d'État en vertu des articles 21 et 24 de la Charte relatifs aux industries extractives, les droits de l'homme et l'environnement. Elle impose des obligations aux entreprises en matière des droits de l'homme et de l'environnement, 42-45.

155 Bulletin d'information (n 145).

156 *Ibid.*

157 LO Gostin & BM Meier *Foundations of global health and human rights* (2020).

4.1 La conceptualisation d'une «humanisation» panafricaine du DII

Les mécanismes d'investissements africains ont interprété le développement durable comme un concept doté d'une portée juridique liant la promotion des investissements, le développement durable et les obligations des investisseurs.[159] Cette approche africaine met l'accent sur l'importance de placer l'être humain au cœur du processus de développement, en garantissant que les investissements sont menés de manière à respecter la dignité humaine et à promouvoir le bien-être à long terme.

Par ailleurs, selon les dispositions de l'article 21(2) de la Charte, les populations dont les terres, les ressources en eau ou les moyens de subsistance ont été perturbés ou altérés par des spoliations ont droit à des mesures visant à rétablir leur droit de propriété, ainsi qu'à des compensations complètes, efficaces et appropriées non seulement en ce qui concerne les impacts socio-économiques de cette ingérence, mais également en ce qui concerne les coûts d'opportunité et les effets sociaux néfastes. Toutes les actions nécessaires pour faciliter la réinstallation et assurer la pleine réhabilitation des moyens de subsistance des populations touchées devraient être mises en œuvre.

Un autre droit abordé dans les orientations pour l'établissement de rapports est celui mentionné à l'article 24 de la Charte. Celui-ci stipule que «tous les peuples ont droit à un environnement global et satisfaisant, favorable à leur développement».

L'importance d'un environnement propre et sûr pour la qualité de vie des populations constitue un pilier fondamental de ce droit. Contrairement à ce que pourrait laisser entendre le libellé, l'article 24 ne garantit pas un environnement parfaitement propre et exempt de toute altération. Il vise plutôt à assurer un environnement suffisamment salubre pour garantir à chacun une vie et un développement sécurisés.

Le droit à un environnement propre, tel que protégé par l'article 24 de la Charte, implique une évaluation adéquate des risques environnementaux avant toute entreprise industrielle ou minière à petite échelle.

Il est donc crucial de prendre des mesures nécessaires pour atténuer les risques identifiés lors d'activités minières de petite ampleur.

L'exploitation croissante des ressources naturelles en Afrique comporte des risques réels pour les droits de l'homme et l'environnement.[160] Le secteur minier a été le premier à être confronté

158 S Steininger 'The role of human rights in investment law and arbitration: state obligations, corporate responsibility and community empowerment' in I Bantekas & M Stein (eds) *The Cambridge companion to business and human rights law, Cambridge companions to law* (2021) 406-427.

159 Acte additionnel de la CEDEAO (2008), PI (2023), Accord d'investissement de la SADC.

explicitement à un «devoir de vigilance».[161] Certains pays africains ont donc adapté leur législation minière pour améliorer la gouvernance et se conformer aux normes internationales. Bien que le devoir de diligence ne soit pas directement mentionné dans ces textes, on y retrouve des règles similaires. La protection des DH est intrinsèquement liée à la préservation de l'écosystème naturel. Les atteintes à l'écosystème entravent la pleine réalisation des DH en contribuant à la perpétuation de la pauvreté, l'augmentation de l'immigration en l'absence de perspectives d'avenir, alors que l'exercice de ces droits contribue à la préservation de l'environnement et à la promotion d'un développement durable.

Ainsi ces atteintes entravent le progrès vers le développement durable des investissements étrangers, pilier du PI et compromettent les résultats de la coopération économique intra-africaine. Afin d'assurer un développement véritablement durable et efficace, il est impératif d'intégrer la protection des DH en tant que facteur pour atteindre le développement durable, dans le cadre du renforcement des objectifs de l'Agenda 2063,[162] tandis que ce dernier ne peut être réalisé sans une prise en compte de l'implication des individus dont notamment les investisseurs dans la justice environnementale.[163]

Par conséquent, afin d'assurer que les investissements concourent au développement durable de l'État hôte, il a été nécessaire d'intégrer une approche de protection des DH, en initiant une responsabilité sociétale des entreprises aux investisseurs dans le cadre de leurs activités d'investissements, à travers une matérialisation du concept de DH.

Cette matérialisation du concept de DH permettra aux États et aux investisseurs de conceptualiser le degré de protection des DH à atteindre selon le secteur d'activité, les besoins économiques des deux parties et les systèmes juridiques.

Ainsi, les DH ne sont pas simplement des objectifs à atteindre pour le développement durable, mais spécifiquement également les processus par lesquels ces objectifs peuvent être réalisés en tant que moteur essentiel de la restructuration africaine du droit international des investissements. Ce processus doit être ancré dans un cadre normatif international ou national approprié pour les DH, et doit être inclusif, non discriminatoire, participatif et responsable.[164]

160 Document officiel CS NU, 6432e session Rés NU S/RES/1952 (2010) par laquelle le Conseil de sécurité des Nations unies mande le groupe d'experts sur la République démocratique du Congo pour proposer des recommandations sur le devoir de diligence des entreprises impliquées en aval de l'extraction de minerais dans le pays afin de limiter le soutien indirect au conflit.

161 B Campbell *Ressources minières en Afrique : quelle réglementation pour le développement?* (2010) Presses de l'Université du Québec 1-9.

162 Nanhri & Rinadh *Guiding framework on mainstreaming human rights in the ACFTA processes* (2023).

163 Y Choondassery 'Rights-based approach: the hub of sustainable development' (2017) 8 *Discourse and Communication for Sustainable Education* 17-23.

164 K Arts 'Inclusive sustainable development: a human rights perspective' (2017) 24 *Current Opinion in Environmental Sustainability* 58-62.

Cette spécificité africaine du droit international des investissements représente une approche innovante, contemporaine et holistique qui conjugue investissement, développement et responsabilité, mettant l'accent sur la dignité humaine en tant que pivot central du processus d'investissement international. La dignité humaine est perçue comme un cadre conceptuel juridique enraciné dans les normes internationales de DH, exigeant que les investissements soient réalisés sans porter atteinte globalement aux principes des DH des individus et des peuples déjà existants dans l'État hôte, tout en participant aux objectifs de DH de ce dernier.

La pertinence de cette approche DH pour le développement réside dans le fait qu'elle propose une vision du développement, offre un cadre normatif pour le guider et introduit une dimension morale et éthique qui faisait auparavant défaut.[165] Le contenu d'un tel cadre éthique repose sur les normes et les principes normatifs de DH ayant donné lieu à des obligations correspondantes imposées aux investisseurs.

En effet, la réforme du droit international des investissements en Afrique ne pourrait avoir un impact positif et durable que si les États disposent de lois déjà établies sur les DH, car la mise en œuvre d'une approche DH nécessite une application pratique comme point de départ.[166]

À cet égard, le rôle de l'Union africaine est essentiel pour promouvoir une révision des codes nationaux d'investissement des États africains, afin de les renforcer et de les aligner sur le PI, tout en garantissant que les investisseurs des différents États puissent se conformer aux réglementations nationales en vertu des lois en vigueur afin d'éviter une situation de «super privilège» pour les investisseurs,[167] qui pourrait porter atteinte aux DH des peuples africains.

Conformément à l'article 4 du PI, chaque État partie doit accueillir les investissements conformément à ses lois et réglementations nationales, par exemple, bien que le PI accorde diverses formes de protection à l'investissement, le statut d'investissement aux fins de la protection conventionnelle doit être déterminé par la législation nationale de l'État partie hôte.

De ce fait, il existe trois dimensions de règles et réglementations applicables pour encadrer les investissements étrangers dans un État d'accueil : les accords bilatéraux d'investissements, les accords régionaux d'investissement, les lois nationales sur les investissements

165 A Cornwall & C Nyamu-Musembi 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* 1415-1437.

166 M Broberg & HO Sano 'Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences' (2018) 22 *The International Journal of Human Rights* 664-680.

167 W Ben Hamida 'L'arbitrage transnational unilatéral. Réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique' (2003) thèse de doctorat en droit, Université Paris II.

et les contrats d'investissement conclus entre l'État hôte et l'investisseur.

En Afrique, la spécificité du droit réside principalement dans sa pluralité. Sur ce continent, une variété d'ordres juridiques et de concepts doivent coexister et essayer de collaborer ou du moins de se tolérer. Contrairement à un système juridique traditionnel unique, il existe une diversité d'ordres juridiques différents. Les Africains jonglent chaque jour entre ces divers systèmes juridiques.[168] Cependant, l'objectif du pluralisme n'est pas de mettre en avant ces conflits et de les résoudre, mais plutôt de les apaiser de manière pragmatique s'ils se transforment en problèmes réels en DII.

Les articles 31(2) et 32 du PI soulignent que les États parties doivent garantir que les investisseurs et leurs investissements respectent leurs lois et réglementations nationales ainsi que le droit international. Il demeure néanmoins un certain paradoxe, car l'article 31 du PI dispose que les États parties peuvent mettre en œuvre des lois et politiques visant à protéger les droits de l'homme, les droits du travail, l'environnement lié aux investissements, ainsi que les droits des peuples autochtones et des communautés locales.

Cependant, l'article 3 précise qu'il est entendu que, sous réserve du droit international applicable, les références aux termes «peuples autochtones», «communautés locales» et «groupes sous-représentés» dans le protocole ne s'appliquent pas sur le territoire des États parties qui ne reconnaissent pas ces groupes selon leurs lois et réglementations nationales. Il est donc impératif de renforcer la définition des «peuples autochtones», des «communautés locales» et des «groupes sous-représentés».

A l'instar de l'individu africain ou de l'investisseur africain en tant qu'individus, les citoyens africains en tant que peuple ont le droit d'exister,[169] le droit à l'égalité et à la dignité,[170] le droit au développement,[171] le droit à la libre disposition des ressources naturelles,[172] le droit au patrimoine commun de l'humanité,[173] le droit à la paix et à la sécurité,[174] et le droit à un environnement sain.[175] Le droit des peuples à l'existence est consacré par l'article 20 de la Charte africaine, qui est le seul instrument juridique international contraignant à reconnaître ce droit.

Les droits des peuples à l'égalité et à la dignité sont protégés par l'article 19 de la Charte africaine, qui établit le principe d'égalité abstraite des peuples ainsi que leur égalité dans la jouissance des droits,

168 U Kischel *Comparative law* (2019) 631-674.
169 Art 20, Charte africaine.
170 Art 19, Charte africaine.
171 Art 22, Charte africaine.
172 Art 21, Charte africaine.
173 Art 22, Charte africaine.
174 Art 23, Charte africaine.
175 Art 24, Charte africaine.

dans la dignité. Cet article non seulement défend l'égalité mais sous-entend également l'interdiction de la discrimination.

La Charte est donc un outil indéniable démontrant l'intérêt supérieur de protection des peuples africains contre toutes formes de discriminations et donc de facto celles pouvant être pratiquées par les investisseurs étrangers. Ainsi, si les peuples africains sont égaux entre eux, et donc que tous les États parties sont égaux entre eux, de ce fait les droits des peuples africains sont égaux à ceux de l'investisseur étranger africain en tant qu'individu.

L'intégration d'obligations explicites pour investisseurs en matière de DH des communautés autochtones dans les Accords régionaux d'investissement peut contribuer à apaiser les résistances des communautés locales, soutenant ainsi la mise en œuvre réussie des projets d'investissements.[176]

Ainsi, pour être bénéfique aux économies à différents niveaux de développement, la réforme du droit international des investissements en Afrique doit être mise en œuvre selon une conceptualisation du principe DH, qui signifie donc une formulation flexible de la protection des DH, afin de mieux s'adapter à la réalité, à améliorer son rapport avec cette dite réalité, et en approfondir sa compréhension. La flexibilité d'intégration des DH pour les entreprises, qu'elles soient de différentes tailles et capacités, y compris celles du vaste secteur informel permettra une potentielle convergence d'intégration du principe de DH face à l'évolution juridique de chaque États et de ses coutumes ancestrales, aboutissant ainsi à une refonte panafricaine du droit international des investissements.

4.2 La réalisation d'une «humanisation» panafricaine du DII

L'approche DH en tant que spécificité africaine du droit international des investissements place l'humain au centre du développement économique et insiste sur le respect de la dignité et du bien-être de tous les individus à long terme, et met l'être humain au centre du développement, en prônant le respect de la dignité et du bien-être de chaque individu à long terme, néanmoins, un mécanisme d'application est indispensable.[177]

Dans le contexte de l'africanisation du droit international des investissements, l'approche africaine en matière de DH implique l'intégration d'engagements substantiels pour les investisseurs, notamment en ce qui concerne les DH.

Pour assurer l'efficacité de la protection des DH dans le cadre du droit international des investissements africain, les détenteurs de

176 M Sattorova 'Investor responsibilities from a host state perspective: qualitative data and proposals for treaty reform' (2019) 113 *American Journal of International Law* 22-27.

177 Broberg & Sano (n 166).

droits sont habilités à faire valoir ces droits contre les détenteurs d'obligations, incluant l'accès à des mécanismes judiciaires[178] et arbitraux adaptés aux différends. Certains pays peuvent avoir besoin de périodes et de mécanismes de transition spéciaux qui offrent un délai supplémentaire pour développer leurs capacités à mettre en œuvre de nouvelles obligations pour intégrer de manière flexible le concept de DH.[179] Cette flexibilité reconnue dans toutes les communautés économiques régionales africaines et même au sein du PI[180] met le point sur la réalité de la géométrie variable existante en Afrique.[181]

Néanmoins, l'UA devrait inclure des engagements spécifiques en matière de développement et de renforcement de l'engagement des États en faveur de l'intégration des principes DH dans leurs lois nationales, afin de garantir que toutes les parties soient en mesure de respecter les engagements des directives régionales et continentales de la ZLECAf.

Il faut également souligner que dans une approche d' «humanisation» du droit international des investissements en Afrique, l'actuelle négociation du mécanisme de règlement des différends doit prendre en compte que l'intégration du RDIE sous sa forme traditionnelle[182] ne correspond pas à la vision du PI concernant les protections traditionnelles des investisseurs. En outre, elle ne reflète pas non plus la décision de certains États africains d'abandonner complètement le RDIE. Cette démarche ne répondrait pas forcément aux attentes de tous les États africains de manière holistique. Par exemple, l'article 13 du Protection of Investment Act Sud-africain de 2015 exclut complètement le RDIE et identifie la médiation comme le principal mécanisme de règlement des différends en réservant simplement le droit de l'Afrique du Sud à consentir à l'arbitrage international d'État à État sous réserve de l'épuisement des recours internes.[183]

En outre, la conceptualisation du principe DH en droit international des investissements tente de mettre en place ses propres mécanismes intégrés tant au niveau régional, que continental pour les différends entre États ne faisant pas partie de la même CER.

178 *Ibid.*

179 A titre d'exemple, les efforts les plus récents sont la tenue de l'ECOMOF 2024 encourageant les investissements dans les secteurs miniers et pétroliers important pour l'économie mais en tentant de prendre en compte le

179 développement durable, la consécration du droit constitutionnel de vivre dans un environnement sain en Afrique du Sud (2024), loi environnementale n°49-17 marocaine (2020), prémices de l'instauration de taxes carbones dans plusieurs pays africains (Cameroun, Maroc …), la National Environmental Management : Air QualityAct (loi sur la qualité de l'air en Afrique du Sud).

180 PI, art52.

181 J Gathii *African regional trade agreements as legal regimes* (2011).

182 Les articles 5 à 21 du projet d'annexe prévoient le règlement des différends entre investisseurs et États. L'article 6 du projet d'annexe dispose que les investisseurs peuvent soumettre une demande d'arbitrage en vertu du Règlement du CIRDI, du Règlement de la CNUDCI ou 'en vertu de toute autre institution d'arbitrage ou du règlement d'arbitrage'.

183 Art 13, Protection of Investment Act (2015).

Ces mécanismes dans le sillage de la refonte panafricaine du droit international des investissements assureront le règlement des différends, la compensation pour l'État hôte, et la réparation matérielle des préjudices pour les victimes des atteintes au DH,[184] en naviguant sur la flexibilité en tant que spécificité propre aux systèmes juridiques africains.

En outre, l'article 21 du PI introduit les prémices d'une innovation en ce qui concerne l'évaluation d'une indemnisation juste et adéquate basée sur un équilibre équitable entre l'intérêt public et celle des personnes concernées, en tenant compte de toutes les circonstances pertinentes de l'utilisation passée et présente de l'investissement, de l'historique de son acquisition, de la juste valeur marchande de l'investissement, du but de l'expropriation, de l'étendue des bénéfices antérieurs réalisés par l'investisseur grâce à l'investissement, du comportement antérieur de l'investisseur et de la durée de l'investissement.

Il est important de souligner que la norme d'indemnisation juste et adéquate s'applique également en cas d'expropriation illégale. Le calcul de la juste valeur marchande du bien exproprié exclut les pertes consécutives ainsi que les bénéfices spéculatifs ou exceptionnels réclamés par l'investisseur. Il est attendu qu'une telle indemnisation soit réalisée au cas par cas par rapport à la juste valeur marchande de l'investissement exproprié et dans un délai raisonnable conformément aux lois et réglementations nationales. L'évaluation d'une rémunération juste et adéquate représente indéniablement une avancée significative, mais reste perfectible ; l'Union Africaine ou les CER devraient apporter une définition claire du comportement d'investissement, en particulier en ce qui concerne le respect des normes élevées d'éthique des affaires, des droits humains liés aux investissements et des normes du travail, ainsi qu' une évaluation de l'impact de ces investissements sur les communautés.

Il est possible néanmoins, que la politique gouvernementale exclut certains investissements stratégiques des obligations préalables à l'établissement, en les déchargeant légalement des études d'impact environnemental, ou en continuant à favoriser fiscalement certains types d'investissements plus rentables que durables dans certains secteurs aux dépends des atteintes aux DH par exemple.[185]

Dans le but d'empêcher les gouvernements de priver préférentiellement les citoyens de leur droit à l'information à l'avenir, il est suggéré qu'une relecture des futurs instruments d'investissement comprend une clause exigeant que toutes les opérations d'investissement soient accompagnées d'une évaluation de l'impact

184 JT Gathii *Designing the Continental Free Trade Area (CFTA): an African human rights perspective* (2017) UNECA African Trade Policy Centre.

185 A titre d'exemple la nouvelle loi pétrolière du Nigeria, voté en 2021, et la loi ougandaise qui n'interdit pas l'exploration pétrolière dans les zones protégées.

social, rendu publiquement obligatoire, comme c'est déjà préconisé dans le cadre du PI.[186]

L'intégration d'une telle clause dans le traité peut renforcer l'engagement des investisseurs en faveur du développement durable du pays d'accueil et contribuer à la prévention des violations des DH. Il est essentiel de garantir le droit à l'information dans les accords d'investissement afin de faciliter la participation du public aux processus décisionnels. Par ailleurs, il serait opportun de mettre en place un mécanisme efficace pour dédommager les victimes d'atteinte aux DH afin qu'ils puissent disposer du droit de poursuivre les investisseurs devant un tribunal arbitral ou régional, tout comme les États qui peuvent présenter des demandes reconventionnelles en cas de non-respect des obligations conventionnelles, voire la mise en place d'un mécanisme à part entière.

Car en effet, il faut souligner que les textes régionaux existent en même temps que les lois nationales des États ce qui pousse à se poser la question légitime de la manière dont la convergence entre les systèmes nationaux et régionaux se fera, notamment si les lois nationales sont moins protectrices des DH que les textes régionaux, cela pourrait être appliqué dans le cadre de la mise en œuvre du PI vis-à-vis des lois nationales les plus protectrices des investissements au détriment des DH.

Car malgré l'existence de l'article 49 du PI visant à harmoniser les textes des CER et supprimer les TBI intra-africains, les lois nationales des Etats peuvent tendre vers une divergence et maintenir des standards de protection plus élevés que ceux du PI.

En effet, à titre d'exemple, l'Accord d'investissement de la SADC, et le code d'investissement de la CEDEAO coexistent de manière asymétrique avec des lois nationales qui divergent du texte régional.[187]

Par conséquent, la relation entre les lois nationales des Etats de la SADC et de la CEDEAO et l'accord d'investissement de la SADC et le

186 Le principe de la participation du public, tel que incarné dans le principe 10 de la Déclaration de Rio, est un élément fondamental du processus d'EIE. En vertu du principe de participation du public, chacun devrait pouvoir accéder aux informations relatives à l'environnement détenues par les autorités publiques, et l'État devrait prévoir des recours judiciaires et administratifs efficaces ; art 35.3, PI.

187 L'Afrique du Sud aligne sa loi nationale sur l'accord d'investissement de la SADC, tandis que le Congo et le Zimbabwe améliorent la qualité de leurs normes nationales de l'accord d'investissement de la SADC qui prévoit des normes de protection des investissements plus faibles. Il accorde le droit à une indemnisation juste et adéquate en cas d'expropriation. Il prévoit le traitement national et autorise le rapatriement des capitaux. Il prévoit une norme de transparence renforcée par l'obligation des États membres de promouvoir et d'établir la prévisibilité, la confiance et l'intégrité en adhérant et en appliquant des politiques, pratiques, réglementations et procédures ouvertes et transparentes liées à l'investissement. Il n'inclut cependant pas le TJE et le RDIE. Le Code des investissements du Congo prévoit le TJE et le RDIE ainsi qu'un consentement général à l'arbitrage des membres de la SADC est controversé. Il existe une coexistence asymétrique car les États membres de la SADC prévoient des solutions différentes, L'Afrique du Sud aligne sa loi nationale sur l'accord

code d'investissement de la CEDEAO compromet l'applicabilité et l'efficacité des traités.

Ce cadre coexistant suggère qu'une dynamique de la «répartition des normes» et la «qualité des normes» en tant que déterminant l'applicabilité et l'efficacité des dispositions,[188] pourrait être appliquée au cadre du PI, pour les lois nationales qui seraient considérées comme divergentes.

Ainsi, le renforcement des législations nationales de chaque État reste le mécanisme le plus efficace pour imposer et renforcer les obligations des investisseurs en matière d'évaluation de l'impact sur les DH. Conformément à l'obligation des États en droit international d'assurer l'accès à un recours pour les victimes de violations des droits de l'homme, il pourrait être envisagé d'inclure une disposition soumettant les investisseurs à la juridiction civile des tribunaux de leur État d'origine pour les dommages causés dans l'État d'accueil, comme préconisé par l'article 47 du PI qui initie la possibilité de poursuivre en justice les investisseurs et leurs investissements devant les tribunaux nationaux de l'État hôte, et les soumets, le cas échéant et en conformité avec les lois et réglementations nationales, à des poursuites civiles devant les tribunaux de leur État d'origine pour les actes, décisions ou omissions commis dans l'État d'accueil en lien avec l'investissement, si ces actions, décisions ou omissions entraînent des dommages, des blessures corporelles ou des pertes de vies humaines dans l'État d'accueil.

Le droit à un recours en cas de violation est un droit substantiel qui permet la mise en œuvre des garanties offertes par les droits positifs et les protections négatives découlant de l'article 21(1). Il est intrinsèque et essentiel à tous les droits de l'homme et est également intégré dans le droit d'accès à la justice. Ce droit à un recours implique également des réparations. Selon l'article 21(2), en cas de spoliation, la réparation en faveur du «peuple spolié» prend la forme d'une restitution ou d'une compensation. Toute spoliation de terre doit être légale, dans l'intérêt exclusif des populations, raisonnable et proportionnée. Les peuples

d'investissement de la SADC, tandis que le Congo et le Zimbabwe améliorent la qualité de leurs normes nationales de 'accord d'investissement de la SADC qui prévoit des normes de protection des investissements plus faibles. Il accorde le droit à une indemnisation juste et adéquate en cas d'expropriation. Il prévoit le traitement national et autorise le rapatriement des capitaux. Il prévoit une norme de transparence renforcée par l'obligation des États membres de promouvoir et d'établir la prévisibilité, la confiance et l'intégrité en adhérant et en appliquant des politiques, pratiques, réglementations et procédures ouvertes et transparentes liées à l'investissement. Il n'inclut cependant pas le TJE et le RDIE. Le Code des investissements du Congo prévoit le TJE et le RDIE ainsi qu'un consentement général à l'arbitrage. De plus, le Code d'investissement de la Zambie garantit le TJE, la NPF et le RDIE qualifiés après accord avec le gouvernement.

188 KP Muzaliwa 'Member States' Foreign Investment Laws and the Applicability and Effectiveness of Regional Investment Agreements within the Association of Southeast Asian Nations (ASEAN) and the Southern African Development Community (SADC)' thèse de doctorat soutenue en Septembre 2022 à la Graduate School of International Social Sciences YOKOHAMA National University ; KP Muzaliwa *Relationship between the SADC investment laws of SADC member states : perspectives from the Democratic Republic of Congo investment code* (2021) 4 TDM.

affectés par la spoliation doivent recevoir une compensation complète, efficace, équitable et appropriée, ainsi qu'une assistance pour la réhabilitation. Cette compensation doit être disponible avant que ces peuples ne soient déplacés de leur terre et doit être déterminée en consultation avec les personnes concernées, sans aggraver leurs conditions de vie. Elle doit également prendre en compte la plus grande vulnérabilité de certains groupes, tels que les familles dirigées par des femmes.

En plus des droits importants énoncés dans les paragraphes précédents, l'article 21 propose également des garanties procédurales pour assurer une mise en œuvre efficace. La première garantie procédurale concerne la tenue de consultations effectives et sincères ainsi que la participation rigoureuse à la prise de décisions concernant les projets de prospection et d'extraction des ressources naturelles. Cela permet aux personnes affectées vivant dans les zones où ces projets sont envisagés d'avoir accès à toutes les informations nécessaires avant la finalisation du projet, notamment les conclusions des évaluations d'impact environnemental, social et sur les droits de l'homme. Ces informations doivent être facilement accessibles et disponibles dès le début et pendant toute la durée du projet.

En outre, les États parties doivent mettent en place des règles et des procédures qui ne limitent pas indûment ou n'interdisent pas la possibilité d'engager des poursuites en responsabilité civile des investisseurs dans leur État d'origine, en prenant en compte les règles régissant les conflits de lois et la reconnaissance et l'exécution des jugements étrangers.

La confusion pourrait résulter du manque de clarté concernant les actions intentées par une victime devant un tribunal national tandis qu'une demande reconventionnelle de l'État sur la même question est soumise à un tribunal arbitral. Afin d'éviter de telles ambiguïtés, les futurs accords d'investissement en Afrique devraient s'inspirer de la disposition du modèle de traité d'investissement bilatéral de l'Africa Arbitration Academy (TBI modèle de l'AAA)[189] et préciser que les demandes reconventionnelles ne constituent pas un jugement définitif contre des actions à caractère juridique, coercitif ou réglementaire conformément aux lois ou procédures judiciaires de l'État hôte.[190] En outre, les futurs accords d'investissement pourraient incorporer la philosophie d'*Ubuntu* en tant que principe essentiel pour l'interprétation, l'exécution et l'application des obligations en matière de DH, issu de la coutume africaine. Le principe d'*Ubuntu* est dérivé de l'idiome africain populaire *Umuntu Ngumuntu Ngabantu*, traduit par une personne est une personne en raison de ce que les autres membres de la communauté ont fait pour elle.[191]

189 Voir modèle de TBI de l'AAA disponible en ligne sur : https://jusmundi.com/en/document/treaty/fr-modele-de-traite-bilateral-dinvestissement-de-lafrica-arbitration-academy-2022-tbi-modele-aaa-2022-friday-1st-july-2022 (consulté le 11 novembre 2024).

190 Art 22, TBI modèle de l'AAA.

191 Modèle de TBI AAA, article 2.

Ubuntu défend le respect de la dignité humaine et de l'égalité pour tous, en fonction de leur statut au sein de la communauté. Ce principe reconnaît que chaque individu a le devoir inhérent d'accorder le respect de la dignité humaine et de l'égalité aux autres membres de la communauté dans laquelle il évolue.[192] En tant que principe fondamental des traités, *Ubuntu* s'avère être un levier potentiel pour renforcer l'adoption et la mise en œuvre des normes relatives aux droits de l'homme de manière générale, ainsi que de celle de la responsabilité des entreprises en matière de droits de l'homme en particulier.

Le communalisme africain renvoie au système traditionnel de fonctionnement des régions rurales d'Afrique d'autrefois.[193] En Afrique, la société a perduré pendant des décennies sans structures hiérarchiques formelles, offrant un accès équitable à la terre et aux cours d'eau pour tous, évoquant ainsi des formes d'égalitarisme et de socialisme. Certains éléments de cette manière de vivre sont reconnus par l'UA.[194]

En 2009, la Cour africaine a pris une décision historique concernant l'affaire des *Endorois* qui a été considérée comme une victoire pour les peuples autochtones de toute l'Afrique.[195] La Commission avait reproché au gouvernement kényan d'avoir privé la communauté endoroise de ses terres ancestrales en créant une réserve naturelle autour du lac Bogoria, portant atteinte à ses activités pastorales et culturelles. Les articles 21 et 22 de la Charte, qui traitent respectivement de la libre utilisation des ressources naturelles et du droit au développement, ont servi de fondement à cette condamnation.

En outre, le 23 juin 2022, un arrêt de la Cour africaine oblige le Kenya à verser une compensation aux Ogiek pour les dommages matériels et moraux subis, ainsi qu'à mettre en place toutes les mesures nécessaires, législatives et autres, pour identifier, délimiter et octroyer un titre collectif aux terres ancestrales des Ogiek. Le Kenya est également tenu d'assurer la pleine reconnaissance des Ogiek en tant que peuple autochtone du pays et de garantir leur droit à être consultés sur tous les projets de développement, de conservation ou d'investissement sur leurs terres.[196]

Ces arrêts rendus laissent entendre une forme de conceptualisation de la doctrine morale du communalisme africain en prônant la dignité humaine, les droits et les responsabilités. Le philosophe Polycarp

192 Art 1, Modèle de TBI AAA.

193 E Etta, D Esowe & O Asukwo 'African communalism and globalization' (2016) 10 *African Research Review* 3 303-316.

194 Voir la jurisprudence *Ogiek c. Kenya* ayant conclu une Violations des arts 1, 2, 8, 14, 17, 21 et 22 de la Charte africaine ; CAHDP, *Affaire Commission Africaine des droits de l'homme et des peuples c. Kenya*, Requête N° 006/2012 (Décision du 26 Mai 2017).

195 CADHP, *Centre for Minority Rights Development (Kenya) and Minority Rights Group c. Kenya*, (*Endorois Welfare Council c. Kenya*), no 276/03, (Décision du 25 novembre 2009).

196 CADHP, *Affaire Commission Africaine des droits de l'homme et des peuples c. République Du Kenya*, Requête N° 006/2012 (Décision concernant les réparations du 23 Juin 2022).

Ikuenobe affirme que le communalisme africain ne perçoit pas nécessairement de conflit entre les individus et la communauté ; au contraire, ils se soutiennent mutuellement et les individus sont tenus d'avoir une attitude morale consistant à contribuer à la communauté dans leur propre intérêt.[197]

Cette attitude met l'accent sur le devoir comme objectif primordial de la création d'une communauté, visant à offrir les conditions matérielles nécessaires pour concrétiser les droits substantiels et le bien-être des individus.

Ces idéaux panafricanistes ont ultérieurement influencé les standards et les institutions de gouvernance continentale. L'Organisation de l'Unité africaine (OUA) représentait un compromis entre deux courants majeurs du mouvement panafricain. Le groupe de Casablanca défendait une vision d'une «Afrique sans frontières», prônant une intégration approfondie et une union fédérale des États africains, avec des organes communs comme une armée africaine unifiée. D'un autre côté, le groupe de Monrovia préconisait une forme plus flexible d'alliance pour une coopération économique progressive centrée sur l'État-nation.[198]

C'est cette dernière vision qui a finalement prévalu et qui a servi de fondement à l'OUA puis l'UA dans sa configuration actuelle. Néanmoins, les aspirations du groupe de Casablanca demeurent un principe d'adhésion pour les panafricanistes, et continuent de se refléter dans l'«Agenda 2063» de l'UA, envisageant une fédération des États africains d'ici 2060,[199] ainsi que dans la décision prise par l'UA en 2008 d'intégrer la diaspora en tant que sixième région de l'Union. Cela offre aux panafricanistes des Amériques, des Caraïbes et d'autres régions la possibilité de participer aux organes décisionnels et aux processus de prise de décisions de l'UA.

La similitude culturelle fait de l'Afrique un eldorado pour les investisseurs issus des Amériques ayant des origines africaines, notamment en raison de l'approche historique holistique des DH. Les similitudes historiques et culturelles peuvent permettre une meilleure appréhension du principe DH sur le continent.

La ZLECAf incarne donc cette vision ambitieuse pour l'unité et la prospérité de l'Afrique et de ses diasporas issues des États américains à travers la CARICOM et les partenariats USA-Afrique. En surmontant les obstacles infrastructurels et financiers, ces régions peuvent instaurer un environnement économique solide et inclusif bénéfique à tous les citoyens.[200]

197 P Ikuenobe 'Human rights, personhood, dignity, and African communalism' (2018) 17 *Journal of Human Rights* 589-604.

198 F Borella 'Les regroupements d'Etats dans l'Afrique indépendante' (1961) 7 *Annuaire français de droit international* 787-807.

199 Objectifs et domaines prioritaires pour les dix premières années de l'Agenda 2063, disponible en ligne sur : https://au.int/fr/agenda2063/objectifs (consulté le 11 novembre 2024).

Cette approche panafricaine faisant office de spécificité dans la réforme du DII africain est également en train d'influencer les lois internes des Etats africains, qui réforment leurs codes d'investissement[201] dans le but de renforcer les partenariats intra-africains[202] et avec le Sud-Global.

Le Bénin est l'un des premier Etats africains à avoir pris en septembre 2024 une mesure que l'on pourrait qualifier d'approche panafricaine, en adoptant une loi visant à faciliter l'obtention de la nationalité béninoise pour les descendants d'africains.[203] Cette mesure encourage ainsi les investisseurs étrangers à venir s'installer et investir dans le pays de leurs ancêtres. L'Afrique du Sud prône également l'approche panafricaine depuis 2016 avec le lancement d'une nouvelle initiative : *Trade Invest Africa*. Cette initiative visait déjà à promouvoir le commerce et l'investissement en Afrique en offrant un soutien aux entreprises souhaitant croître sur le continent, notamment en fournissant un accès au financement, en identifiant des opportunités sur le marché et en proposant du soutien non financier tel que des données de marché et des opportunités de réseautage.

En outre, les politiques minières sud-africaines ont toujours eu une approche DH holistique de redistribution des richesses pour les communautés défavorisées.[204] La Charte minière Sud africaine de 2017 relève le seuil minimum de participation des Noirs dans les sociétés minières de 26 à 30 %, et dispose qu'une nouvelle entreprise de prospection doit avoir au moins 50 % d'actionnariat noir, y compris lors

200 Le partenariat entre la Chambre de commerce et d'industrie (CCI) et la Banque africaine d'import-export (Afreximbank), à travers des initiatives comme le Conseil d'affaires et des programmes de formation sur les opportunités d'exportation offertes par la ZLECAf, représente une avancée significative vers l'établissement d'un équilibre dans lequel les investissements peuvent servir de liens entre les États africains, ainsi qu'entre le continent africain et ses diasporas caribéennes.

201 Vague de réforme des lois internes des Etats africains : la loi 20-07 algérienne relative à la loi de finances complémentaire pour 2020 ; Le Code des investissements du Bénin (loi n° 2020-02), adopté le 20 mars 2020 ; La loi sur l'Agence d'investissement et de développement du Zimbabwe de 2020 ; le 'Code pétrolier' du Bénin (loi n° 2019-06) ; Le Code gabonais des hydrocarbures (loi n° 002/2019 du 16 juillet 2019) ; La nouvelle loi algérienne sur les hydrocarbures de 2019 ; La Loi tunisienne 2019-47 du 29 mai 2019 relative à l'amélioration du climat des affaires ; la République du Congo a promulgué la loi n° 88-2022 portant cadre juridique des contrats de partenariat public-privé (PPP) ; Charte de l'investissement marocaine de 2022 ; le Règlement général sur les investissements, SI 227 de 2023 du Zimbabwe ; la nouvelle loi sur l'investissement de la Tanzanie de 2022 ; la loi sur le développement des investissements, du commerce et des affaires (n° 18 de 2022) ; nouvelle loi sur l'investissement algérienne de 2022 ; Politique nambienne de zone économique spéciale (politique ZES) de 2022 ; la loi sur l'Office national d'investissement de la Sierra Leone de 2022 ; le règlement éthiopien n° 517-2022 sur les incitations à l'investissement de 2022 ; Code des investissements de 2020 de l'Union des Comores

202 Par exemple, le projet panafricain de la Grande muraille verte (GMV).

203 Loi No. 2024-31 relative à la reconnaissance de la nationalité béninoise aux Afro-descendants en République du Bénin, 2024.

204 *Piero Foresti and Others c. Afrique du Sud*, Affaire CIRDI n° ARB (AF)/07/1, décision, 4 août 2010.

du droit de vote, elle est également applicable à la législation sur les diamants et les métaux précieux. De plus, une nouvelle entreprise minière doit avoir une participation de 30 % de personnes noires, répartie de manière spécifique entre les employés, les communautés et les entrepreneurs. En outre, il est exigé que les sociétés minières achètent 70 % des biens et 80 % des services à des entreprises détenues par des Noirs. De plus, il est obligatoire que 100 % des échantillons minéraux soient analysés par des entreprises basées en Afrique du Sud.

Enfin, la Charte exige que la moitié des membres des conseils d'administration des sociétés minières soient noirs, dont 25 % doivent être des femmes noires. Les critères de la Charte doivent être pris en considération pour décider de l'octroi d'une licence.[205] Une réforme en cours en 2024 vise à contraindre les investisseurs à appliquer ces mesures en vue d'asseoir une redistribution des richesses économique équitable.

La grande variété des nouvelles dispositions juridiques dans ces textes africains pose donc le problème de l'interprétation[206] à la lumière du principe des DH notamment avec la réforme du système de règlement des différends d'investissements. Une interprétation des AII intra-africains doit se faire selon la doctrine africaine *Ubuntu* et celle du «communalisme africain» et prendre en compte la complexité des systèmes juridiques des États africains. L'interprétation doit garantir une certaine flexibilité afin de permettre à chaque État d'encadrer sa propre définition du principe DH dans le cadre de l'arbitrage d'investissement.

Il convient donc de préciser qu'un tel projet d'interprétation du DII, et d'identification de la manière dont les approches de la doctrine africaine, en tant que forces particulières influencent le monde, peut être abordé sous au moins trois angles.

Tout d'abord, l'interprétation ascendante peut être adoptée pour rechercher la généralité à partir du particularisme des DH africains ; commencer aussi localement que possible pour comprendre les modes d'influence mutuelle des DH sur le comportement des investisseurs, puis comparer et extrapoler graduellement à une échelle de plus en plus grande jusqu'à atteindre un niveau global d'interprétation. L'interprétation devrait se focaliser sur les intentions des législateurs lors du processus d'interprétation. L'objectif principal est de se concentrer sur le problème que la loi cherche à résoudre et de proposer une réponse dans le cadre de la nouvelle loi.

Deuxièmement, une vision globale ou descendante peut être adoptée de l'influence de l'investissement sur le DH dans son ensemble, pour laquelle l'interprétation est ensuite de plus en plus restreinte pour comprendre et justifier la manifestation la plus locale du droit qui façonne la conduite de l'investisseur. L'interprétation concernera à la

205 La Charte minière Sud africaine de 2017.

206 A Kairouani 'La mise en oeuvre du droit au développement dans le Protocole d'investissement de la Zone de libre échange continentale africaine' (2023) 7 *Annuaire africain des droits de l'homme* 284-302 disponible en ligne sur http://doi.org/10.29053/2523-1367/2023/v7a13 (consulté le 11 novembre 2024).

fois la signification littérale et l'intention de la loi. Elle est perçue comme un compromis entre la règle du sens littéral et la règle du méfait, car elle offre aux interprètes la capacité de modifier la signification littérale des mots si l'interprétation de leur sens initial entraîne de la confusion et des résultats opposés à l'intention principale.

Alternativement, le point d'analyse peut être contrarié sur un terrain d'entente où ses deux vecteurs se rencontrent. À ce niveau d'analyse, l'attention n'est pas tant portée sur la direction de l'approche DH par le DII à une échelle toujours plus grande ou sur la réplication d'une éthique juridique globale au niveau local, mais plutôt sur les tensions impliquées dans de tels processus d'interprétation. Cette construction harmonieuse d'interprétation pourrait être utilisée lorsqu'il y a un conflit entre plusieurs lois ou des parties différentes d'une même loi. En de telles circonstances, il est essentiel d'interpréter les dispositions de manière conséquente pour maintenir l'harmonie et clarifier l'objectif global de la loi. En outre, la coutume complète les droits fondamentaux en régissant les statuts personnels et en protégeant certaines catégories vulnérables ou en favorisant certains secteurs économiques.[207] Le droit coutumier constitue également un pilier essentiel pour garantir les droits culturels souvent laissé de côté dans le cadre du droit international des investissements.[208]

L'intégration de principes issus de la coutume est une spécificité africaine[209] dans les constitutions nationales, et qui peut entrer dans le cadre du droit de réglementer des États. Ainsi, sur le plan économique,

207 A titre d'exemple la légalisation de la culture du chanvre pour permettre l'inclusion des populations autochtones au Maroc conformément au droit coutumier africain des droits de l'homme.

208 Voir la gestion différente des dossiers du statut d'indication géographique des cafés Sidamo, Harar et Yirgacheffe ainsi que le dossier du thé Rooibos auquel fait face la société Starbucks. Ainsi que la loi spécifique sud-africaine protégeant les vins et spiritueux (LiquorProductsAmendment Products Amendment Act 8 of 2021) et le régime des marques qui protège les marques de certification (Trade Marks Act 194 of 22 December 1993) ; Affaire CIRDI n° ARB/15/29, décision finale, *Cortec Mining Kenya Limited, Cortec (PTY) Limited et Stirling Capital Limited c. République du Kenya*, 22 octobre 2018 ; Affaire CIRDI n° ARB/16/32, décision finale, *Thomas Gosling, Property Partnerships Development Managers (Royaume-Uni), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd et TG Investments Ltd c. République de Maurice* (*Gosling c. Maurice*), 18 février 2020 ; Décision de la CNUDCI, *Glamis Gold, Ltd. c. États-Unis d'Amérique*, introduite en 2003 ; Affaire CIRDI n° ARB/84/3, décision sur le fond, *Southern Pacific Properties (Middle East) Limited c. République arabe d'Égypte*, 20 mai 1992 ; Affaire CIRDI n° ARB/84/3, *Southern Pacific Properties (Middle East) Limited c. République arabe d'Égypte* ; Affaire CIRDI n° ARB/16/1, *Al Jazeera Media Network c. République arabe d'Égypte* ; Affaire CIRDI n° ARB/16/4, *Eco Oro Minerals Corp. c. République de Colombie* ; Affaire CIRDI n° ARB/05/15, décision finale, *Waguih Elie George Siag et Clorinda Vecchi c. République arabe d'Égypte*, 1er juin 2009 ; Affaire CIRDI n° ARB/10/25, *Bernhard von Pezold et autres c. République du Zimbabwe*, et *Border Timbers Limited, Border Timber International (Private) Limited, et Hangani Development Co. (Private) Limited c. République du Zimbabwe.*

209 A titre d'exemple, la Stratégie Continentale de développement des indications géographiques (IG) en Afrique pour la période 2018-2023, a été établie par la Direction de l'Economie Rurale et de l'Agriculture (DREA) de l'Union Africaine (UA), en collaboration avec les Etats membres de l'Union Africaine, les

la coutume joue un rôle majeur dans la propriété foncière selon certaines constitutions africaines. A titre d'exemple, en RDC, l'article 34 de la constitution considère la propriété privée comme sacrée tout en garantissant le droit à la propriété individuelle ou collective conformément à la loi ou à la coutume. En Angola, l'article 92 de la constitution protège le droit à l'utilisation et à la jouissance des moyens de production par les communautés rurales, conformément à la constitution, à la loi et aux règles coutumières. De son côté, la constitution gambienne protège les habitants titulaires de terres selon la coutume contre toute privation de propriété et oblige le gouvernement à les réinstaller sur des terres alternatives favorisant leur bien-être économique et culturel.[210]

En intégrant des normes coutumières qui s'harmonisent avec les droits fondamentaux, les dispositions constitutionnelles visent à soutenir le développement économique de l'individu et de la collectivité en adéquation avec les droits des investisseurs. Par exemple, l'article 22 de la constitution togolaise protège le droit de circuler librement et de s'établir sur le territoire national conformément à la loi ou à la coutume locale. Ces coutumes intégrées dans les droits fondamentaux nationaux sont sélectionnées en fonction de leur compatibilité avec les normes protégeant les DH. Cette coexistence entre la coutume et le droit international des investissements nécessite néanmoins des mécanismes d'intégration pour assurer une harmonie entre les coutumes africaine et les droits reconnus aux investisseurs dans le cadre de traités d'investissement sont directement applicables, à savoir le traitement juste et équitable, le standard de compensation en cas d'expropriation, les privilèges fiscaux et douaniers, etc., ainsi que des mécanismes de règlement des différends adaptés à l'interprétation de ces coutumes à l'instar de l'exemple Ghanéen qui prévoit la participation populaire dans l'administration de la justice à travers des tribunaux coutumiers qui contribuent à l'application de la coutume.[211]

Dans notre optique, l'intégration de tels éléments dans les futurs accords d'investissement pourrait favoriser l'émergence d'une approche basée sur la dignité humaine, facilitant ainsi l'acceptation et la mise en œuvre effective des normes relatives aux DH et de la responsabilité des entreprises en matière de DH.

Communautés Economiques Régionales (CER) et les partenaires techniques au développement/Charte Culturelle Africaine/Convention Africaine sur la Conservation de la Nature et des Ressources Naturelles/Charte Convention Africaine des Droits de l'Homme et des Peuples/Convention pour la Protection du Patrimoine Mondial Culturel et Naturel/Convention pour la Sauvegarde du Patrimoine Culturel Immatériel/Déclaration Universelle sur la Diversité Culturelle/Convention sur la Protection et la Promotion de la Diversité des Expressions Culturelles/Déclaration sur la Conservation des Paysages Urbains Historiques/Charte du Tourisme Culturel/Règlement d'urbanisme de la zone tampon de protection du Tombeau des Askia à Gao, Mali/Procès-verbal de palabre, Loropéni, Burkina Faso.

210 Art 22(4), Protection of Fundamental Rights and Freedom, Constitution de la Gambie.

211 Chapitre 11, art 125, Constitution du Ghana.

La mise en œuvre de la réforme du droit international des investissements au niveau régional et continental, opérera crescendo l'harmonisation voire l'amélioration des normes déjà établies. Toutefois, l'efficacité de l'implication des investisseurs ne peut être effectuée uniquement sur la base de la présence de mécanismes d'application dans les Accords régionaux d'investissements, mais aussi sur leur fonctionnement effectif en pratique et leur intégration et convergence pour influencer les réformes des droits nationaux des États africains.

Selon une partie des analystes, les changements visés par le PI ne devraient avoir que des effets pratiques limités.[212] En effet, le PI diminue les protections offertes par les TBI intra-africains aux investisseurs intra-africains, mais n'a aucun impact sur les protections offertes par les TBI non intra-africains aux investisseurs non-africains en Afrique.

En premier lieu, l'impact du Protocole ne touchera qu'une petite partie du stock d'IDE en Afrique (c'est-à-dire les IDE intra-africains), car la majorité des IDE en Afrique proviennent d'investisseurs non-africains, principalement les Etats européens et asiatiques.[213]

Cependant, malgré leur volume modeste, les investissements directs des nations africaines en Afrique sont diversifiés : par exemple, l'Afrique du Sud et le Nigeria ont des participations dans plus de 20 autres nations africaines, tandis que le Togo détient des actifs d'investissements directs dans plus de 30 autres pays du continent africain.[214]

Le PI en outre met en place une agence panafricaine du commerce et de l'investissement dont la mission est d'aider les agences nationales de promotion de l'investissement et le secteur privé à mobiliser des ressources financières, à promouvoir le développement des entreprises et à offrir un soutien technique, afin de promouvoir et faciliter l'investissement conformément aux dispositions du protocole.

212 J Feris 'Investment protocol: critical for the success of the AfCFTA' (2021) Insights on theAfrican Continental Free Trade Area disponible en ligne sur : https://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/publications/2021/AfCFTA/Downloads/CDH-Insights-on-the-AfCFTA-Investment-Protocols-Jackwell-Feris.pdf (consulté le 11 novembre 2024) ; JC Brada, Z Drabek, I Iwasaki 'Does investor protection increase foreign direct investment? A large meta-analysis' (2021) 35 *Journal of Economic Surveys* 1 34-70 ; Y Ayele et autres (eds) *The AfCFTA Protocol on Investment: issues and potential impacts* (2023) ODI Policy brief disponible en ligne sur : https://www.researchgate.net/publication/381320311_Policy_brief_The_AfCFTA_Protocol_on_Investment_issues_and_potential_impacts (consulté le 11 novembre 2024).

213 UN Trade and Development, Regional trend Africa (2024) World investment report, disponible en ligne sur https://unctad.org/system/files/non-official-document/wir2024-regional_trends_africa_en.pdf (consulté le 11 novembre 2024).

214 La Conférence des Nations unies sur le commerce et le développement (CNUCED) offre des données bilatérales sur la plupart des pays, disponible en ligne sur : https://investmentpolicy.unctad.org/international-investment-agreements(consulté le 11 novembre 2024).

Cette initiative marque une avancée significative vers la mise en place d'une structure institutionnelle qui encouragera les investissements intra-africains durables respectant les principes DH. L'existence d'une sécurité juridique et d'une transparence dans les dispositions du PI qui a parfois fait défaut[215] pourrait également encourager davantage les investisseurs africains à investir en Afrique, créant ainsi une chaîne de valeur africaine.

En fin de compte, on pourrait penser que les droits des investisseurs intra-africains de l'UA en vertu des TBI intra-africains seront affaiblis par le PI, car la protection des investisseurs de l'UA dans les États membres de l'UA sera réduite, et donc que les protections pour les investisseurs non africains resteront inchangées. D'autant plus que la plupart des litiges RDIE contre les États membres de l'UA ont été principalement engagés dans le cadre d'accords entre États africains et non africains, plutôt que dans des accords intra-africains.

Ainsi la réforme du DII n'aurait qu'un faible impact sur la protection des DH car cela fermerait davantage la porte aux investisseurs intra-africains, en octroyant encore plus d'avantages aux nombreux investissements étrangers hors UA déjà présents en Afrique.

Mais l'évolution de la pratique conventionnelle africaine tend vers une tendance entérinant les principes DH et de développement durable.

L'influence du PI sur la pratique des traités ne se limite pas seulement aux traités entre pays africains. Les pays qui ont signé le Protocole sont obligés d'harmoniser tous les nouveaux accords bilatéraux non africains avec ses dispositions.

Depuis l'adoption du PI 2023, plusieurs pays africains ont entamés une refonte de leur pratique conventionnelle,[216] en mettant un accent particulier sur les nouveaux accords internationaux d'investissement progressistes notamment avec les États du Sud Global.

L'intégration du principe DH dans le langage de rédaction de ces traités est disparate mais demeure présente. Il semble donc que l'Afrique ait fixé un nouveau standard en matière de pratique des traités internationaux, qui soit cohérente, progressive et plus équitable.[217]

La consolidation de cette spécificité panafricaine du droit international des investissements devient ainsi un outil de l'émergence d'un ordre juridique africain distinct promouvant les principes DH en

215 *World Duty Free Co c. Kenya*, Affaire CIRDI n° Arb/00/7, décision, 6 octobre 2006 ; *African Holding Company of America, Inc. et Société africaine de construction au Congo S.A.R.L. c. la République démocratique du Congo*, Affaire CIRDI n° ARB/05/21, décision sur les objections à la compétence et la recevabilité, 29 juillet 2008, para 52 et 54.

216 TBI Angola-China 2023 ; TBI Angola-Japon 2023 ; Accord de facilitation de l'investissement durable entre l'UE et l'Angola (SIFA) 2023 ; APE UE-Kenya 2023 ; TBI Biélorussie - Zimbabwe 2023 ; Accord de partenariat économique global entre Maurice et les Émirats arabes unis 2024 ; TBI Biélorussie - Guinée équatoriale 2023 ; Accord de libre-échange Égypte - Serbie 2024.

217 Art 49(4), PI.

tant qu'impératif pour tous les investissements étrangers, et à l'avenir pour les investissements extra-africains.[218]

5 CONCLUSION

Dans le présent article, une analyse a été effectuée afin d'évaluer l'intégration de l'approche de protection des DH en tant que spécificité du droit international des investissements en Afrique. Les conclusions ont suggéré que cette spécificité africaine du DII, telle qu'elle est mise en œuvre dans les accords d'investissement africains, semble avoir un impact croissant nivelant sur la concrétisation des objectifs de développement durable.

Les résultats révèlent que la réforme du droit international des investissements en Afrique a conduit à l'adoption d'instruments d'investissement axés sur la consolidation des investissements durables, tout en reposant sur un cadre normatif prônant une approche contraignante de protection des DH.

La refonte africaine du droit international des investissements a mis en place des mécanismes assurant la responsabilité des entreprises en matière de DH tels que l'accord d'investissement de la SADC, le PI, le Code d'investissement de la CEDEAO disposant de mécanismes pouvant inciter l'investisseur à être juridiquement responsable en matière de violation des DH, ainsi que des mécanismes arbitraux permettant de résoudre les différends d'investissements relatifs à l'atteinte aux DH émanant des actions ainsi que des mécanismes étatiques permettant de dédommager les victimes.

Néanmoins, en raison de l'absence de mécanismes pouvant les dédommager directement dans le cadre des instances arbitrales, il a été suggéré que l'accès des victimes aux instances étatiques pour obtenir une compensation était le moyen juridique à favoriser dans les futurs accords d'investissements des CER, mais également dans l'annexe 1 du PI en cours de négociation.

Il a été noté que la réplicabilité de l'approche de protection des DH dans le cadre de la refonte africaine du droit international des investissements en Afrique a été renforcée par l'implication des CER les plus avancées et a été harmonisée par la mise en place du PI pour les CER et les États les moins avancés. Cette approche permet ainsi d'appuyer les efforts constants des CER actives et d'aider par le biais du PI les CER inactives et les Etats les moins développés à s'harmoniser aux tendances, pour permettre *in fine* une intégration régionale. En outre, les États africains sont encouragés à intégrer ces principes lors de futures négociations de traités avec des partenaires extra régionaux pour renforcer et affirmer la spécificité africaine au-delà du cadre intra-régional.[219]

218 Art 49, PI.
219 Art 49(4), PI.

Il est également souligné que le rôle de régulateur des États est l'un des moyens les plus significatifs pour protéger les DH sur leurs territoires respectifs, en prenant des mesures efficaces à cet effet.

L'implémentation de la protection des DH dans le cadre du droit international des investissements en Afrique passe par divers mécanismes et sa spécificité se caractérise notamment par sa flexibilité et son aspect hétérogène panafricain.

La réforme africaine du droit international des investissements est holistique revêtant à la fois un aspect polycentrique au niveau de l'intégration économique sous-régionale et un aspect statocentrique au niveau de l'intégration économique continentale.

Cette réforme tant sur le plan sous-régional que continental a établi un cadre contraignant pour la responsabilité des investisseurs en matière de protection des DH. Cette pratique africaine pourrait servir de modèle pour les autres pays du Sud Global, à condition que les principes de responsabilité et de justice soient effectivement mis en œuvre et appliqués.

Au sein du droit international des investissements, les pays africains ne sont plus seulement des preneurs de règles, mais sont devenus des créateurs de règles.[220] Cependant, cette africanisation s'avère de fois modérée pour certains instruments et radicale pour d'autres.[221] Dans cette perspective, des efforts supplémentaires et une volonté politique ferme seront nécessaires pour poursuivre cette évolution. La philosophie *Ubuntu*, en tant que principe sous-tendant l'interprétation, l'exécution et l'application des obligations en matière de DH pourrait renforcer l'acceptation et la mise en œuvre de la responsabilisation des investisseurs tout en conservant une identité propre au contexte panafricain.

220 MM Mbengue & S Schacherer 'Africa as an investment rule-maker: decrypting the Pan-African Investment Code' (2021) 23 *African Yearbook of International Law* 81-121.

221 Akinkugbe (n 32).

L'indépendance personnelle des juges de la Cour africaine des droits de l'homme et des peuples

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RÉSUMÉ: Alors que les thématiques classiques du système juridictionnel des droits de l'homme ont suscité d'abondantes recherches, la question de l'indépendance personnelle des juges de la Cour africaine des droits de l'homme et des peuples (Cour africaine) demeure encore largement sous-explorée, en grande partie, pour des raisons culturelles. Pourtant, cette indépendance, souvent associée à l'indépendance institutionnelle, constitue une condition essentielle de la légitimité de toute juridiction internationale et de l'autorité de ses décisions. À l'occasion du 20e anniversaire de l'entrée en vigueur du Protocole de Ouagadougou, cet article entreprend une analyse approfondie de l'indépendance personnelle des juges de la Cour africaine. L'étude révèle que, nonobstant les garanties prévues par le Protocole en vue de préserver cette indépendance, ces mesures restent insuffisantes pour répondre pleinement aux attentes des justiciables africains. Cette contribution met en lumière les défis persistants et propose une réflexion sur les moyens d'améliorer les mécanismes en place afin de renforcer l'impartialité et l'indépendance des juges de cette institution clé du système africain de protection des droits de l'homme.

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TITLE AND ABSTRACT IN ENGLISH

The independence of judges of the African Court on Human and Peoples' Rights

ABSTRACT: Despite the extensive body of research on traditional themes within the human rights jurisdictional system, the issue of the personal independence of judges at the African Court on Human and Peoples' Rights (African Court) remains significantly underexplored, largely due to prevailing cultural considerations. Yet personal independence, often conflated with institutional independence, constitutes a fundamental prerequisite for the legitimacy of any international judicial body and the authority of its decisions. Marking the 20th anniversary of the entry into force of the Ouagadougou Protocol, this article provides a detailed examination of the personal independence of the African Court's judges. The analysis demonstrates that, notwithstanding the safeguards established by the Protocol to ensure such independence, these measures fall short of fully addressing the expectations of African litigants. This study identifies persistent challenges and proposes recommendations for enhancing existing mechanisms to reinforce the impartiality and independence of the judges of this pivotal institution within the African human rights system.

MOTS-CLÉS: Cour africaine des droits de l'homme et des peuples ; indépendance personnelle ; Juges ; Protocole de Ouagadougou ; Union africaine

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1 INTRODUCTION

«*Going far or not going far enough?*»,[1] tel pourrait être, pour pasticher les propos de Christian Pippan, le sempiternel dilemme que pose voire impose la problématique de l'indépendance judiciaire. Principe consubstantiel à la notion d'État de droit, condition *sine qua non* d'un procès juste et équitable et directement associé à la bonne administration de la justice, l'indépendance judiciaire désigne «le fait pour une personne [et]/ou une entité de ne dépendre d'aucune autre autorité que la sienne propre».[2] Importante dans la compréhension de la notion d'indépendance judiciaire, cette définition ne permet pas, malheureusement, de traduire toute la complexité de ce principe sacro-saint de l'ordre juridique international. En effet, dans son acceptation la plus extensive, le principe de l'indépendance judiciaire «exige que les juridictions et les juges prennent leurs décisions librement, à l'abri de toute pression où manipulation extérieure, de la part de qui ce soit ou

1 C Pippan 'Democracy as a global norm. Has it finally emerged?' in M Happold (eds) *International law in a multipolar world* (2012) 209.

2 J Salomon (dir) *Dictionnaire de droit international* (2001) 570.

pour quelque raison que ce soit. Il requiert non seulement que la justice soit rendue de manière indépendante, mais également, qu'elle soit indépendante au niveau des apparences».[3] De cette définition transparaît plus clairement les différents éléments qui composent ce concept à savoir l'indépendance institutionnelle et l'indépendance personnelle. S'influençant mutuellement, en théorie, au point de se confondre réciproquement,[4] en pratique, il sied toutefois de préciser que ces deux éléments susvisés ne recouvrent pas systématiquement la même réalité. Et pour cause, si :

> [...] la première [a] trait aux juridictions en tant qu'institutions (...), la seconde concerne les membres de celles-ci».[5] En effet, «l'indépendance institutionnelle se manifeste sous l'angle d'une série d'autonomies parmi lesquelles l'autonomie budgétaire, l'autonomie d'organisation interne, l'autonomie en matière de recrutement du personnel, l'autonomie des systèmes informatiques ou celle en matière d'élection des présidents des différents formations de jugement».[6] Quant à l'indépendance personnelle,[7] elle «profite individuellement aux juges qui doivent, dans l'exercice de leurs fonctions, être libres de toute influence ou ingérence indue ou abusive».[8]

Ainsi, pris sous cet angle individuel, l'indépendance personnelle:

> [...] peut être conçue soit comme un droit du juge (garanti par les obligations corrélatives de l'État et des tierces-personnes, et, si nécessaire, par les sanctions à l'encontre de celles et ceux qui tentent de l'influencer indûment), soit comme un devoir «il doit respecter et contribuer à maintenir l'indépendance du pouvoir judiciaire et, en dernière analyse, appliquer le droit, au vu des éléments du dossier particulier, sans céder à la crainte de déplaire, ni au désir de plaire à toutes les formes du pouvoir, exécutif, législatif, parlementaire, politique, hiérarchique, économique, médiatique ou de l'opinion publique».[9]

Bien que fondamentale dans l'appréhension de l'indépendance judiciaire, l'indépendance personnelle n'a pourtant retenu que timidement l'attention de la doctrine, notamment de la littérature

3 J Malenovsky 'L'indépendance des juges internationaux' (2010) *RCADI* 26

4 Ainsi, la Cour européenne des droits de l'homme et des peuples (CourEDH) définit l'indépendance d'un tribunal à partir des éléments se rapportant aux membres de ce dernier : '[p]our déterminer si un organe peut passer pour indépendant - notamment à l'égard de l'exécutif et des parties – a eu égard au mode de désignation et à la durée du mandat des membres (...), à l'existence de garanties contre les pressions extérieures (...) et au point de savoir s'il y a ou non apparence d'indépendance'. Voir *Campbell and Fell c. Royaume-Uni* CEDH (28 juin 1984) para 78.

5 Malenovsky (n 3) 26.

6 Malenovsky (n 3) 26-27.

7 L'indépendance personnelle constitue le noyau dur du Statut du juge depuis des siècles. En effet, dès 1840, en France sous la monarchie de Juillet, le Comte de Portalis exprimait, devant des pairs, l'idée selon laquelle 'les juges doivent réunir quatre qualités principales : l'instruction ou les lumières, l'intégrité, l'indépendance et la dignité ou les mœurs', voir C Fillon, M Boninchi & A Lecompte *Devenir Juge. Mode de recrutement et crise des vocations de 1830 à nos jours* (2008) 3.

8 Malenovsky (n 3) 27.

9 Malenovsky (n 3) 27-28.

juridique francophone.[10] Selon Jiri Malenovsky, la raison en est essentiellement culturelle. En effet,

> [...] la doctrine continentale, souvent d'inspiration française, est naturellement portée vers l'étude des juridictions, envisagées en tant qu'institutions désincarnées, holistiques et rendant des décisions de manière anonyme, «au nom du peuple», un et indivisible, conformément à l'allégorie bien connue de la justice quasiment sans visage, statuant les yeux bandés. Inversement, la doctrine anglo-saxonne, privilégiant une approche davantage pragmatique, s'intéresse aux individualités qui composent ces juridictions (...).[11]

Fort étonnement, ce constat s'est avéré doublement vrai, s'agissant du système juridictionnel africain de droits de l'homme où l'office des juges de la Cour africaine des droits de l'homme et des peuples (Cour africaine) n'a quasiment pas fait l'objet d'une exégèse dans la littérature juridique aussi bien francophone qu'anglophone et ce, comparativement à son indépendance collective ou encore à son œuvre normative et jurisprudentielle pour lesquelles pullulent un nombre incalculable de travaux scientifiques.[12]

La récente commémoration du 20e anniversaire de l'entrée en vigueur du Protocole à la Charte africaine des droits de l'homme et des peuples (Protocole de Ouagadougou)[13] est opportunément pertinente en ce qu'elle offre l'occasion d'analyser le régime juridique qui régit l'indépendance des juges de la Cour africaine Autrement dit, l'indépendance des juges de la Cour africaine, dont la composition reflète les différents points de vue juridiques, politiques et idéologiques existant au sein des États parties de l'Union africaine (UA), est-elle suffisamment assurée de sorte à renforcer la légitimité de la Cour africaine et l'autorité de son action ? Certes, le Protocole de Ouagadougou et les autres instruments juridiques pertinents de la Cour africaine,[14] prévoient un ensemble de garanties à l'indépendance des juges de la Cour africaine. Toutefois, une analyse approfondie de ces garanties porte manifestement à croire que celles-ci demeurent encore lacunaires.

In fine, si le principe de l'indépendance personnelle des juges de la Cour africaine est clairement énoncé en ce qu'il emprunte aux garanties traditionnelles attachées à leur fonction de juge et à leur statut de fonctionnaire international (2), celui-ci demeure encore insuffisamment assuré au regard du défaut de transparence et des risques de pressions politiques qui, respectivement, précède la

10 À cet égard, il faut relever l'une des rares activités scientifiques portant sur la question, notamment le colloque organisé le 30 mai 2008 par l'Université Paris 1 (Panthéon-Sorbonne) sur le thème de l'indépendance et de l'impartialité des juges internationaux. Voir H Ruiz Fabri & J-M Sorel (dir) *Indépendance et impartialité des juges internationaux* (2010) 304.

11 Malenovsky (n 3) 20.

12 Voir au titre des ouvrages, G Le Floch (dir) *La Cour africaine des droits de l'homme et des peuples* (2023) 468 ; et au titre des articles, les différents volumes de l'Annuaire africain des droits de l'homme.

13 Le Protocole de Ouagadougou est entré en vigueur le 25 janvier 2004.

14 Voir le Règlement intérieur de la Cour africaine et l'accord de siège conclu entre le gouvernement tanzanien et l'UA relatif au siège de la Cour africaine.

sélection et la nomination des juges et entourent le renouvellement de leur mandat (3).

2 DES GARANTIES DE L'INDÉPENDANCE DES JUGES CERTES TRADITIONNELLEMENT ÉNONCÉES

Le Protocole de Ouagadougou contient des dispositions, plus ou moins classiques, qui insistent sur la nécessité de garder et de sauvegarder l'indépendance personnelle des juges de la Cour africaine. D'abord, fonctionnelles puisque liées à l'exercice même de leur fonction de juge international (2.1), les garanties de l'indépendance personnelle des juges de la Cour africaine sont, par ailleurs, adossées à leur statut de fonctionnaire international (2.2).

2.1 Les garanties fonctionnelles de l'indépendance

Les garanties fonctionnelles du juge de la Cour africaine s'apprécient tant à l'aune des prérogatives qui lui sont substantiellement accordées (2.2.1) qu'au regard des obligations qui lui sont corrélativement imposées (2.2.2).

2.1.1 Les prérogatives accordées aux juges

Au titre des prérogatives reconnues aux juges de la Cour africaine en vue de garantir leur indépendance personnelle, il convient de mentionner premièrement le principe du secret des délibérations. Consacrée dans la quasi-totalité des textes d'autres juridictions internationales,[15] la confidentialité des délibérations est prévue dans le Règlement intérieur (RI) de la Cour africaine, qui dispose que : «[l]es délibérations de la Cour ont lieu en séance privée ; elles sont et demeurent confidentielles. Le Greffier ou son adjoint, ainsi que les autres juristes du Greffe et les interprètes dont la présence est jugée nécessaire assistent aux délibérations».[16] Ainsi, en vertu de cette disposition, les parties au litige ne peuvent aucunement être informées des prises de position de chacun des juges de la Cour africaine quant à leurs demandes et leurs arguments. Afin de préserver autant que faire se peut, le secret des délibérations, les arrêts de la Cour africaine indiquent, non pas les noms mais plutôt, le nombre des juges ayant constitué la majorité. Dit autrement, l'identité des juges appartenant respectivement à la majorité et à la minorité n'est pas divulguée. Tout en gardant constamment à l'esprit que les juges de la Cour africaine

15 Voir à cet effet Art 54 du statut de la Cour internationale de justice ; art 24 du statut de la Cour interaméricaine des droits de l'homme et Art 22 du règlement intérieur de la Cour européenne des droits de l'homme.

16 Règle 67 alinéa 2 du Règlement intérieur (RI) de la Cour africaine des droits de l'homme et des peuples (n 14).

siègent à titre individuel, toutes ces précautions paraissent primordiales du point de vue du juge lui-même qui évolue dans un contexte africain particulièrement sensible où les droits de l'homme font souventes fois l'objet d'un instinctif effet de repoussoir de la part des États, notamment dans des affaires à fort enjeu politique, à l'image de celles touchant au contentieux électoral.[17] Au regard de ce qui précède, le secret des délibérations participe à la préservation et au renforcement de l'intégrité judiciaire des juges de la Cour africaine, corollaire naturel de son indépendance dont elle est la traduction concrète, en les protégeant de toute sorte d'influence indue sur les procédures judiciaires, qu'elle soit exercée de manière externe à la suite d'une action éventuelle des parties au litige et/ou d'une tierce personne ou qu'elle soit formulée de nature interne suivant des interactions potentielles que ce dernier serait susceptible d'avoir avec ses pairs relativement au fond d'une affaire enregistrée au rôle de la Cour africaine.

A l'important principe du secret des délibérations, se greffe une autre prérogative non moins importante à savoir l'émission d'opinions séparées. La Cour africaine n'est pas restée en autarcie de ce classicisme puisque le droit des juges de la Cour africaine aux opinions séparées fut consacré dans le Protocole de Ouagadougou. Avant de présenter la disposition principale de ce Protocole qui l'encadre, il semble préalablement nécessaire de procéder à quelques observations sur les rapports ambiguës voire contradictoires qu'entretiennent ces deux principes. Bien que s'inscrivant dans la réalisation d'un objectif commun, à savoir l'objectivisation de l'indépendance judiciaire du juge international, il n'en demeure pas moins que la possibilité qui lui est reconnue d'émettre des opinions séparées remet incidemment en cause le secret du délibéré. Cette «trahison» inférée ou cette «infidélité» caractérisée des opinions séparées vis-à-vis du secret des délibérations s'apprécie à la lumière de l'étalage ou du déballage, sur la «place publique», des divergences voire des différences d'opinions, supposées rester confidentielles, entre les juges. Pis, d'aucuns estiment qu'un «trop grand nombre d'opinions dissidentes jointes à un arrêt donné peut diminuer l'autorité de ce dernier. En effet, les décisions rendues à une majorité d'une ou deux voix ont évidemment moins de force que celles faisant l'unanimité parmi les juges».[18] Ainsi, de l'avis du professeur J-F Flauss, les opinions séparées créent, à l'occasion de certaines affaires, «une réelle cacophonie [du fait du leur multiplication revêtant de plus en plus souvent] les allures d'un véritable contre arrêt

17 Voir *Ajavon c. Bénin* (fond et réparations) arrêt du 29 mars 2019 requête n°013/2017 ; *Actions pour la protection des droits de l'homme (APDH) c. Côte d'Ivoire* (2016) 1 RJCA 697. S'agissant notamment de cette affaire, lire l'article de EJ Tiehi 'L'exécution minimaliste de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire 'Actions *pour la protection des droits de l'homme (APDH) c. République de Côte d'Ivoire*' : much ado about nothing ?' (2020) 18(1) *Revue des Droits de l'Homme* 260-286.

18 M Eudes 'La légitimité du juge de la Cour européenne des droits de l'homme. Observations sur la légitimité et l'indépendance du Juge de Strasbourg' (2020) 13(1) *Revue Québécoise de Droit International* 151.

ou d'une dissertation juridique traquant et dénonçant systématiquement toutes les déficiences de la solution retenue par la Cour».[19] C'est la raison pour laquelle, en l'absence de texte spécifique[20] sur l'éthique judiciaire des juges de la Cour africaine encadrant plus ou moins les opinions séparées, sur le modèle de la Cour européenne des droits de l'homme (CourEDH),[21] ceux-ci sont tenus d'y recourir avec prudence et tempérance, d'en user avec tenue et retenue, et non d'en abuser avec violence et virulence, au risque de «nuire à l'institution qu'ils représentent, la perte de la crédibilité d'une juridiction ayant des conséquences désastreuses sur la cause qu'elle est censée protéger».[22] Au-delà de cette approche objectivement critique, la possibilité offerte aux juges d'émettre des opinions séparées, ou des opinions «alternatives»[23] à celle de la majorité doit être plutôt vue comme une expression de l'indépendance personnelle des juges, émanation directe de l'exercice de leur liberté d'expression d'où son ancrage solide, à l'instar du secret des délibérations, dans la pratique des juridictions internationales.[24] Par cette liberté d'expression, chaque juge de la Cour africaine «peut décider de préciser dans une opinion séparée les particularités d'un système juridique [ou d'une question juridique] qu'il connait bien et qui aurait pu ne pas être complétement bien perçu par ses collègues. Par [ce] biais, il peut ainsi s'attarder sur certaines traditions ou pratiques nationales pertinentes dans la compréhension de l'affaire soumise à la Cour».[25] La disposition pertinente octroyant aux juges la faculté d'émettre des opinions séparées est l'article 28 du Protocole de Ouagadougou qui, en son alinéa 7, stipule que «Si l'arrêt n'exprime pas, tout ou en partie, l'opinion unanime des juges, tout juge a le droit d'y joindre une opinion individuelle ou dissidente». Précisons que deux catégories d'opinions séparées se dégagent de cette disposition à savoir l'opinion individuelle et l'opinion dissidente.

19 J-F Flauss 'Actualité de la Convention européenne des droits de l'homme : Convention européenne des droits de l'homme et droit administratif' (1996) 12 *L'actualité juridique Droit administratif* 1005.

20 Cette absence de texte spécifique encadrant la pratique des opinions séparées est quelque peu atténuée par la règle 9 du RI de la Cour africaine.

21 Voir *Résolution sur l'éthique* judiciaire, adoptée en 2021, qui interdit clairement les opinions séparées à la marge de l'éthique judiciaire. Le champ d'application de cette *Résolution sur l'éthique judiciaire* de la CourEDH est donc plus vaste que la règle 9 du RI de la Cour africaine qui ne les prohibe pas tout en empêchant les juges qui s'y pratiquent de participer à une affaire.

22 N Peltier 'Les opinions séparées des juges à la Cour africaine des droits de l'homme et des peuples' in G Le Floch (dir) *La Cour africaine des droits de l'homme et des peuples* (2023) 249.

23 W Mastor 'Les opinions séparées sont-elles raisonnables?' (2015) 5 *Revue de la Recherche Juridique* 2117.

24 À l'exception de la Cour de justice de l'Union européenne ou de quelques juridictions d'intégration, telles que la Cour de la CEDEAO, toutes les juridictions internationales confèrent à leurs membres la possibilité d'émettre des opinions séparées.

25 Eudes (n 18) 151.

Si opinion individuelle[26] et opinion dissidente[27] ne sont pas fondamentalement opposés tant au regard de leur rôle, qu'eu égard à leur objet, celles-ci n'étant que la substantifique moelle de «l'utile commentaire de la décision qu'elles accompagnent»,[28] des nuances peuvent, sinon, doivent, en revanche, être établies entre ces deux termes du point de vue de leur contenu terminologique. En effet, l'opinion individuelle, encore appelée opinion concordante,[29] est une opinion dans laquelle les juges, quoiqu'ayant participé au vote majoritaire, souhaitent exprimer leur réticence sur certains motifs, en apportant des rectifications qu'ils estiment profitables à la décision,[30] en contestant une partie du raisonnement,[31] en développant des points non abordés dans la décision,[32] en proposant une autre base juridique sur laquelle la Cour aurait pu se fonder.[33] Somme toute, l'opinion individuelle vise à nuancer, à clarifier, à éclairer les parties sur le sens et la pertinence de la décision.[34] Quant à l'opinion dissidente, elle permet, au contraire, au juge qui en est l'émetteur de se mettre en marge de la décision majoritaire c'est-à-dire de «s'écarter de la vision

26 L'opinion individuelle est celle d'un juge qui a voté avec la majorité en ce qui concerne le dispositif du jugement, mais qui n'accepte pas tout ou partie de l'exposé des motifs. Ce juge peut ainsi justifier son dissentiment partiel et faire connaître les motifs qui l'ont conduit à accepter quand même le dispositif. Voir Salomon (n 2) 782.

27 L'opinion dissidente est celle d'un juge qui n'a pas voté avec la majorité parce qu'il est en désaccord avec le dispositif de la décision et, par conséquent, avec ses motifs. Ce juge peut ainsi donner les raisons de son dissentiment et rendre publics les points ayant donné lieu à controverse parmi les juges. Voir Salomon (n 2) 782.

28 A Ramseir & D Scalia 'Quand la dissidence devient le jugement' (2020) 19 *Champ pénal/Pénal Field* para 41. Ce document est disponible sur https://journals.openedition.org/champpenal/11968 (consulté le 16 mars 2024).

29 Peltier (n 22) 235-258.

30 Opinion individuelle du juge Blaise Tchikaya jointe aux ordonnances rendues dans l'affaire *Bernard Anbataayela Mornah* Bénin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Tanzanie et Tunisie, requêtes n° 0112020 et n° 00212020, dans laquelle le juge regrette que la décision ait été rendue sous forme d'ordonnance et non pas sous la forme d'un arrêt.

31 Opinion individuelle du juge Fatsah Ouguergouz dans l'affaire *Efoua M'bozo O Samuel c. Parlement panafricain* du 30 septembre 2011 requête 010/2011. Par le biais de cette opinion individuelle, le juge Ouguergouz regrettait que l'affaire ait l'objet d'un traitement judiciaire, la Cour étant manifestement incompétente, tout en souscrivant au sens pris par la décision.

32 Opinion individuelle du juge Ngoepe jointe à l'affaire *Christopher Mtikila c. Tanzanie* du 14 juin 2013 requête n° 011/2011, 'dans laquelle le juge éprouva le besoin de rédiger une opinion sur une problématique qui fruste la Cour depuis quelques temps et qui s'est manifestée au cours de l'élaboration de cet arrêt d'une manière différente des précédentes', à savoir l'ordre d'examen du couple recevabilité/compétence ; opinion individuelle du juge Blaise Tchikaya jointe à l'arrêt *Evodius Rutechura c. Tanzanie* du 26 février 2021 requête n° 004/2016, dans laquelle le juge regrette la caractère trop laconique du dispositif et tente de le compléter en abordant des questions tenant à la peine de mort.

33 Opinion individuelle du juge Nutsinzi dans l'affaire *Femi Femana c. Union africaine* du 26 juin 2016 requête n° 011/2011, dans laquelle le juge proposait une autre base juridique pour fonder l'incompétence de la Cour africaine.

34 T Ondo 'Les opinion séparées des juges de la Cour africaine des droits de l'homme et des peuples' (2015) 104 *Revue Trimestrielle des Droits de l'Homme* 951.

dominante».[35] Cette dissidence dont la portée est variée[36] peut s'exprimer sous différentes formes. À cet effet, les juges peuvent simplement désapprouver les motifs de la décision,[37] regretter le manque de clarté dans le raisonnement ou dans l'exposé des arguments tout en mettant de l'ordre dans un arrêt que les juges dissidents trouvent désorganisés,[38] compléter un arrêt que les juges dissidents estiment lacunaire dans l'analyse et la motivation.[39] Qu'elles soient individuelles ou dissidentes, les opinions séparées participent de la même fonction, celle d'accompagner l'arrêt et d'enrichir le débat doctrinal en reconnaissant le droit à la liberté d'expression des juges de la Cour africaine dans le processus de construction des arrêts rendus.[40]

Outre les droits qui leur sont reconnus, l'indépendance personnelle des juges de la Cour africaine passe aussi par le respect d'un certain nombre d'obligations à leur charge.

2.1.2 Les obligations imposées aux juges

Pour garantir leur indépendance personnelle, les juges sont astreints à des obligations contenues dans les instruments juridiques de la Cour africaine. Ces obligations, souvent passées sous silence, sont subrepticement enserrées dans la prestation de serment requise par l'article 16 du Protocole de Ouagadougou. Ainsi, «[à]près leur élection, les juges prêtent serment d'assurer leurs fonctions en toute impartialité et loyauté». La prestation de serment revêt une dimension symbolique et porte en elle une valeur juridique. Une dimension symbolique, parce que la prestation de serment est un véhicule de symboles qui visent à rendre sensible ce qui ne l'est pas par nature. Tel est le cas, par exemple, de la «barre» ou la «barrière» dans la salle d'audience[41] qui, à première

35 Ondo (n 34) 953.

36 À travers une opinion dissidente, les juges peuvent annoncer leur désaccord avec la majorité de manière frontale, peuvent être plus tempérées en émettant seulement des opinions partiellement dissidentes. Voir respectivement l'opinion individuelle de la juge Chafika dans l'affaire *Glory C. Hossou et Landry Adelakoun c. République du bénin* du 2 décembre 2021 requête n° 016/2020 : 'je réfute totalement la motivation et le dispositif de l'arrêt, adoptés dans l'affaire *Glory C. Hossou et Landry Adelakoun c. B*énin à la moitié de dix voix contre une (1)' ; Opinion partiellement dissidente du juge Blaise Tchikaya jointe à l'affaire *Robert Richard c. République unie de Tanzanie* du 2 décembre 2021 requête n° 035/2016, dans laquelle le juge approuve l'arrêt dans l'ensemble mais se détache du dispositif.

37 Opinion dissidente du juge Ben Achour jointe à l'affaire *Léon Mugesera c. Rwanda* du 27 novembre 2020 requête n° 012/2017, contestant une partie des motifs invoqués par la Cour africaine aux articles 73 et 74 de la décision.

38 Opinion dissidente de la juge Chafika Bensaoula jointe à l'arrêt *Akwasi Boateng et 351 autres c. République du Ghana* du 27 novembre 2020 requête n° 059/2016, où la juge reproche à la Cour africaine des 'zones d'ombre' dans la narration des faits et donc dans l'exposé fait par la Cour africaine en tenant de corriger ce qu'elle estime être une imprécision importante.

39 Opinion dissidente du juge Ouguergouz jointe à l'affaire *Ekollo Mundi Alexandre c. Cameroun et Nigéria* du 23 septembre 2011 requête n° 008/2021 para 21.

40 Peltier (n 22) 241.

41 Cette barre ou cette barrière est, de nos jours, remplacée parfois par un espace vide entre les premiers rangs du public et la Cour.

vue, ne suscite pas d'intérêt particulier mais qui, dans l'esprit du *décorum* ou du cérémonial entourant la prestation de serment, symbolise la séparation entre le public et la Cour : entre d'un côté le temps (du) public et de l'autre le temps (du) judiciaire. Le temps judiciaire étant entendu comme un espace de justice déconnecté du temps commun et rythmé par la procédure qui met en veilleuse les affects en donnant toute place au droit rien qu'au droit.[42] Par ailleurs, une dimension juridique, car elle constitue l'acte de prise de fonction des juges de la Cour africaine, par lequel le juge s'engage solennellement devant la communauté, et en l'occurrence la communauté internationale, à exercer ses fonctions avec «impartialité et loyauté». On aurait pu s'étonner de l'absence du qualificatif *indépendance*, aux côtés de ceux d'impartialité et de loyauté. Cette omission volontaire tient simplement au fait que l'indépendance est un concept générique qui les intègre dans son approche définitionnelle. L'indépendance présuppose aussi bien l'existence de droits au profit du juge que de devoirs à sa charge tandis que l'impartialité,[43] notion qui lui est voisine, regroupe exclusivement l'ensemble des devoirs s'imposant au juge. En d'autres termes, l'impartialité est caractérisée par l'état d'esprit du juge, à partir de son horizon intérieur et non par l'existence d'une pression exercée de l'extérieur sur ce dernier.[44] Quant à la loyauté, elle signifie que lorsque le juge prête serment, peu importe la formule consacrée à cet effet, cette promesse qui est contenue dans le serment l'engage envers l'État de droit[45]. Ainsi, sur la base de cette prestation de serment, les juges de la Cour africaine sont, en conséquence, tenus de respecter deux obligations principales à savoir l'obligation d'incompatibilité et l'obligation de récusation.

L'obligation d'incompatibilité est prévue à l'article 18 du Protocole de Ouagadougou et, de manière détaillée, la règle 5 du RI de la Cour africaine qui dispose que «les juges de la Cour ne peuvent, pendant la durée de leur mandat, exercer aucune activité de nature à porter atteinte aux exigences d'indépendance et d'impartialité liées à leurs fonctions». Il s'agit notamment de fonctions politiques, diplomatiques, administratives ou de conseiller juridique au sein d'un gouvernement.[46] En définitive, une fois la prestation de serment effectuée, chaque juge doit déclarer à la Cour africaine toute activité pouvant

42 Voir https://www.icc-cpi.int/fr/news/icc-prestation-de-serment-des-juges#:~:text=En%20ce%20qui%20concerne%20la,respecterai%20le%20caractère%20confidentiel%20des (consulté le 24 janvier 2024). Pour aller plus loin sur la définition du serment, lire R Verdier *Le Serment: signes et fonctions* (1992) 458.

43 L'impartialité s'entend d'une absence de parti pris, de préjugé, de conflit d'intérêts chez un juge, un arbitre, un expert ou une personne en position analogue par rapport aux parties se présentant devant lui ou par rapport à la question qu'il doit trancher. Voir Salmon (n 3) 562.

44 F Gelinas 'Independence and impartiality in international adjudication' in A Dodek et L Sossin (eds) *Judicial independence in context* (2010). Ce document est disponible sur https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335788 (consulté le 2 février 2024) ; voir aussi W Lucy 'the possibility of impartiality' (2005) 25 *Oxford Journal of Legal Studies* 3-31.

45 Voir le document disponible sur https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf (consulté le 10 février)

46 Règlement intérieur (n 14) règle 5 para 2.

constituer une source d'incompatibilité. C'est fort de cette obligation que le juge Rafaa Ben Achour[47] fut «contraint» de renoncer, après son élection en juin 2014, à son poste de conseiller de l'ancien président tunisien Béji Caïd Essebsi, le 1 avril 2015.[48] Quant à l'obligation de récusation, elle est énoncée à l'article 22 du Protocole de Ouagadougou. En vertu de cette obligation, dans le cas où un juge possède la nationalité d'un État partie à une affaire, il se récuse, se mettant, dès lors, à l'abri d'éventuelles pressions, sous toutes leurs formes et dans toutes leurs manifestations, de la part de son État de nationalité. Par cette récusation, comme en témoignent les lignes de Marina Eudes, «le gouvernement de son pays d'origine ne pourra pas lui reprocher un vote défavorable dans une affaire importante, vote qui serait peut-être sanctionné par le choix d'un autre candidat lors des élections suivantes à la Cour».[49] Selon Jiri Malenovsky, le modèle «récusatoire» est à privilégier dans la mesure où:

> la règle relative au droit de siéger du «juge national» [est née] (…) à l'époque où les règlements des différends entre États étaient principalement régis de manière bilatérale, reposant sur des considérations tenant au respect de la réciprocité et de l'égalité souveraine. (…) Or, cette situation n'a pas vraiment d'équivalent s'agissant des juridictions régionales des droits de l'homme. Si la présence d'un «juge national» dans une procédure déclenchée par une requête individuelle poursuivait l'objectif d'exposer aux juges la position de l'État défendeur, cela affaiblirait nécessairement la position du requérant qui, n'ayant pas la qualité d'État, ne bénéficie pas du même privilège. D'un point de vue conceptuel, la participation du «juge national» va donc à l'encontre du principe de l'égalité des armes.[50]

Si ce modèle peut être naturellement privilégié pour les avantages qu'il procure conformément aux raisons ci-dessus présentées, il est toutefois à relativiser au regard des inconvénients qu'il provoque. En effet, le modèle «accusatoire», contrairement au modèle «participatoire» prive une juridiction, en l'espèce la Cour africaine, de l'opportunité d'être éclairé par le juge national sur un aspect du droit de son État de nationalité.[51]

47 Le juge Rafaâ Ben Achour fut élu en juin 2014 et réélu en 2021.

48 Voir l'article disponible sur https://www.webdo.tn/fr/actualite/national/tunisieselon-le-jort-rafaa-ben-achour-conseiller-aupres-de-beji-caid-essebsi-a-demissio nne/167111 (consulté le 20 février).

49 Eudes (n 18) 150-151.

50 Malenovsky (n 3) 107-108.

51 Ce modèle 'participatif' est en vigueur au sein de la Cour européenne des droits de l'homme (CEDH) au sein de laquelle le juge national est systématiquement présent dans la composition de la Cour pour l'examen d'une affaire, lorsqu'elle siège en Chambre de sept juges ou en grande Chambre de 17 juges. Pour en savoir davantage sur les motifs de récusation du juge au sein de la CEDH, voir article 28 du Règlement de la CEDH du 28 mars 2024.

Outre les garanties fonctionnelles, l'indépendance personnelle des juges de la Cour africaine est confortée par des garanties attachées à leur statut de fonctionnaire international.[52]

2.2 Les garanties statutaires de l'indépendance des juges

Exerçant leurs fonctions au sein d'une juridiction internationale,[53] les juges de la Cour africaine sont, par ricochet, des fonctionnaires internationaux c'est-à-dire un personnel employé par une organisation internationale (OI), doté d'un régime statutaire ou spécifique contractuel, et exerçant une fonction au service de l'ensemble des États membres composant cette organisation. A ce titre, ils bénéficient, à l'instar de tout fonctionnaire international, d'avantages tant classiques (2.2.1) que spécifiques (2.2.2).

2.2.1 Les avantages classiques

Les prérogatives classiques sont celles dont jouissent assez généralement les fonctionnaires travaillant au nom et pour le compte d'OIs. Ces prérogatives classiques sont constituées de privilèges et d'immunités diplomatiques, sur le modèle de celles qui sont accordées aux chefs de missions diplomatiques sur le fondement de la Convention de Vienne de 1961 sur les relations diplomatiques et, en particulier de la Convention générale de l'Organisation de l'unité africaine (OUA) sur les privilèges et immunités. Dans le cadre des juridictions internationales, en l'espèce de la Cour africaine, l'ensemble du personnel judiciaire,[54] y compris les juges, bénéficient d'un certain nombre de protections juridiques visant à assurer leur indépendance vis-à-vis des États aussi bien pendant l'exercice de leur mandat qu'après l'expiration de leur mandat. Ainsi, selon, le Protocole de Ouagadougou:

> [d]ès leur élection et pendant toute la durée de leur mandat, les juges à la Cour jouissent des privilèges et immunités en Droit international au personnel diplomatique. Les juges à la Cour ne peuvent, en aucun moment, même après l'expiration de leur mandat, être poursuivis en raison des votes ou des opinions émis dans l'exercice de leurs fonctions.[55]

52 S'entend d'une personne chargée, en vertu d'un accord entre États ou par une organisation internationale, d'exercer pour leur compte et sous leur contrôle, sur une base statutaire, une activité d'intérêt international d'une durée déterminée ou indéterminée. Voir Salomon (n 2) 508.

53 Une juridiction internationale est une institution investie du pouvoir de juger, c'est-à-dire de trancher des litiges entre États par décision obligatoire, qu'il s'agisse d'un organe arbitral ou judiciaire ou de tout autre organisme disposant de pouvoirs juridictionnels. Voir Salmon (n 3) 628.

54 Il faut ajouter le Greffe et son adjoint. Pour Marina Eudes, l'octroi de ces immunités et privilèges à ces fonctionnaires de la Cour africaine trouve son explication dans le fait qu'ils jouent un 'rôle important de gardien de la jurisprudence'. Voir Eudes (n 19) 148-149.

55 Art 17(3) et 4 du Protocole de Ouagadougou.

Avant de présenter l'étendue de ces privilèges et immunités qui relèvent d'ailleurs du droit international coutumier,[56] faudrait-il rappeler qu'ils sont octroyés aux juges :

> [...] dans l'intérêt de [de la Cour africaine] et non pour leur bénéfice personnel. [C'est d'ailleurs la raison pour laquelle], le secrétaire général administratif a le droit et le devoir de lever l'immunité accordée à un fonctionnaire dans tous les cas où il estime que cette immunité empêcherait que la justice suive son cours et qu'elle peut être levée sans porter atteinte aux intérêts de l'organisation de l'Unité africaine. À l'égard du Secrétaire général administratif, le Conseil des Ministres a qualité pour prononcer la levée de l'immunité.[57]

Ainsi, conformément à l'article VI de la Convention de l'OUA, les juges de la Cour jouissent d'une immunité de juridiction pour les paroles, les écrits, et tous les actes dont ils sont responsables dans l'exercice de leurs fonctions officielles. En outre, ils seront exonérés de tout impôt sur les traitements et émoluments versés par l'Union Africaine ; ils seront exempts de toute obligation relevant du service national ; ils ne seront soumis, en plus de leurs conjoints et des membres de leurs familles vivant à leur charge, aux dispositions limitant l'immigration et aux formalités d'enregistrement des étrangers. De plus, les juges de la Cour africaine jouiront, en ce qui concerne les facilités de change, des mêmes privilèges que les fonctionnaires d'un rang comparable appartenant aux missions diplomatiques accréditées auprès du gouvernement intéressé ; ils jouiront, ainsi que leurs conjoints et les membres de leurs familles vivant à leur charge, des mêmes facilités de rapatriement que les agents diplomatiques en période de crise internationale ; ils jouiront du droit d'importer en franchise leur mobilier et leurs effets à l'occasion de leur première prise de fonction dans le pays intéressé. Enfin, les documents de la Cour africaine et de ses membres dont les juges, sont inviolables et leurs correspondances et communications officielles ne peuvent être retenues ou censurées.[58] Somme toute, l'ensemble de ces privilèges et immunités à l'intention des juges de la Cour africaine constitue un élément incontournable de leur indépendance personnelle en leur offrant une entière liberté, notamment de parole, pendant et après l'exercice de leur mandat.

Partant de ce qui précède, nous pouvons naturellement conclure que l'indépendance personnelle des juges de la Cour africaine s'arc boute et «puise une garantie supplémentaire»[59] dans les privilèges et immunités diplomatiques auxquels se greffent d'autres prérogatives, plus spécifiques, qui leur sont accordées par l'UA.

56 Voir Affaire relative au mandat d'arrêt du 11 avril 2000 *(République démocratique du Congo c. Belgique)* CIJ (14 février 2002) (2002) arrêt CIJ recueil p 3 25.

57 Art V al. 4 de la Convention générale de l'OUA sur les privilèges et immunités.

58 Convention générale de l'OUA sur les privilèges et immunités (n 57) art. V § 2.

59 JM Essein *Liber amicorum* (1995) 426-427.

2.2.2 *Les avantages spécifiques*

Afin de ne pas être soumis à des risques de pressions tous azimuts de la part des États, d'un organe de l'UA ou d'une personne, les juges de la CourADHP bénéficient de nombreux avantages. Ces avantages sont essentiellement financiers et accessoirement sécuritaires. Au titre des avantages financiers,[60] les juges de la Cour africaine bénéficient d'une indemnité d'intersession qui est de 30% des 90% du salaire mensuel du président de la Cour africaine pour les activités à assumer pendant l'intersession ;[61] d'une indemnité mensuelle de judicature de 10% des 90% du salaire mensuel du président de la Cour ;[62] d'une indemnité journalière de subsistance conformément au Statut et règlement de l'UA.[63] Aussi, bénéficient-ils d'un montant forfaitaire pour les frais administratifs d'un montant de 500 dollars américains par mois ;[64] d'honoraires pour les sessions d'un montant de 500 dollars américains par jour durant les sessions ordinaires de la Cour africaine.[65] Enfin, les juges de la Cour ont droit à des gratifications, une assurance vie et une assurance-maladie.[66] Un certain nombre de frais annexes sont également pris en charge par l'UA, qu'il s'agisse des frais de séjour dans le cadre de missions officielles ou de frais de transport en première classe.[67]

Ces avantages financiers particulièrement alléchants sont complétés par des mesures de protection extraordinairement poussées dont bénéficient les juges de Cour africaine dans le cadre de l'accord de siège conclu entre l'UA et le gouvernement de la République-Unie de Tanzanie relatif au siège de la Cour. Ainsi, conformément à l'alinéa 3 de l'article XIII de cet accord de siège, «le gouvernement assure la sécurité et la protection des membres de la Cour et de la résidence du Président, des logements des juges et de la résidence du greffier». Concernant plus particulièrement la protection de leur intégrité physique, les juges de la Cour disposent individuellement d'une garde rapprochée. Cette protection si spéciale accordée aux juges pourrait, *prima facie*, surprendre en comparaison au traitement réservé notamment à leurs homologues européens. Cependant, elle pourrait s'expliquer, en partie, par un contexte sécuritaire encore relativement critique marqué par la présence résiduelle, dans cet espace sous-régional, de groupes

60 Union Africaine Rapport sur les avantages des juges de la Cour africaine des droits de l'homme et des peuples, Conseil Exécutif, 41e session ordinaire 20 juin-15 juillet 2022, Ex. Cl/1378 (XLI). Ce document est disponible sur https://portal.africa-union.org/DVD/Documents/DOC-AU-WD/EX%20CL%201378%20(XLI)%20_F.pdf (consulté le 10 juin 2024).

61 Union Africaine (n 60) 1 para 5 (i).

62 Union Africaine (n 60) 1 para 5 (ii).

63 Union Africaine (n 60) 2 para 5 (vi).

64 Union Africaine (n 60) 2 para 5 (iii).

65 Union Africaine (n 60) 2 para 5 (v).

66 Union Africaine (n 60) 2 para 5 (vii et viii).

67 Union Africaine (n 60) 2 para 5 (ix).

terroristes et extrémistes violents.[68] Qu'à cela ne tienne, ces avantages témoignent de la volonté affirmée de l'UA et de ses États membres d'assurer aux juges de la Cour un certain confort financier et une absolue garantie sécuritaire de nature à les aseptiser contre tous les pesanteurs, notamment politiques, de la part des États dans le cadre de médiatiques affaires qu'ils auront à traiter.

Nonobstant tous ces garde-fous fonctionnels et statutaires, globalement salutaires, le système de garanties mis en place par l'UA visant à assurer l'indépendance des juges de la Cour brille encore par certaines limites donnant le sentiment légitime d'une symphonie toujours inachevée.

3 DES GARANTIES DE L'INDÉPENDANCE DES JUGES ENCORE INSUFFISAMMENT ORGANISÉES

Des zones d'ombre subsistent quant aux garanties d'indépendance mises en place par le Protocole de Ouagadougou au profit des juges de la Cour africaine. Ces insuffisances observées quant à l'indépendance de ces juges sont perceptibles en amont (3.1) et visibles en aval de leur élection (3.2).

3.1 Les insuffisances perceptibles en amont de l'élection des juges

Les insuffisances perceptibles en amont de l'élection des juges de la Cour africaine s'observent, d'une part, par la lisibilité parcimonieuse du processus de nomination des candidats nationaux (3.1.1) ainsi que par une participation minimaliste de la société civile à ce processus (3.1.2).

3.1.1 Une lisibilité parcimonieuse du processus de désignation des candidats

C'est un truisme de dire que la procédure précédant l'élection des juges[69] se caractérise par un manque de prévisibilité et ce, d'autant plus que le Protocole de Ouagadougou est, sans surprise, laconique sur la question. À cet égard, l'article 12 dudit protocole se contente d'enjoindre à chaque État partie de «présenter jusqu'à trois candidats dont au moins deux doivent être ressortissants de l'État qui les présente. Los de la présentation des candidatures, il sera dûment tenu compte de la représentation adéquate des deux sexes». Ce laconisme du Protocole de Ouagadougou va de pair avec le silence des règles et

68 A ce sujet, l'on peut se référer à l'impact des attaques terroristes comme ceux du 7 août 1998, pendant lesquelles des camions piégés explosaient devant les ambassades américaines à Nairobi au Kenya et Dar es Salam en Tanzanie. Ces attaques, revendiquées par une cellule d'un groupe local d'al-Qaïda, firent 224 morts et plus de 4 000 blessés.

procédures organisant, à l'échelon national, la désignation des candidats au poste de juge de la Cour africaine.

En effet, au-delà des différences constatées d'un État à un autre, «il est clair que la plupart des candidats sont choisis par les gouvernements indépendamment de toute consultation nationale publique. Autrement dit, ce sont bien les autorités politiques qui désignent les candidats au poste de juges à la [Cour], avec les préoccupations partisanes et d'amitié que cela peut laisser deviner en certains cas».[70] Il en résulte que :

> les gouvernements intéressés tirent largement profit de leur faculté d'opérer la sélection des candidats de façon autonome, sur la base de qualifications définies plutôt vaguement en droit international, en ayant souvent tendance à présenter des «juristes d'État», c'est-à-dire des professionnels ayant entretenu des relations particulières avec les structures du pouvoir d'État et suffisamment à l'écoute des intérêts poursuivis par ces structures.[71]

Cette opacité qui entoure les processus nationaux de désignation des candidats aux fonctions de juge au sein de la Cour est telle qu'elle se traduit par une difficulté voire une impossibilité d'illustrer nos propos par des exemples précis ou des cas pratiques spécifiques. Or, il est indéniable que la transparence de ces processus a, à terme, une incidence indirecte sur l'indépendance des juges par la qualité des profils qu'elle suscitera, par l'inclusivité des candidats qu'elle favorisera et par la crédibilité qu'elle fera naître chez les justiciables africains. D'abord, par leur qualité, ces processus doivent s'assurer que les candidats proposés soient d'éminents juristes jouissant d'une compétence avérée en droit international des droits de l'homme *lato sensu* et en droit africain des droits de l'homme *stricto sensu*. Ensuite, par leur inclusivité, ces processus doivent veiller à ce que les candidats proposés soient représentatifs de l'ensemble du monde juridique.[72] L'idée centrale étant, en définitive, de garantir la crédibilité de ces processus en décelant ou en levant, respectivement, toute accointance politique ou tout doute d'appartenance politique de l'un quelconque des juges de la Cour. Ceci dans l'hypothèse où ce dernier s'engagerait dans une activité professionnelle à l'occasion de laquelle il exprimerait en public *via* les médias, soit par écrit, soit par des actions publiques ou

69 Pour approfondir les lectures sur l'élection des juges de la CourADHP, notamment sur la procédure suivant la désignation des candidats, il est fortement recommandé de lire, en sus du Protocole de Ouagadougou et du RI de la CourADHP, les autres textes pertinents qui constituent le droit électoral applicable en la matière à savoir, entre autres, les décisions du Conseil exécutif et de la Conférence des Chefs d'État et de gouvernement ainsi que les notes verbales du Bureau du Conseiller juridique. Voir SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20(1) *African Human Rights Law Journal* 1-40. Ce document est disponible sur https://scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962020000100002&lng=en&nrm=iso (consulté le 31 octobre 2024).

70 Eudes (n 18) 146.

71 Malenovsky (n 3) 134.

72 Certes, les magistrats, mais aussi, les professeurs d'universités, les avocats et les fonctionnaires internationaux etc.

par tout autre moyen, des opinions qui seront objectivement en porte-à-faux avec son indépendance personnelle. En fait, «il ne suffit que les juges (…) soient indépendants (…), encore faut-il qu'ils le paraissent, de manière à ne donner prise à aucun soupçon».[73]

Fort de ce postulat, des propositions peuvent être formulées afin d'améliorer les procédures nationales de sélection des candidats aux fonctions de juge à la Cour de sorte à aiguillonner les États dans le sens du renforcement de la transparence et de l'efficacité de ces procédures. Ces propositions s'appuient sur celles de sélections au sein des autres juridictions internationales.[74] Ainsi, il pourrait être procédé à des appels à candidature notamment dans une presse spécialisée[75] ou opter pour la constitution d'un groupe d'experts nationaux et/ou internationaux c'est-à-dire une «autorité éminente extérieur au gouvernement au sujet des candidats proposés».[76] Cette proposition permettrait de «s'assurer de la qualité des candidats retenus, qualité appréciée par des personnalités elles-mêmes reconnues et a priori moins sujettes à des préoccupations partisanes».[77] Ce groupe d'experts devra notamment s'assurer que le processus soit ouvert à tous les candidats potentiels qui répondent effectivement aux conditions telles que définies dans le Protocole de Ouagadougou.[78] Il devra aussi veiller à ce que soit rendu public, après la phase de dépôt des candidatures, les informations des candidats relativement à leurs compétences, leur expertise, leurs expériences en matière de droits de l'homme ainsi que les raisons pour lesquelles ils satisfont aux conditions pour être désignés comme candidats aux postes de juges à la Cour. Enfin, un autre point[79] qui nous semble devoir retenir l'attention dans le processus de sélection est bien évidemment l'ordre de présentation sur les listes en ce qu'elle pose la question de l'égalité des candidatures. En effet,

> […] il semble que cet ordre ne soit pas anodin, la préférence du gouvernement allant dans la première nommée, au détriment des autres, qui ferait alors office, volontairement ou non de figurants. Or, c'est généralement le candidat ainsi choisi qui est le plus souvent élu (…). Dans ces conditions, il pourrait arriver que des juristes de qualité refusent tout simplement de figurer sur la liste de candidatures, en apprenant que leur gouvernement a déjà fait son choix et qu'ils n'ont que peu de chance d'accéder à la fonction [de juge de la Cour].[80]

Pour rétablir l'égalité entre les candidats, une liste par ordre alphabétique peut être établie de sorte à ne pas non seulement

73 JA Carillo-Salcedo 'Quelle juge pour la nouvelle Cour européenne des droits de l'homme?' (1997) 9 *Revue Universelle des Droits de l'Homme* 3.

74 Voir les procédures de sélection et de nomination des juges au sein de la CourEDH et de la Cour pénale internationale.

75 Eudes (n 18) 142.

76 Eudes (n 18) 143.

77 Eudes (n 18) 144.

78 Protocole de Ouagadougou (n 55) art 11.

79 L'égalité des sexes est au cœur de la Cour au regard de la composition des juges. A date, sur les onze juges qui composent la Cour, il y a 5 femmes pour 6 hommes.

80 Eudes (n 18) 145.

privilégier le «candidat officiel ou naturel» de l'État en question mais aussi à ne pas orienter le vote des États membres de l'UA. L'ensemble de ces propositions pourront être revêtues d'une force juridique et symbolique si elles sont adossées à une décision de la Conférence des chefs d'États et de gouvernement de l'UA.[81]

Quid de la participation de la société civile à ce processus ?

3.1.2 Une participation minimaliste de la société civile

Parler d'une participation minimaliste de la société civile est, en réalité, un euphémisme tant celle-ci demeure quasi-inexistante. En effet, il est déplorable de constater que les organisations nationales de la société civile (OSCs) ne sont pas véritablement associées au processus de sélection et de nomination des candidats au poste de juges de la Cour africaine. Les OSCs bénéficient d'une expertise dans le domaine des droits de l'homme, d'une crédibilité auprès du grand public qui les autorise légitimement à être associée à toutes les phases de ce processus, en particulier l'assistance aux États pour la présentation des candidatures. En d'autres termes, l'État doit requérir l'avis et les opinions de la société civile, notamment celles des représentants de l'ensemble du secteur judiciaire, des organisations des droits de l'homme et autres parties prenantes. À cet effet, elle doit être à même de pouvoir aider à identifier et à encourager les demandes des candidats hautement qualifiés. Les États doivent aider les OSCs à faire circuler les annonces aussi largement que possible et à convaincre les personnes qui satisfont aux critères de faire acte de candidature. Les organisations juridiques professionnelles doivent également être parties prenantes de ce processus afin qu'il soit pleinement inclusif. En effet, de toutes les OSCs, les organisations professionnelles sont les mieux placées pour rassembler les opinions de leurs membres qui peuvent contribuer à évaluer des candidats potentiels de telle sorte que les informations de base pour le processus de désignation soient aussi fiables que possibles. Outre ces organisations, des individus peuvent aussi fournir des informations importantes sur les candidats.[82] En conclusion, des mécanismes nationaux doivent être mis en place afin que la société civile et les organisations professionnelles puissent donner leur avis et des informations substantielles sur les candidatures. Ces avis et opinions pourront être portés à la connaissance des candidats avant la sélection ou l'entretien pour leur permettre d'y répondre ou pour fournir des renseignements complémentaires.

Au niveau régional, s'il faut se réjouir de la mise en place de l'*Initiative d'Arusha*, il convient cependant d'en relativiser la portée. En

81 La Conférence des chefs d'États et de gouvernement de l'UA est l'organe suprême de prise de décision et de définition des politiques de l'UA. Elle est composée des chefs d'État et de gouvernement de tous les États membres. Son rôle est précisé à l'article 9 de l'acte constitutif de l'UA. Elle a, entre autres, la charge de définir les politiques de l'UA, fixer ses priorités, adopter son programme annuel et assurer le contrôle de la mise en œuvre de ses politiques et décisions.

82 Voir le document disponible sur https://www.amnesty.org/fr/wp-content/uploads/sites/8/2021/06/ior630012004fr.pdf (consulté le 31 octobre 2024).

effet, cette initiative demeure très peu connue du public africain auquel elle s'adresse principalement. De plus, son impact au sein des États africains paraît plus que limité dans la mesure où cette initiative se contente bonnement d'identifier, en prévision au processus de nomination, les experts qualifiés et à partager une base de données de ces derniers avec les États pour qu'ils en tiennent compte au cours du processus de nomination. Pour rappel, l'*Initiative d'Arusha* est une initiative de nomination et de sélection des mécanismes africains des droits de l'homme visant à promouvoir les droits de l'homme en soutenant les États parties dans la nomination et la sélection des membres des mécanismes des droits de l'homme en Afrique. Ce faisant, elle a pour objectif de contribuer à l'amélioration de l'efficacité, de l'indépendance et de l'impact de ces mécanismes.[83] C'est ainsi que le 28 mars dernier, l'*Initiative d'Arusha* a annoncé le lancement d'une campagne publique pour l'identification de candidats qualifiés en vue des prochaines élections à la Cour africaine. Pour être davantage efficace, cette initiative devra élargir son cercle de partenaires classiques[84] en établissant des collaborations nouvelles, en autres, avec des OSCs nationales pour un partage d'expériences et de bonnes pratiques sur la meilleure façon d'assurer et de s'assurer de la transparence des processus de désignation des candidats.

Les insuffisances quant aux garanties d'indépendance des juges de la Cour ne sont pas uniquement circonscrites à leur processus de sélection et de nomination. Elles s'étendent aussi après leur élection.

3.2 Les insuffisances visibles en aval de l'élection des juges

Les insuffisances visibles en aval de l'élection des juges de la Cour africaine renvoient à celles qui s'observent après leur prise de fonction. Essentiellement facilitées par le caractère renouvelable du mandat des juges de la Cour (3.2.1), ces insuffisances sont aussi liées au mode de fonctionnement de la Cour (3.2.2).

3.2.1 Les risques sous-jacents au renouvellement de leurs mandats

Selon l'article 15 paragraphe 1 du Protocole de Ouagadougou, les juges de la Cour africaine sont élus pour une période de six ans et rééligibles

83 Au sujet de l'Initiative d'Arusha, voir avec intérêt : https://www.chr.up.ac.za/images/centrenews/2024/French_Arusha_Initiative_Press_Statement_on_Experts_Identification_Campaign_1.pdf (consulté le 10 mars 2024).

84 Les ONGs parties ayant signé l'Initiative d'Arusha lors du lancement de la campagne sont : African Defenders, Centre for Human Rights – University of Pretoria, Centre for Rights Education and Awareness, Coalition for an Effective African Court on Human and People's Rights, Defend Defenders, Initiative for Strategic Litigation in Africa, Institute for Human Rights and Development in Africa, International Service for Human Rights, Pan African Lawyers Union, Robert F. Kennedy Human Rights, Synergia – Initiatives for Human Rights, The Network of African National Human Rights Institutions.

une seule fois. Dit autrement, ils peuvent solliciter, à l'issue du premier terme de leur mandat, l'obtention d'un second mandat de six ans. La durée du mandat des juges de la Cour africaine est similaire à celui de la Cour interaméricaine des droits de l'homme dont le statut prévoit en son article 5 que «les juges de la Cour interaméricaine des droits de l'homme sont élus pour six ans et ne peuvent être réélus qu'une seule fois (…)». Toutefois, cette approche de la Cour africaine diffère de celle de la Cour européenne des droits de l'homme où le mandat des juges est de neuf ans, non renouvelable. À cet égard, il est notable de relever, afin d'élargir la comparaison, que les mandats des juges sont diversifiés et varient selon la nature des juridictions internationales. Ainsi, celui des juges de la Cour pénale internationale est de neuf ans, non renouvelable.[85] Il en va de même pour les juges de la Cour internationale de justice ainsi que ceux du Tribunal international de droit de la mer. Cette démarche comparative dénote une préférence des juridictions internationales[86] pour le mandat unique (non renouvelable). Ce choix trouve sa justification dans deux motivations. La première tient au fait que les juges des juridictions ayant opté pour le mandat unique siègent à temps plein et non à temps partiel. La seconde, qui est sans doute intrinsèquement liée à la première, est inhérente à l'importante charge de travail des juges au regard du nombre de requêtes et la complexité des dossiers à traiter. Indépendamment de ces motifs, il est clair que le mandat unique offre aux juges une sécurité, une stabilité et une tranquillité quant à l'exercice de leurs fonctions.

Attributs que les juges de la Cour africaine pourraient difficilement avoir dans l'hypothèse où ils envisagent de faire acte de candidature pour le renouvellement de leur mandat. En effet, nous ne sommes pas sans ignorer que :

> les fonctions de juges bénéficient d'une image d'honorabilité et de respectabilité et sont généralement bien rémunérées. L'accès à ces fonctions est dès lors très convoité et attire de nombreux candidats qui doivent faire état de hautes qualifications et se soumettre, en règle générale, à une compétition. Cette volonté de réélection peut se révéler préjudiciable à leur indépendance En effet, faire l'objet d'une procédure de sélection équivaut à se soumettre à une autorité détenant le pouvoir de choisir. La composition et la fiabilité de cette autorité revêtent donc une importance cruciale. Il est impératif que ladite autorité soit irréprochable et que son pouvoir soit exercé par des personnes indépendantes et impartiales, en conformité avec des critères précis et objectifs et, en principe, sous le contrôle du public puisque la fonction de juge relève de la fonction publique. Dans l'hypothèse où le juge est nommé à l'issue d'une procédure de sélection contestable et que, dès lors, sa nomination n'était pas évidente, voire juste, et qu'il y avait peut-être d'autres candidats objectivement plus qualifiés que lui, il ne saurait être exclu qu'ensuite l'intéressé se considère, en conscience, comme le débiteur de ceux qui l'ont

85 Art 36 para 9(a) du Statut de Rome portant création de la Cour pénale internationale du 17 juillet 1998.

86 Sauf la Cour de justice de l'Union Européenne et de la Cour de justice de la CEDEAO.

> choisi de manière non impartiale et nourri ainsi à leur égard un sentiment de gratitude non désintéressée.[87]

Si ce sentiment de gratitude des juges ne peut s'exercer directement à l'égard de son État de nationalité en raison de leur obligation de récusation, il peut, en revanche, s'exprimer de façon indirecte par une propension fort affirmée ou une réticence à peine dissimulée à la condamnation d'un État attrait devant la Cour africaine Condamnation pour laquelle leur État de nationalité pourrait avoir un intérêt politique particulier. Par ailleurs, il ne serait pas superfétatoire d'établir un lien entre le nombre de mandats des juges de la Cour africaine et leur attitude dans l'exercice de leur fonction de juger oscillant, au gré des circonstances, entre pusillanimité et audace. En d'autres termes, les juges de la Cour africaine se montrent, parfois dans l'exercice de leur mandat unique ou du second et ultime terme de leur mandat, plus «libres» dans l'expression de leurs opinions, plus «critiques» des incongruités de la Cour voire plus enclins à consacrer des revirements jurisprudentiels significatifs au détriment des États. À cet égard, il sied de rappeler que, dans son arrêt de principe rendu en matière électorale dans l'affaire *Actions pour la protection des droits de l'homme (APDH) c. République de Côte d'Ivoire*, la Cour était composée, sur les neuf juges de la majorité ayant voté en faveur de la violation par l'État défendeur des droits allégués, de sept juges qui étaient en fin de mandat.[88] Bien que cette observation empirique ne puisse être aucunement généralisée à tous les arrêts fondateurs de la Cour, force est cependant de reconnaître qu'elle constitue un précédent majeur à l'orée duquel devront être minutieusement scrutées les relations larvées entre le mandat des juges de la Cour et leur indépendance personnelle.

Les «dangers» afférents à la durée du mandat des juges de la Cour africaine ne manquent pas de faire échos aux implications latentes à l'exercice partiel de leur fonction qui n'est pas sans conséquence sur la perception de leur indépendance.

3.2.2 Les implications latentes de l'exercice partiel de leurs fonctions

En son alinéa 3, l'article 15 du Protocole de Ouagadougou énonce que «[t]ous les juges, à l'exception du Président, exerce leurs fonctions à temps partiel». Ce choix des États parties fut principalement motivé par les contraintes financières de l'UA et les ressources limitées subséquemment accordées à la Cour africaine. Ce mode d'exercice des fonctions des juges de la Cour africaine a, non seulement, des incidences sur la durée des procédures judiciaires mais, également, sur l'indépendance des juges dont l'activité peut être perturbée par l'exercice d'autres activités connexes. Pis, cette situation peut

87 Malenovsky (n 3) 115.

88 Il s'agissait des juges Fatsah Ouguergouz, Vasco Angelo Mwatusse, Gérard Niyungeko, El Hadji Guissé, Solomy Balungi Bossa, Augustino Ramadhani et Elsie Thompson.

également témoigner, aux yeux des justiciables, d'un relatif désintérêt des juges pour leur fonction de juge international. Si l'exercice partiel des fonctions des juges de la Cour africaine pouvait se justifier dans les années qui ont suivi la création de la Cour, par le niveau particulièrement faible de requêtes enregistrées par la Cour africaine, il se serait difficile d'en dire de même plus de 25 ans après sa création. À l'instar de ces consœurs européennes et interaméricaines, les débuts de la Cour africaine furent assez laborieux[89] puisqu'entre 2006 et 2010, elle n'avait été saisie que d'une seule affaire, laquelle s'est d'ailleurs achevée par un arrêt en incompétence.[90] Depuis lors, la Cour africaine a été saisie de plus de 300 requêtes ; chiffres qui, pour une juridiction internationale qui n'a qu'une vingtaine d'années, témoignent d'une activité plus que soutenue.[91] Cet intérêt fut même à la base de réactions épidermiques de certains États[92] qui ont retiré leurs déclarations d'acceptation de la compétence de la Cour.[93]

Par conséquent, le moment semble être venu pour l'UA de modifier cette décision d'exercice à temps partiel des fonctions des juges de la Cour africaine, d'autant plus qu'il existe un projet de fusion entre la Cour africaine et la Cour de justice de l'UA.[94] Pour rappel, le passage de la Cour à la Section des droits de l'homme laisse

> entrevoir au moins deux éléments de régression concernant la protection des droits humains en Afrique. [L'un de ces éléments porte sur le] nombre insuffisant de juges. La Cour africaine instituée par le Protocole de Ouagadougou est composée de 11 juges. (…) Ce nombre s'est manifestement et progressivement rétréci [avec] le Protocole de 2008 [passant ainsi] à huit. Au lieu de maintenir ces huit juges, déjà

89 Voir S Doumbe-Bille 'La juridictionnalisation des droits de l'homme en Afrique : "much ado about nothing?"' in *L'homme dans la société internationale* (2013) 702.

90 Voir *Michelot Yogogombaye c. République du Sénégal* (exception d'incompétence) arrêt du 15 décembre 2009 Requête 001/2008.

91 G Le Floch 'La Cour: une juridiction à un tournant de sa jeune histoire' in G Le Floch (dir) *La Cour africaine des droits de l'homme et des peuples* (2023) 24.

92 À titre d'exemples, le Rwanda a introduit sa demande visant ce retrait le 24 février 2016, puis la Tanzanie le 14 novembre 2019, le Bénin le 24 mars 2020 et enfin la Côte d'Ivoire le 28 avril 2020. Voir TS Bidouzo 'Le retrait de déclaration facultative de reconnaissance de compétence de la Cour Africaine des Droits de l'Homme et des Peuples' (2023) *RDLF* chron. n°29 ; K Kouame & EJ Tiehi 'Le civexit ou le retrait par la Côte d'Ivoire de sa déclaration d'acceptation de la compétence de la Cour africaine des droits de l'homme et des peuples : un pas en avant, deux pas en arrière' (2022) 21 in *Revue des droits de l'homme* ; CVN Kemkeng 'La déclaration de l'article 34(6) du Protocole de Ouagadougou dans le système africain des droits de l'homme : entre régressions continentales et progressions régionales' (2018) 2 *Annuaire africain des droits de l'homme* 179-199.

93 S'appuyant ainsi sur art 34(6) du Protocole de Ouagadougou.

94 L'idée de fusionner ces deux Cours fut émise par les Chefs d'État et de Gouvernement de l'UA sur l'initiative de l'ex-président nigérian, Olusegun Obasanjo, lors du Sommet d'Addis Abeba en juillet 2004. Une idée qui a pris forme à travers l'adoption du Protocole de Sharm El-Sheikh le 1er juillet 2008, pour créer la Cour africaine de Justice et des droits de l'homme ; puis le Protocole de Malabo le 27 juin 2014 qui vise à élargir les compétences de cette unique cour à la matière pénale.

> insuffisants, le Protocole de Malabo de 2014 n'a prévu que cinq juges pour la Section des droits de l'homme et des peuples. Il s'agit là d'un manifeste nivellement vers le bas, dans la mesure où on se demande si l'énorme travail des 11 juges (…) peut être effectué par cinq juges.[95]

Il va donc de soi, suivant la logique de cette mutation annoncée, que la charge de travail des juges de la Section des droits de l'homme s'en trouvera davantage alourdie, si bien que leurs conditions de travail se révèleront impropres à garantir tous les aspects d'une indépendance pleine et entière avec, en filigrane, le danger de «voir le flux des contentieux [des droits de l'homme] se tarir».[96]

4 CONCLUSION

«*Going far or not going far enough?*», la réponse à cette question nous semble évidente tant, «*it is better to go far than not far enough!*». Or, l'analyse qui vient d'être faite de ce sujet montre que l'indépendance des juges de Cour africaine ne va manifestement pas assez loin. Certes, les instruments pertinents de la Cour dont le Protocole de Ouagadougou prévoient des garanties à l'indépendance des juges de la Cour. Ainsi qu'il fut démontré plus haut, ces garanties à l'indépendance personnelle des juges de la Cour sont constituées, d'une part, de droits qui leur sont reconnues à l'instar de l'émission d'opinions séparées et, d'autre part, de devoirs qui leur sont dévolus, à l'image de l'obligation de récusation. Aussi importantes et nécessaires que puissent être ces garanties qui correspondent plus ou moins aux standards classiques en la matière, elles demeurent encore insuffisantes à l'effet d'offrir aux juges de la Cour africaine la pleine et totale indépendance que les justiciables sont en droit d'attendre de la Cour et, *ipso facto*, d'exiger des juges qui la composent. Ce caractère inachevé de l'indépendance personnelle des juges de la Cour s'observe essentiellement par l'opacité qui caractérise le processus de sélection et la nomination des candidats. À l'image de l'indépendance institutionnelle, l'indépendance des juges de la Cour est fondamentale pour la Cour en elle-même d'où l'absolue nécessité d'un instrument de l'UA insistant, symboliquement voire juridiquement, sur l'intégrité judiciaire des juges de la Cour. Étant donné que les juges de la Cour constituent la partie émergée de l'*iceberg* juridictionnel de la protection des droits de l'homme dont ils sont la personnification, la «performance et l'efficacité de [la Cour] dépendent à bien des égards de [leurs] capacités professionnelles et personnelles, de leur savoir-faire, de leur expérience ainsi que de leur engagement et leur intégrité. La Cour africaine peut contribuer de manière significative à la promotion et à la protection des droits humains à l'échelle de l'Afrique si la désignation et l'élection des juges répondent complètement aux conditions requises par le Protocole et si la Cour

95 A Sylla 'Les réformes du système judiciaire de l'Union africaine : enjeux juridico-institutionnels sur la Cour africaine des droits de l'homme et des peuples' (2022) 6 *Annuaire africain des droits de l'homme* 217.

96 L Burgogue-Larsen 'La Cour africaine des droits de l'homme et des peuples au cœur des paradoxes' in G Le Floch (dir) *La Cour africaine des droits de l'homme et des peuples* (2023) 466.

reçoit le soutien politique inconditionnel des États membres de l'UA. Il est donc essentiel pour la crédibilité et le bon fonctionnement de la Cour d'élire des juges»[97] qui jouissent, en toute objectivité et de notoriété publique, d'une très haute autorité morale, d'une compétence et d'une expérience juridique, judiciaire ou académique reconnue dans le domaine des droits de l'homme et des peuples.[98] C'est probablement à ce prix que la CourADHP pourra véritablement se conformer à l'obligation de motivation de ses décisions, dont elle participe à l'acceptabilité[99] et en facilite l'exécution. Mieux, la CourADHP doit faire preuve, dans le cadre de son office, d'une prolixité motivationnelle, loin de son actuelle «économie d'argumentation»[100] qui lui est ouvertement reprochée en son propre sein[101] et qui est vertement critiquée par la doctrine.[102]

97 Voir le document disponible sur https://www.amnesty.org/fr/wp-content/uploads/sites/8/2021/06/ior630012004fr.pdf, p 1 (consulté le 17 mars 2024).

98 Protocole de Ouagadougou (n 55) art 11.

99 Selon Gilbert Guillaume, la motivation vise une triple fonction qui est essentielle dans la légitimité et l'acceptabilité de la décision. Selon lui. La motivation des décisions 'permet en premier lieu aux États de s'assurer que le juge, et tout simplement le juge international, est resté dans les limites de sa compétence. Elle tente en deuxième de convaincre la partie du bien-fondé de la décision prise et en particulier de la faire accepter par la partie qui a perdu le procès. Elle dégage en troisième lieu, à titre de sous-produit, des règles de droit qui pourront par la suite guider l'action des États, des juges et des arbitres'. Voir G Guillaume 'Commentaire' in H Ruiz Fabri & J-M Sorel (dir) *La motivation des décisions des juridictions internationales* (2008) 91.

100 Voir R Ben Achour et B Tchikaya opinion individuelle dans l'affaire *Mulindahabi Fidèle c. Rwanda,* (exceptions d'irrecevabilité) du 26 juin 2020 Requête n° 011/2017 para 2.

101 Voir C Bensaoula opinion dissidente dans l'affaire *Ajavon c. Bénin* du 29 mars 2019 Requête n° 013/2017 pp 1-2.

102 Peltier (n 22) 231.

The African Court on Human and Peoples' Rights: assessing its effectiveness

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ABSTRACT: This article examines the effectiveness of the African Court on Human and Peoples' Rights using the compliance rate, the usage rate and the goal-based approaches. It uses a qualitative research method combined with purposive sampling and it consults the jurisprudence of the African Court and secondary sources to assess the effectiveness of the Court. The article submits that taking into consideration its relatively short period of operation and the volatile political environment in which it has been functioning, the African Court has been effective in presiding over sensitive cases involving issues such as freedom of expression, press freedom, and election disputes. Compliance with some of the Court's sensitive judgments also attests to some degree of its effectiveness. It is also reasoned that the African Court should in the future pay more close attention to factors that are capable of affecting its effectiveness. These factors include the soundness of the legal reasoning employed in delivering judgments, the composition of the African Court, the enforceability of reparation orders, and a holistic understanding of the socio-economic and political context of the state parties.

TITRE ET RÉSUMÉ EN FRANÇAIS

La Cour africaine des droits de l'homme et des peuples : évaluation de son efficacité

RÉSUMÉ: Cet article évalue l'efficacité de la Cour africaine des droits de l'homme et des peuples en s'appuyant sur trois critères principaux : le taux de conformité aux décisions, le taux d'utilisation de ses mécanismes et les approches basées sur les objectifs. La recherche adopte une méthode qualitative, combinant un échantillonnage raisonné et une analyse des arrêts de la Cour ainsi que des sources secondaires pertinentes. L'article soutient que, malgré sa durée de fonctionnement relativement courte et l'instabilité politique du contexte dans lequel elle opère, la Cour a su démontrer une certaine efficacité dans le traitement de dossiers sensibles, notamment en matière de liberté d'expression, de liberté de la presse et de contentieux électoraux. Le respect de certaines de ses décisions, particulièrement celles portant sur des enjeux sensibles, témoigne d'un degré significatif d'efficacité. Néanmoins, l'article souligne que la Cour devrait accorder davantage d'attention à plusieurs facteurs susceptibles d'améliorer son efficacité future. Parmi ces facteurs, figurent la solidité du raisonnement juridique employé dans ses décisions, la composition de la Cour, la force exécutoire des réparations ordonnées, ainsi qu'une compréhension approfondie du contexte socio-économique et politique des États parties.

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KEY WORDS: African Court on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; effectiveness; compliance; usage

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1 INTRODUCTION

African Court on Human and Peoples' Rights (African Court) is one of the three main human rights bodies of the African Union. The other two are the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The African Commission is a quasi-judicial organ established by the African Charter on Human and Peoples' Rights (African Charter) with the mandate 'to promote human and peoples' rights and ensure their protection in Africa'.[1] Similarly, the African Children's Committee, a quasi-judicial body that promotes and protects children's rights enshrined in the African Charter on the Rights and Welfare of the Child (African Children's Charter), monitors the implementation of and interprets the provisions of the African Children's Charter.[2] The African Court is mandated to complement the protective mandate of the African Commission.[3] Unlike the two institutions, the African Court is vested with binding judicial power.

The idea of establishing a continental human rights judicial body was conceived during the 1961 African Conference on the Rule of Law which invited the African governments to

> study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that

1 Arts 30 and 45 of the African Charter. The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. For more on the promotion and protection mandate of the African Commission, see F Viljoen *International human rights law in Africa* (2012) 300-390; V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000* (2002) 335-352.

2 Art 42, African Children's Charter.

3 Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on African Charter on Human and Peoples' Rights. The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004.

> recourse thereto be made available for all persons under the jurisdiction of the signatory States.[4]

Despite this early initiative, in 1981, instead of a court, the African Charter established the African Commission. The drafters of the Charter thought that Africa was not ready for a supranational judicial institution at that time.[5] Furthermore, establishing a judicial body was deemed a premature task[6] due to the stronghold the principle of non-interference had in the Organisation of African Unity (OAU) and states' unreadiness to give away part of their sovereignty.[7] Moreover, it was considered that the African Commission is compatible with the reconciliatory nature of dispute resolution entrenched in African culture and tradition.[8]

In the 1990s, a combination of internal and external factors such as the wave of democratisation across the continent,[9] advocacy by non-governmental organisations,[10] and development aid with a condition of strong protection for human rights[11] pushed African states to reconsider the idea of establishing a human rights court. After a series of deliberations on the draft, the African Court Protocol was adopted in 1998 and came into force in 2004 making the African Court a reality. The Court has been operating in a continent with many countries at an infant stage of democratic consolidation and building a human rights culture. Nonetheless, in its two-decade existence, the Court has been able to adjudicate hundreds of contentious cases and provide few advisory opinions.[12]

This article assesses the effectiveness of the African Court. Following this introductory part, the second part clarifies concepts and terminologies that run throughout the article. The third part discusses approaches used to assess the effectiveness of international or regional courts, namely the compliance rate, the usage rate and the goal-based approaches and uses the same to evaluate the effectiveness of the African Court. Part four discusses factors that affect the effectiveness of international or regional courts and considers the situation of the African Court in light of these factors. The final part provides concluding remarks.

4 International Commission of Jurists, *African Conference on the Rule of Law* (1961) 11.

5 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004 (2007) 101(1) *American Journal of International Law* 2.

6 Viljoen (n 1) 411-412.

7 G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51(1) *Journal of African Law* 154-155.

8 E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31(4) *Howard Law Journal* 650.

9 Viljoen (n 1) 412.

10 Viljoen (n 1) 412; Bekker (n 7) 159.

11 Bekker (n 7) 158.

12 African Court, https://www.african-court.org/cpmt/statistic (accessed 10 October 2024). As of 2024, the African Court received 351 contentious cases and finalised 228; received 15 requests for advisory opinions and finalised them all.

2 CONCEPTUAL FRAMEWORK

It is important to clarify some of the important concepts and terminologies that are central to this paper. The first one is international courts (ICs). In the context of this research, ICs refer to permanent global, regional, and sub-regional judicial bodies with full judicial power to pronounce binding decisions. Yet, the focus of this article is human rights courts. International Courts, particularly in reference to those with global reach, have been defined as 'independent judicial bodies created by international instruments and invested with the authority to apply international law to specific cases brought before them'.[13] In a broader context, international judicial bodies are identified as having five basic criteria, namely, permanence, established by an international legal instrument, applying international law in deciding cases, using rules of procedure set in advance in considering cases, and rendering binding decisions.[14]

International courts have not been there from time immemorial. Rather they are a relatively recent historical development.[15] Their creation is related to the consolidation, codification, and development of international organisations and international law.[16] It was in the twentieth century that the international community started coming together with the view of establishing international judicial bodies.[17] Since then, the world has witnessed a good number of ICs with a wide range of jurisdictions on several matters such as international trade, investment matters, and criminal law. Hence, the operation of human rights courts should not be seen in isolation from the dynamics of international law and ICs that adjudicate other subject matters. The notable regional human rights courts are the European Court of Human Rights (European Human Rights Court or ECHR) and the Inter-American Court of Human Rights (IACtHR), with the African Court as the most recent one.

Another concept is the 'effectiveness of ICs' which is a fluid and complex notion with no agreed definition and assessment criteria. Effectiveness has been referred to as 'a measure of the success of regimes and governance systems in solving problems or moving systems toward desired outcomes.'[18] Others have defined the

13 Y Shany 'Assessing the effectiveness of international courts: a goal-based approach' (2012) 106(2) *American Journal of International Law* 225.

14 CPR Romano 'The proliferation of international judicial bodies: the pieces of the puzzle' (1999) 31(4) *New York University Journal of International Law and Politics* 713-714.

15 KJ Alter 'The evolution of international law and courts' in O Fioretos and others (eds) *Oxford handbook of historical institutionalism* (2016) 590.

16 FK Tiba 'What caused the multiplicity of international courts and tribunals' (2006-2007) 10 *Gonzaga Journal of International Law* 204.

17 S Katzenstein 'In the shadow of crisis: the creation of international courts in the twentieth century' (2014) 55 *Harvard International Law Journal* 156.

18 T Squatrito and others 'A framework for evaluating the performance of international courts and tribunals' in T Squatrito and others (eds) *The performance of international courts and tribunals* (2018) 7.

effectiveness of ICs as 'the degree to which a legal rule or standard induces the desired change in behaviour.'[19] Some have used the term 'performance of ICs' to describe essentially the same notion but with slight differences technically and scope-wise.[20] The performance of ICs has been addressed from two perspectives, namely 'outcome performance' referring to 'the degree to which the ICs attain substantive goals' and 'process performance' concerned with 'the degree to which the ICs practices measure up to intended or aspired procedural standards.'[21] Thus, although effectiveness and performance terminologies have been employed in various literature, the crux of these concepts, the factors affecting both, and the criteria of assessment, their assessment are in essence similar. Therefore, for consistency purposes, this article uses the word 'effectiveness' in a way that captures the accomplishments of ICs in influencing the behaviours of all stakeholders, mainly states in living up to their human rights obligations, their accessibility by the rights holders and the extent to which they achieved the goal they are established for.

3 THE AFRICAN COURT IN LIGHT OF APPROACHES TO ASSESSING THE EFFECTIVENESS OF ICs

Irrespective of their differences, in terms of, for example, years of existence, geographical reach, and jurisdiction, the question of effectiveness remains crucial and common to all ICs. Assessing the extent to which the activities of ICs have impacted the behaviour of states and non-state actors remains one of the challenging areas of research. Partly, this is because of the difficulty of establishing the causal relationship between the works of the ICs and the apparent conduct of states and non-state actors.[22] It is so also because of the lack of a globally agreed-upon set of criteria to assess the effectiveness of ICs. Nevertheless, different approaches can be and have been used as general benchmarks for evaluating the effectiveness of ICs without excluding the peculiarity of each court. This section, therefore, discusses the commonly used approaches to assess the effectiveness of ICs, namely, the compliance rate, the usage rate, and the goal-based approaches.

19 D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts of Human Rights' (2010) 6(1) *Journal of International Law and International Relations* 39; K Raustiala & AM Slaughter 'International law, international relations and compliance' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2002) 593.

20 Squatrito and others (n 18) 6.

21 As above.

22 D Abebe 'Does international human rights law in African courts make a difference?' (2017) 56 *Virginia Journal of International Law* 533.

3.1 Compliance rate approach

In the context of international law and institutions, the word compliance has two dimensions, usually termed as first-order compliance and second-order compliance.[23] First-order compliance refers to states' compliance with the substantive treaty provisions or rules entrenched in a given legal instrument.[24] Second-order compliance denotes 'compliance with the decisions of an authoritative body charged with the responsibility of interpreting provisions of a treaty or resolving disputes arising from the implementation of the treaty'.[25] Compliance is an outcome or 'a status that is attained' when the laws and the practices of a state are in line with the rules of a treaty and the judgments arising out of it.[26] Compliance is different from implementation in that the latter connotes 'the process of putting international commitments into practice: the passage of legislation, creation of institutions (both domestic and international) and enforcement of rules'.[27] In other words, implementation encompasses the multitude of steps taken by a state in putting international commitments into action while compliance, particularly, second-order compliance, enunciates the 'conformity between a remedial order of a judicial body and state behaviour or factual situation at the domestic level'.[28] The effectiveness of ICs is related to second-order compliance.

The compliance approach presupposes that courts have the power to compel the state parties to defend the claims levelled against them in a dispute and to comply with the resulting decision, albeit not in the strict sense like domestic courts.[29] Hence, the effectiveness of ICs depends on the extent to which the parties obey the contents of their judgments.[30] The notion of compliance, in turn, triggers the question

23 MP Ryan 'The logic of second order compliance with international trade regimes' (1992) *University of Michigan Working Paper* No 694 3-4; This categorisation was first made in R Fisher *Improving compliance with international law* (1981).

24 Ryan (n 23) 3; BA Simmons 'Compliance with international agreements' (1998) *Annual Review of Political Science* 78.

25 Ryan (n 23) 3; In some literature, the element of good faith is added, and compliance is defined as 'acceptance of the judgment as final and reasonable performance in good faith of any binding obligation.' See AP Llamzon 'Jurisdiction and compliance in recent decisions of the International Court of Justice' (2008) 18(5) *European Journal of International Law* 822.

26 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 152; MG Burgstaller *Theories of compliance with international law* (2005) 103-189.

27 Raustiala & Slaughter (n 19) 539; Murray and others (n 26) 152.

28 VO Ayeni 'Introduction and preliminary overview of findings' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 9; K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32(3) *Case Western Reserve Journal of International Law* 392.

29 LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107(2) *Yale Law Journal* 283.

30 EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 98(1) *California Law Review* 28.

of why states comply with the judgments of ICs. Scholars argue that justifications provided for why states obey international law are equally applicable to compliance with judgments of ICs.[31]

One of the justifications is that states are rational actors capable of identifying and pursuing their interests and hence 'only comply with a ruling if doing so offers a higher payoff than the alternative of refusing to comply'.[32] Put alternatively, states do a cost-benefit analysis and comply only when the benefits of complying triumph over the cost of non-compliance. In doing the analysis, states consider their reputation,[33] monetary elements and their present and future bargaining power.[34] Some argue that compliance is not an overnight achievement, but a behaviour learned over time through continuous engagements with several stakeholders such as civil society organisations (CSOs) and international organisations.[35] Thus, states' behaviour is shaped in a socialised environment through an 'iterative process of social learning'[36] where many parties interact and hence influence each other's practices, including compliance.[37] For instance, the interaction can involve naming and shaming as a means of ensuring compliance.[38]

31 C Hillebrecht 'The power of human rights tribunals: compliance with the European Court of Human Rights and domestic policy change' (2014) 20(4) *European Journal of International Relations* 1104; EA Posner & JL Goldsmith 'International agreements: a rational choice approach' (2003) 44(1) *Virginia Journal of International Law* 134-135; AT a 'A compliance-based theory of international law' (2002) 90(6) *California Law Review* 1860-1861; Hawkins & Jacoby (n 19) 41-43.

32 AT Guzman 'International tribunals: a rational choice analysis' (2008) 157(1) *University of Pennsylvania Law Review* 174 & 198.

33 Guzman (n 32) 198; Hawkins & Jacoby (n 19) 41; A Alkoby 'Theories of compliance with international law and challenge of cultural difference' (2008) 4(1) *Journal of International Law and International* 162 (emphasis that states assume reputation as having a monetary value in their relationship with other states). However, others argue that the impact of reputation in inducing compliance is either weaker or sophisticated as states possess multiple reputations which do not necessarily depend on non-compliance with a single treaty. For more elaboration, see GW Downs & MA Jones 'Reputation, compliance, and international law' (2002) 31(1) *Journal of Legal Studies* 95, 101-102 & 113.

34 HL Jones 'Why comply? an analysis of trends in compliance with judgments of the International Court of Justice since Nicaragua' (2012) 12(1) *Chicago-Kent Journal of International and Comparative Law* 65.

35 Alkoby (n 33) 155.

36 Hillebrecht (n 31) 1104.

37 Raustiala (n 28) 405.

38 Hillebrecht (n 31) 1104-1105; JH Lebovic & E Voeten 'The cost of shame: international organizations and foreign aid in the punishing of human rights violators' (2009) 46(1) *Journal of Peace Research* 80-85.

3.1.1 Criticism against the compliance approach

Critics of the compliance approach argue that compliance does not necessarily indicate states' behavioural change and hence is less helpful in assessing the effectiveness of ICs,[39] because effectiveness is concerned more with the extent to which the normative standards and court judgments induce the desired change in state practice.[40] High rates of compliance can occur without necessarily modifying the behaviour of states.[41] Moreover, scrutinising the nature of the remedies ordered in the judgments is necessary.[42] The reason is that 'low-cost' judgments 'that can be complied with, without sacrificing important state interests are more likely to be complied with than 'high-cost' judgments that 'adversely affect important state interests in a significant manner'.[43] For instance, payment of compensation might be taken as easy and complied with than remedies requiring a change of legislation. Worse still, a state may choose to comply with an order requiring it to change its laws and policies, but still refrain from implementing such laws. Further, partial compliance, a situation where a state complies only with some parts of the orders and leaves out others, adds another challenge to the compliance approach.

3.1.2 Compliance with the African Court judgments

The African Court has the power to make appropriate orders to remedy the violation of rights, including the payment of fair compensation or reparation when it finds a violation of a human right against a responsible state.[44] Further, article 27(2) of the African Court Protocol authorises the African Court to order provisional measures to avoid irreparable harm to the rights-holders. State parties have the obligation to comply with the judgment and to guarantee its execution.[45] Under article 29(2) of the African Protocol of the Court, the African Court must notify the Executive Council of the AU so that the latter 'shall monitor its execution on behalf of the Assembly'. Further, the African Court must submit a report of its activities to each regular session of the African Union Assembly.[46] The reports include 'the cases in which a State has not complied with the African Court's judgment'.

39 Raustiala & Slaughter (n 19) 539; Hawkins & Jacoby (n 19) 39.

40 Hawkins & Jacoby (n 19) 39.

41 LR Helfer 'The effectiveness of international adjudicators' in CPR Romano and others *Oxford Handbook on International Adjudication* (2014) 467.

42 Y Shany 'Compliance with decisions of international courts as indicative of their effectiveness: a goal-based analysis' in J Crawford & S Nouwen (eds) *Select proceedings of the European Society of International Law: third volume* (2010) 230.

43 Shany (n 42) 231.

44 African Court Protocol, art 27(1).

45 African Court Protocol, art 30.

46 African Court Protocol, art 31.

The African Court handed down its first merit judgment in 2013.[47] However, before that, the African Court had issued a provisional measure, particularly against Libya, which failed to comply with the orders.[48] In the first merit judgment, *Mtikila v Tanzania*, the African Court found that the ban on independent candidacy in elections violated the right to participate in the government of one's country and freedom of association of the applicant.[49] Further, the African Court ordered Tanzania to take 'constitutional, legislative and all other necessary measures within a reasonable time' to remedy the violations.[50] However, as of 2023, Tanzania has not amended its Constitution alleging that it requires conducting a referendum and it informed the Court that the referendum was still pending.[51] Nonetheless, the African Court used the terminology 'partial compliance' in its 2019 Activity Report in relation to the status of *Mtikila v Tanzania* case, but without providing an explanation on what amounts to 'partial compliance' in the context of this judgment. Thus, the problem of compliance began as early as the first merit judgment of the African Court.

It is important to closely consider the compliance status of Tanzania, given that most of the applications submitted to the African Court are against Tanzania. The majority of the applications brought against Tanzania involve the right to fair trial, putting in question the criminal justice system of the country.[52] Some of the violations include the absence of legal aid, denial of the right to appeal, non-adherence to the principle of presumption of innocence, unduly prolonged trial, and independence of the courts.[53] In most of these cases, Tanzania failed to comply with the orders of the African Court.[54] For instance, in *Thomas v Tanzania*, the African Court ordered Tanzania 'to take all necessary measures, within a reasonable time to remedy the violation found, specifically, precluding the reopening of the defense case and the retrial

47 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34.

48 *African Commission v Libya* (provisional measures) (2011) 1 AfCLR 17; E Polymenopoulou '*African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya*, Order for Provisional Measures 25 March 2011' (2012) 61(3) *International and Comparative Law Quarterly* 774.

49 *Mtikila v Tanzania*, paras 111 & 114.

50 *Mtikila v Tanzania*, para 126.

51 African Court Activity Report of 2023, Annex 2 https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-afchpr-1-january-31-december-2023/ (accessed 15 April 2024).

52 A Possi 'It is better that ten guilty persons escape than that one innocent suffer: the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* 314, 334; *Penessis v Tanzania* (merits), Application 013/2015, African Court (28 November 2019); *Thomas v Tanzania* (merits) (2015) 1 AfCLR 465; *Onyango & Others v Tanzania* (merits) (2016) 1 AfCLR 507; *Onyango & Others v Tanzania* (reparations), Application 006/2013, African Court (4 July 2019); *Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599; *Abubakari v Tanzania* (reparations), Application 007/2013, African Court (4 July 2019).

53 Possi (n 52) 322-331.

54 African Court Activity Report of 2020, Annex 2.

of the applicant.'[55] However, Tanzania has not complied with this judgment.[56]

It is helpful to discuss two important cases, one against Kenya (because it involves indigenous community concerns) and another against Rwanda (because it is one of the cases closely connected to Rwanda's decision to withdraw its declaration on direct access under article 34(6) of the African Court Protocol).[57] The application against Kenya was referred by the African Commission following the lack of response from Kenya on the African Commission's provisional measures that required suspension of eviction of the Ogiek community from Mau Forest.[58] In its provisional measures, the African Court also ordered Kenya 'to immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest Complex'.[59] Kenya did not provide the African Court with any progress to that effect.[60] It has established a Task Force for the implementation of the judgment on the merits, but failed to include the representatives of the Ogiek people.[61] In 2020, the Ministry of Environment acknowledged the receipt of the Task Force report, but did not publicise the content of the report.[62]

In relation to legislative measures taken to grant collective title to the Ogiek ancestral land to guarantee use and enjoyment by legal certainty, Kenya's response has been recorded in the Activity Report of the Court:[63]

> The Respondent State indicates that it has taken legislative measures to give effect to the Forest Conservation and Management Act No. 34 of 2016 and the Community Lands Act No. 27 of 2016 which provides that community land rights must be registered in accordance with the provisions thereof and the provisions of the land registration Act 2012. Furthermore, the Respondent State points out that on 25 January 2022 ten (10) Community land titles were processed: four (4) in West Pokot County, two (2) in Laikipia County, one (1) in Samburu County and two (2) in Kajiado County. As at 30 October 2020, two communities (Llingwesi and Musul of Laikipia County) successfully registered their communal lands with an area of 8675.5 and 2646.0 hectares.

55 *Thomas v Tanzania*, para 161.

56 African Court Activity Report of 2019, 19.

57 *African Commission (Ogiek) v Kenya* (merits) (2017) 2 AfCLR 9; *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165; *Umuhoza v Rwanda* (reparations) (2018) 2 AfCLR 202.

58 *African Commission (Ogiek)* (merits), paras 4 & 5.

59 *African Commission (Ogiek) v Kenya* (provisional measures) (2013) 1 AfCLR 193, para 25.

60 African Court Activity Report of 2016, para 21 https://rb.gy/nvouze (accessed 16 August 2020).

61 International Work Group for Indigenous Affairs 'Implementation of Historic African Court Ruling' 25 September 2018 https://www.iwgia.org/en/kenya/3281-implementation-of-african-court-ruling.html (accessed 19 September 2020).

62 M Chepkorir 'The Ogiek still hoping for implementation of African Court ruling three years later' 29 May 2020 https: //naturaljustice.org/the-ogiek-still-hoping-for-implementation-of-african-court-ruling-three-years-later/ (accessed 19 September 2020).

63 African Court Activity Report of 2023, Annex 2.

In 2022, the African Court pronounced a reparations decision in the *Ogiek* case where it ordered Kenya to pay the Ogiek community KES 57 850 000 (approximately) for material prejudice and KES 100 000 000 (approximately) for moral damage.[64] The Court also ordered Kenya to undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, particularly the Mau Forest and its various resources. Time will prove whether Kenya implements this reparation.

In *Umuhoza v Rwanda*, the African Court dealt with a case involving an applicant sentenced to 15 years imprisonment for allegedly watering down genocide as well as aiding and abetting terrorism, among other charges. The African Court decided that the conviction and imprisonment of the applicant violated her right to freedom of expression and fair trial rights and hence ordered Rwanda 'to take all the necessary measures to restore the rights of the applicant'.[65] In the reparation judgment, the African Court ordered Rwanda to pay compensation for the material and moral injury the applicant sustained.[66] Though the African Court did not order the release of the applicant from prison, she was set free on 23 November 2018.[67] However, Rwanda did not report back to the African Court on the measures taken to implement the judgments. Furthermore, Rwanda notified the African Court 'that it will not cooperate with the African Court on this and other applications filed against it before the African Court'.[68] This is a clear indication of Rwanda's resistance to the African Court, particularly after withdrawing from the direct access declaration.

Further, some states complied with what can be considered as 'high-cost' judgments. One example is Burkina Faso, specifically in the judgment of *Zongo v Burkina Faso*.[69] This case is about the assassination of an investigative journalist, together with his companions in 1998. The African Court found that Burkina Faso violated article 7 of the African Charter in that it 'failed to act with due diligence in seeking, trying, and judging the assassins of Norbert Zongo and his companions'.[70] In the reparation proceeding, the African Court ordered Burkina Faso to pay compensation to the applicants for the material damage and moral prejudice and re-open the investigation with the view to bringing to justice the perpetrators.[71] Burkina Faso has

64 *African Commission (Ogiek) v Kenya* (reparations) paras 4-5.

65 *Umuhoza v Rwanda* (merits), para 172.

66 *Umuhoza v Rwanda* (reparations), para 74.

67 *Umuhoza v Rwanda* (reparations), para 30.

68 Activity Report of 2019, 20.

69 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 219; (reparations) (2015) 1 AfCLR 258.

70 *Zongo v Burkina Faso* (merits), paras 156 & 203.

71 *Zongo v Burkina Faso* (reparations), para 111.

complied with these orders and the African Court has recorded the same in its Activity Report.[72]

Another important judgment, partly because it deals with a determination of whether a treaty is a human rights treaty,[73] worthy of mentioning is *APDH v Côte d'Ivoire*.[74] In this case, the applicant alleged that the composition and the functioning of the Independent Electoral Commission (IEC) violate article 17 of the African Charter on Democracy, Elections, and Governance, and article 3 of the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance. The applicant claimed that the majority of the IEC members are government representatives or members of political parties and hence it was neither independent nor impartial. The African Court found that the provisions of the aforementioned treaties have been violated and ordered Côte d'Ivoire to amend its law.[75] Côte d'Ivoire reported to the African Court that 'it had adopted a new law altering the composition of the electoral management body' and currently the compliance report is under review.[76] Yet, irrespective of its compliance, *APDH v Côte d'Ivoire* can be considered as a progressive judgment because it involves a politically sensitive issue relating to election and will serve as a reference for future cases dealing with similar subjects.

In general, there is no uniform trend of compliance with the African Court's judgments. For one thing, the compliance rate varies across state parties. For instance, the situation of Tanzania exhibits a unique feature which scholars term 'litigation fatigue'.[77] Moreover, the weight attached to a given judgment has its impact on the prospect of compliance as witnessed in the politically sensitive case of *Umuhoza v Rwanda*, where the involvement of a prominent member of the opposition party presented a significant compliance challenge due to pushback from and unwillingness of the incumbent government. Compliance with judgments does not happen in a vacuum, but within the political and legal context of states. Thus, compliance should not be seen in isolation from factors external to the merits of the cases.

72 African Court Activity Report of 2018, para 18 https://en.african-court.org/images/Activity%20Reports/Activity%20report%20January%20-%20December%20%202018.pdf (accessed 16 August 2020).

73 The African Court decided that the African Charter on Democracy, Elections and Governance is a human rights treaty and hence falls within the ambit of the material jurisdiction of the African Court as per article 3 of the African Court Protocol.

74 *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668.

75 *APDH v Côte d'Ivoire*, para 153.

76 African Court Activity Report of 2019, 20.

77 SH Adjolohoun 'A crisis of design and judicial practice? curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1 at 10.

In addition, the domestic realities of states can positively or negatively affect their approach to compliance. Consequently, despite the low level of compliance[78] with the Court's decisions, considering the life span of the African Court, the nature of cases it has been dealing with, the lack of consolidated democracy in countries against which politically sensitive judgments were handed down, and success stories of compliance from some states, it is reasonable to say that the African has been effective. In addition, some level of non-compliance is expected and that does not detract from the effectiveness of the African Court as any court experiences some degree of non-compliance, especially during the early age of their establishment.

3.2 Usage rate approach

Another approach to assess the effectiveness of ICs is the usage rate approach. According to this approach, ICs are effective if they are used frequently, meaning that if they entertain many cases.[79] The measurement can be the number of cases ICs consider per year or cases submitted per state.[80] Accordingly, courts with high usage rates are considered to be more effective than courts that occasionally receive applications. If a court is ineffective or perceived to be ineffective, the users will have no incentive to access that court.[81] Thus, the level of effectiveness of ICs affects their usage and vice versa. The attitudes of the users about the effectiveness of a given court matter because individuals or states usually resort to judicial bodies when they have the confidence that these bodies are legitimate, independent, and dispense justice.[82] It is important to note that the perception of individuals, organizations, or states about ICs can be affected by their view toward the institution behind the establishment of the ICs or with which the ICs are more associated.[83]

The usage of ICs has a direct relationship with how private actors' access is designed.[84] For instance, the high usage rate of the European Human Rights Court is attributed, among other several factors, to individuals' direct access.[85] Individuals' direct access is so crucial in the context of human rights courts because whether it is individual or

78 The African Court, in its 2022 Activity Report indicated that 'of the over 200 decisions rendered by the Court, less than 10% have been fully complied with, 18% partially implemented and 75% not implemented'.

79 Guzman (n 32) 188; Shany (n 13) 227; Posner & Yoo (n 30) 28.

80 Posner and Yoo (n 30) 28.

81 Posner and Yoo (n 30) 28.

82 K Malleson 'Promoting judicial independence in the international courts: lessons from the Caribbean' (2009) 58(3) *International and Comparative Law Quarterly* 672 & 687.

83 E Voeten 'Public opinion and the legitimacy of international courts' (2013) 14 *Theoretical Inquiries in Law* 416.

84 KJ Alter 'Private litigants and the new international courts' (2006) 39(1) *Comparative Political Studies* 40, 43 & 46.

85 KJ Alter 'Delegating to international courts: self-binding vs other-binding delegation' (2008) 71(1) *Law and Contemporary Problems* 61.

group rights, the rights holder is an individual as a person or as a member of a group.[86] Even group rights are meant to ensure the collective interests of the individuals within the groups and hence reinforcing the argument that individuals' access to ICs plays a significant role in shaping the usage rate. Consequently, choice design of access to human rights courts can advance or impede the enforcement of human rights obligations.[87] It is noted that

> [t]he key issue for human rights adjudication is whether or not private litigants have access to an international legal system, and on what terms. Human rights advocates prefer a maximalist approach of direct private access to international judicial institutions that can offer binding legal remedies.[88]

Therefore, the architecture of the private litigants' access to international human rights courts directly affects the usage rate which in turn impacts effectiveness. In the context of this research, a user rate should be seen not only from the number of cases entertained by ICs but also from their accessibility to the rights holders.

3.2.1 Criticism against usage rate approach

The usage rate approach to effectiveness is not without its criticisms. One of them is that usage rates do not necessarily indicate the impact of the courts on the behaviour of states.[89] For instance, if the state is repeatedly accused of violations that have similar patterns, perhaps it might be so because it failed to address the root cause of the problem or not even attempting to address it. In such cases, the number of cases submitted to a court against that state shows the ineffectiveness of the court instead of its effectiveness. Moreover, it is argued that

> high usage or litigation rates may be indicative of the parties' perceived utility of turning to the court, but also of the inability of the court to generate, over time, adequate normative guidance that would reduce the number of legal disputes.[90]

Going by the same reasoning, in as much as the usage rate can be considered as evidence of effectiveness, it can also be argued that high usage rates may arguably show the failure of the courts in bringing practical changes.

3.2.2 African Court usage rate

If one applies the usage rate approach to assess the effectiveness of the African Courts, depending on the points of focus, different, seemingly

86 Leaving aside the debate whether individuals rights or group rights prevails or vice versa, when one considers how the international human rights frame is crafted, rights a person has as an individual are more in number than rights he or she enjoys because of membership to certain groups.

87 Alter (n 15) 599.

88 Alter (n 15) 599-600.

89 Guzman (n 32) 188.

90 Y Shany *Assessing the effectiveness of international courts* (2014) 5.

opposing conclusions can be drawn. One line of argument could be looking at the number of applications that the African Court received so far at surface value, perhaps in comparison with other regional courts' statistics, and then assess the extent to which the African Court has been effective. In this regard, to be methodologically fair, it is the first years of the operations of the other regional courts that have to be a point of reference, not their current caseloads.

In the first decade of their operation, the European Human Rights Court and Inter-American Court of Human Rights (IACtHR) handed down seven[91] and three[92] merits judgments, respectively. The African Court, on the other hand, rendered eight merits judgments.[93] This can be taken positively given that the restrictive design of individuals' and NGOs' direct access has been blocking several cases that could have potentially reached the African Court. However, it has been a point of criticism given the infant stage of human rights institutions in which the European Human Rights Court and IACtHR operated their first decade compared to the era of more international judicialisation of the twenty-first century in which the African Court operates.[94] Nonetheless, it is important to consider other factors such as the political landscape and the working time of the African Court. For instance, except for the President of the African Court, all judges perform their functions on a part-time basis, and this can extend the time in which cases are finalised although it is similar for the IACtHR, but not for the European Human Rights Court.[95]

Another dimension is to examine the total number of applications that the African Court received so far. As of April 2022, the African Court had received 325 applications in contentious matters.[96] Also, it had received 15 requests for advisory opinions and 4 applications for

91 *Lawless v Ireland*, application 332/57, ECHR, judgment, 1 July 1961; *De Becker v Belgium*, application 214/56, ECHR, judgment, 27 March 1962; *Wemhoff v Germany*, application 2122/64, ECHR, judgment, 27 June 1968; *Neumeister v Austria*, application 1936/63, ECHR, judgment, 27 June 1968; *The Belgian Linguistic case*, application 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, ECHR, judgment, 23 July 1968; *Stögmüller v Austria*, application 1602/62, ECHR, judgment, 10 November 1969; *Matznetter v Austria*, application 2178/64, ECHR, judgment, 10 November 1969.

92 *Velásquez-Rodríguez v Honduras,* IACtHR, merits judgment, 29 July 1988, Series C No 4; *Godínez- Cruz v Honduras*, IACtHR, merits judgment, 20 January 1989, Series C No 10; *Fairén-Garbi and Solís-Corrales v Honduras*, IACtHR, merits judgment, 15 March 1989, Series C No 6.

93 *Mtikila v Tanzania*; *Thomas v Tanzania*; *Onyango & Others v Tanzania* (merits); *Abubakari v Tanzania* (merits); *APDH v Côte d'Ivoire*; *Zongo v Burkina Faso*; *African Commission v Libya* (merits) (2016) 1 AfCLR 153; *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314.

94 F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 96.

95 African Court Protocol, art 15(4).

96 African Court https://www.african-court.org/cpmt/statistic (accessed 20 April 2022).

interpretation.[97] Although one can see this as good progress, a closer look at the details of the cases shows the other side of the story.[98] Among the submitted cases, there are cases submitted 'without any legal basis' either against a state that has not ratified the African Court Protocol or ratified the African Court Protocol but has not made the special declaration.[99] Accordingly, more than half of the cases submitted during the first five years of the African Court lacked a legal basis.[100] Hence, the total number of applications as it appears on the website of the African Court might not necessarily reflect the usage rate of the African Court.

It is important to examine Tanzania's uniqueness concerning its caseload. Within the first decade of the African Court, among cases submitted against states that have accepted direct access, approximately 81 per cent of the cases (71 out of 87), were against Tanzania.[101] From the usage rate approach, this can be considered as evidence of the effectiveness of the African Court. Less conceivably, one can argue that the redundancy of similar cases is because the African Court failed to generate normative guidance that helps to decrease submissions. Nevertheless, studies suggest rather the problem is within the criminal justice system of Tanzania, not the African Court's inability to provide a rights-based normative framework.[102] Additionally, in most cases involving the death penalty, the African Court has been ordering Tanzania to refrain from executing the death penalty.[103] Plausibly, such intervention can be one of the reasons for the flood of cases initiated by inmates from Arusha and the Kilimanjaro region[104] because 'most applications in subsequently submitted cases are from these two regions'.[105]

Despite this shortcoming, after the first decade, the number of cases reaching the African Court and judgments coming out has significantly increased. Moreover, it could be argued that had it not been for the African Court's access design, it would have received many more cases. In the case of the European Human Rights Court, the

97 As above; the IACtHR has rich jurisprudence of advisory opinions and adopted ten advisory opinions within the first decade of its operation. *See* HF Ledesma *The Inter-american system for the protection of human rights: institutional and procedural aspects* (2007) 979-980; JM Pasqualucci 'Advisory practice of the Inter-American Court of Human Rights: contributing to the evolution of international human rights law' (2002) 38(2) *Stanford Journal of International Law* 241-288.

98 Viljoen (n 94) 67.

99 Viljoen (n 94) 67-68.

100 Viljoen (n 94) 68.

101 Possi (n 52) 314; Viljoen (n 94) 68-69.

102 Possi (n 52) 334-336.

103 *Amini Juma v Tanzania* (provisional measures) (2016) 1 AfCLR 658; *Ally Rajabu and Others v Tanzania* (provisional measures) (2016) 1 AfCLR 590; *Armand Guehi v Tanzania* (provisional measures) (2016) 1 AfCLR 587; *Dominick Damian v Tanzania* (2016) 1 AfCLR 699; *John Lazaro v Tanzania* (provisional measures) (2016) 1 AfCLR 593; *Cosma Faustin v Tanzania* (provisional measures) (2016) 1 AfCLR 652.

104 Possi (n 52) 316.

105 As above.

removal of the gatekeeper, the European Commission of Human Rights in 1998, and allowing individuals to directly access the European Human Rights Court had a momentous impact on its utility.[106] For instance, three years after the reform, only in 2001, the European Human Rights Court delivered 888 judgments exceeding the total of 837 judgments it rendered from 1959 to 1998.[107] However, it was not an easy journey as it took more than three decades to firmly establish the legitimacy of the European Human Rights Court and build states' trust in it before abolishing the duality of the institutions. Similarly, over the years, if the African Court is able to gain similar legitimacy, particularly by surviving the resistance posed by the withdrawals, there would be a possibility of the African human rights system adopting similar practices to the European human rights system, at least as far as individuals and NGOs direct access is concerned.[108] Yet, this currently looks like an ambitious dream.

3.3 Goal-based approach

The goal-based approach is one of the methods used in social science to assess the effectiveness of organisations. Others include the system resource approach[109] and internal process or functioning approach.[110] According to the goal-based approach, 'an action is effective if it accomplishes its specific objective' and the same rule applies to organisations.[111] Hence, an organisation is effective when it achieves its goal. As such, identifying the goal of an organisation is an important part of assessing its effectiveness. The goal-based approach to assessing the effectiveness of ICs follows the same reasoning.[112] Accordingly, ICs are effective to the extent they execute their objectives or goals, which is their mandate.[113] It is important to note that the goal-based approach, especially in its application to the effectiveness of ICs, is a very recent development and there is no robust literature to substantiate its meaning with many practical examples.

106 Art 2(3) of the Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby.

107 Public Relations Unit of the ECHR 'ECHR Overview 1959-2019' (2020) 4 https://echr.coe.int/Documents/Overview_19592019_ENG.pdf (accessed 20 September 2021).

108 For more on the impact of withdrawals of direct access declaration see G Gadisa 'State parties' withdrawal of direct access to African Court of Human and Peoples Rights: the need to reinvigorate complementarity' (2023) 12(1) *Oromia Law Journal* 141-165.

109 E Yuchtman & SE Seashore 'A system resource approach to organizational effectiveness' (1967) 32(6) *American Sociological Review* 891-903; JL Price 'The study of organizational effectiveness' (1972) 13(1) *The Sociological Quarterly* 3-15.

110 WA Martz 'Evaluating Organizational Effectiveness' unpublished PhD thesis, Western Michigan University, 2008 41-45.

111 Shany (n 13) 231.

112 Shany (n 13) 229.

113 Shany (n 13) 237.

Depending on the nature of their work, the size of the organisation, and the interests of the stakeholders, ICs may have several goals. It has been argued that:

> the goals of international courts, as understood by their officials, are often a mirror image of the goals set by the mandate providers and communicated by them to courts, whether explicitly, implicitly, or as unstated objectives.[114]

The conventional norm is that the mandate providers set the goal of the ICs in legal documents establishing such courts. Some of the widely accepted goals of ICs, arguably the primary ones, are ensuring compliance with international norms and dispute resolution (inter-state and individuals' claims against states).[115]

3.3.1 Criticism against goal-based approach

The goal-based approach is also subject to criticism. Commentators argue that ICs should not be strictly confined to the initial intention of their creators and have to go beyond by adapting to the changing environment.[116] Further, others highlight that

> [w]hen assessing the value or effectiveness of international courts and tribunals scholars should not only proceed in terms of how well a given institution serves its constituted ends, but also how well it serves the unstated purposes.[117]

Therefore, it is important to think and look outside the box of the explicitly stated goal and see how the ICs help in solving the contemporary problems of their time. In addition, it is important to note that goal-based approach to assessing the effectiveness of ICs is a recent development that is yet to receive wide acceptance as it was originally meant to assess the effectiveness of organisations with different purposes and structures than courts. Hence, the uniqueness of judicial institutions is not factored into the conception of the approach itself. As such, in its application to assessing the effectiveness of ICs, the goal-based approach has not yet passed the test of time. Adapting the approach to the realities of ICs is a project that is still in the trial stage.

It is also equally important to note that, unlike organisations which set goals and attach timeframes for assessing their effectiveness, courts are most likely not to do the same as their effectiveness may take a long time to materialise due to the kind of cases they entertain. Often the impact of the work of ICs is felt over time, not overnight. For example, if the decision of an IC requires the respondent state to amend its Constitution, which usually involves many decision-makers and lengthy legislative processes, implementation of such a decision may take longer time than expected. Further, ICs, unlike domestic courts, do not have law enforcement agencies such as police that enforce their

114 Shany (n 13) 243.

115 Shany (n 13) 244-246.

116 Squatrito and others (n 18) 8.

117 DD Caron 'Towards a political theory of international courts and tribunals' (2006) 24(2) *Berkeley Journal of International Law* 410.

decisions within the timeframe set out in their judgment. Worse still, there are many other socioeconomic and political factors that affect the manner in which states react and respond to the decisions of ICs. For instance, a country going through political turmoil or transition is less likely to prioritise implementing the decision of ICs. Therefore, it is not easy to assess the effectiveness of ICs using the goal-based approach.

3.3.2 African Court in light of goal-based approach

To assess the effectiveness of the African Court in the eyes of the goal-based approach, it is important to mention the goal of the Court which is the mandate of the Court. The mandate of the African Court is to complement and reinforce the protective mandate of the African Commission.[118] The protective mandate of the African Commission encompasses considering individual communications and inter-state communication as well as conducting fact-finding or investigative missions.[119] Accordingly, in light of the goal-based approach, the effectiveness of the African Court cannot be examined in isolation from the nature and practice of the relationship it has with the African Commission.

The African Court Protocol does not provide details on what complementarity entails. However, some commentators have noted that it is meant to encourage each institution to focus on its strengths to support the overall effectiveness of the system.[120] Others have deconstructed complementarity and identified three interrelated and interdependent objectives, namely functional (enhancing the effectiveness of the African human rights system), relational (relating two institutions 'under a system of shared jurisdictional competence and collective enforcement'), and normative (realising norms envisaged under the African human rights system).[121] Further, complementarity has to be understood not only as the African Court supporting the African Commission but also the other way round, as viewing the two institutions as striving in a synergetic relationship to achieve the same objective, that of ensuring respect and protecting human rights on the continent.

Concerning the complementary relationship between the African Court and the African Commission, it is possible to say that the case referral system, particularly in contentious cases, plays a significant role, without ruling out the importance of the other engagement of the two institutions. The details of the referral mechanism are regulated by their respective Rules of Procedures. In this regard, therefore, the effectiveness of the African Court depends not only on its willingness to

118 African Court Protocol, preamble, para 7 & art 2.

119 Viljoen (n 1) 300.

120 ST Ebobrah 'Towards a positive application of complementarity in the African human rights system: issues of functions and relations' (2011) 22(3) *European Journal of International Law* 666.

121 D Juma 'Complementarity between the African Commission and the African Court' in Pan African Lawyers Union *Guide to the complementarity within the African human rights system* (2014) 8.

complement but also on the readiness of the African Commission to refer cases. As of December 2023, the African Commission has referred only 3 cases. Thus, in the absence of cases referred by the African Commission and rejected by the African Court, it is difficult to conclude that the latter is ineffective in fulfilling its goal of complementing the African Commission. Further, the fact that the African Court has been dealing with hundreds of applications coming from countries that have allowed individuals and NGOs direct access is another indication that the African Court is complementing the protective mandate of the African Commission.

4 FACTORS AFFECTING THE EFFECTIVENESS OF THE AFRICAN COURT

Several factors have implications for the effectiveness of ICs. Some are external to the courts, meaning they are beyond their ultimate control, mostly in the hands of the states, while others are those over which the courts can exercise a certain degree of control. Moreover, these factors are not necessarily legal but may stretch to the political, social, and economic spheres. This section discusses these factors while relating them to the realities surrounding the African Court.

One of the factors is the composition of the Court.[122] It is not questionable that the experiences of the judges and their specific expertise in subject matters over which a court exercises jurisdiction contribute to the effectiveness of a court. In this regard, article 11 of the African Court Protocol provides that judges are 'elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights'. So far, the composition of the African Court exhibits these standards, particularly in terms of pulling together judges with a strong human rights background both from academia and practice backgrounds.[123] To mention some, Justice Fatsah Ouguergouz of Algeria, Justice Gérard Niyungeko of Burundi and Justice Sophia AB Akuffo of Ghana are among the former judges who advanced human rights through pro-human rights legal rulings. For instance, in the *Femi Falana v African Union* case, Justice Akuffo is one of the judges who dissented from the majority decision and argued that article 34(6) of the African Court Protocol is inconsistent with the African Charter.[124]

122 LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107(2) *Yale Law Journal* 300.

123 African Court 'Former Judges' https://www.african-court.org/wpafc/former-judges/; 'Current Judges' https://www.african-court.org/wpafc/current-judges/ (accessed 22 April 2022).

124 *Femi Falana v African Union* (jurisdiction) (2012) 1 AfCLR 118, Separate Dissenting Opinion by Judges Akuffo, Ngoepeand Thompson, para 16.

Another factor is the authority or status of the instrument that ICs are charged with interpreting and applying.[125] The African Court has jurisdiction over 'all cases and disputes submitted to it concerning the interpretation and application' of the African Charter, the African Court Protocol, and 'any other relevant Human Rights instrument ratified by the States concerned'.[126] The African Charter enjoys universal regional ratification, with the exception of one AU member state, Morocco[127] and this can be considered as an indication that the Charter is an acceptable normative standard of the continent as far as human rights are concerned. In addition, the resolution, principles, guidelines, and general comments adopted by the Commission fill the gaps and feed in new developments and hence enrich the jurisprudence of the African human rights system. The case-law of the African Commission and the African Court reflects the fact that the Charter provisions set the human rights standards of which violations cannot be justified by national laws of the state parties.[128]

Moreover, the phrase 'any other relevant human rights instrument' in article 3(1) of the African Court Protocol indicates the wide reach of the subject matter jurisdiction of the African Court. There are instances where the African Court found the violations of 'non-African treaties' such as the Convention on the Elimination of All Forms of Discrimination against Women,[129] the International Covenant on Civil and Political Rights,[130] and also a violation of the Universal Declaration of Human Rights.[131] In this regard, the fact that the African Court has jurisdiction over a widely-ratified human rights treaty, the African Charter, which embraces the unique identities of the continent and wide substantive jurisdiction, can be factors that enhance the effectiveness of the African Court.

Another contributing factor is the quality of legal reasoning,[132] which has the potential of either enhancing state adherence to human rights norms or attracting criticism[133] because it is one of the elements that influence states' responses to judgments.[134] Strong legal reasoning 'would theoretically make it harder for states to ignore' the remedies

125 Helfer & Slaughter (n 122) 304-306.

126 African Court Protocol, arts 3 & 7.

127 African Union 'List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and People's Rights' https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 8 June 2020).

128 *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995), para 15; *Mtikila v Tanzania*, para 109.

129 *APDF and IHRDA v Mali* (merits) (2018) 2 AfCLR 380, para 135.

130 *Anudo v Tanzania* (merits) (2018) 2 AfCLR 248, para 132.

131 *Penessis v Tanzania* (merits), para 168.

132 Helfer & Slaughter (n 122) 318.

133 A Follesdal 'Survey article: the legitimacy of international courts' (2020) *The Journal of Political Philosophy* 10.

134 JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court' (2008) 102(4) *American Journal of International Law* 794.

and authority of a court.[135] A sound argument as to why and how the conclusion is reached is more likely to enhance the rationality and the authority of the judgment.[136] Nonetheless, the quality of legal reasoning is not a guarantee for compliance. In this regard, the Court has been praised for some judgments,[137] and criticised for others.[138]

One of the points of criticism is the approach of the African Court to exhaustion of local remedies[139] concerning constitutional petitions, particularly in civil law, mostly in Francophone countries. The African Court considers constitutional remedies as extraordinary remedies and hence does not require applicants to exhaust them.[140] For instance, in *Ajavon v Benin*, the African Court ruled that the application was admissible without thoroughly assessing the effectiveness of the Benin Constitutional Court in addressing the constitutionality of the law establishing the Anti-Economic Crimes and Terrorism Court.[141] However, before the African Court rendered its decision on this case (29 March 2019), the Benin Constitutional Court had already declared unconstitutional the contested provision of law, article 12 of the law establishing the Anti-Economic Crimes and Terrorism Court (31 January 2019).[142] It is important to note that *Ajavon v Benin* is one of the cases that led to Benin's withdrawal of the declaration on direct access.

Another important factor is the domestic social, economic, political, and judicial context of state parties.[143] For instance, the nature of civic space in a country has its share in shaping the interaction with and response of the country to the ICs.[144] A vibrant CSOs environment can positively influence compliance with the judgments of human rights courts and also helps in bringing violations of rights to

135 Abebe (n 22) 574.

136 Helfer & Slaughter (n 122) 320-321.

137 International Justice Resources Centre 'African Court Addresses Freedom of Expression in Burkina Faso, in Landmark Judgment', 3 February 2015, https://ijrcenter.org/2015/02/03/african-court-addresses-freedom-of-expression-in-burkina-faso-in-landmark-judgment/ (accessed 23 August 2020); The Court was appreciated to take a progressive position in finding that custodial measures for the contravening defamation laws violates the right to freedom of expression.

138 Adjolohoun (n 77) 21-31.

139 Adjolohoun (n 77) 26-29; the exhaustion of local remedies is one of the admissibility requirements as set out under art 6(2) of the Court Protocol and art 56(5) of the African Charter.

140 *Onyango & Others v Tanzania* (merits), para 95; *Thomas v Tanzania*, para 65.

141 *Ajavon v Benin* (merits), Application 013/2017, African Court (29 March 2019), paras, 109-117 & 218.

142 DCC 19-055 of 31 of January 2019, Benin Constitutional Court; Adjolohoun (n 77) 28.

143 LJ Peritz 'Why comply? Domestic politics and the effectiveness of international courts' unpublished PhD thesis, University of California, 2015 129-132.

144 L Conant 'Missing in action? the rare voice of international courts in domestic politics' in M Wind (ed) *International courts and domestic politics* (2018) 20; A Chehtman 'The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis' *Blog of the European Journal of International Law* 8 June 2020 https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis/ (accessed 23 August 2020).

the attention of the international community. Moreover, 'democratic states are more likely to honour their international commitments.'[145] Domestic realities of state parties are relevant in the context of the African Court. Most of the countries that are state parties to the African Court Protocol are far away from establishing a sustainable democratic system. Except for countries such as South Africa, Ghana, Mauritius, Kenya and Zambia, which are relatively open societies, other countries are either in the process of transition to democracy like The Gambia or unable to make meaningful progress like Libya. In other state parties such as Tanzania and Rwanda, there is a pattern of shrinking civic space. There is an extreme situation like Mali and Burkina Faso experiencing unconstitutional changes of government, which has led to their suspension from the AU membership.[146] Thus, the African Court struggles to ensure its effectiveness while operating in a politically volatile environment.

5 CONCLUSION

This article discussed the approaches for assessing the effectiveness of ICs, namely, the compliance rate, the usage rate, and the goal-based approaches and applied the same to assess the effectiveness of the African Court. Taking into consideration the young age of the African Court and the political atmosphere in which it is operating, the work the African Court has undertaken in rendering judgments that cover a wide range of human rights is commendable. Nevertheless, the challenges of low compliance with judgments, flaws in legal reasoning, and delays in delivering judgments cannot be overlooked. Yet, such shortcomings cannot detract from the effectiveness of the African Court.

Non-compliance problems are expected, given that the African Court has been responding to pressing socio-political and legal problems of the continent such as freedom of expression, fair trial and elections. To mitigate the risk of non-compliance, the African Court has to be cognizant of the human rights culture of the state parties and the sensitivities of disputes that are brought before it for determination and the political undertones of each case. In addition, the African Court has to be wise in crafting its judgments, especially with regard to reparations, as it is better to have few but enforceable judgments rather than numerous judgments that state parties refuse to enforce. However, this does not mean that the African Court should compromise on human rights. Rather it is to say that the African Court should always remain awakened to the realities of the context in which it is operating and devise relevant strategies that enable it to remain a fully functional human rights supervising body in Africa. Finally, it is important to invest in factors that can positively affect the effectiveness

145 Conant (n 144) 22.

146 Reuters 'African Union suspends Mali's membership after coup' 19 August 2020 https://uk.reuters.com/article/uk-mali-security/african-union-suspends-malis-membership-after-coup-idUKKCN25F22X (accessed 23 August 2020).

of the African Court including the composition of the courts and the quality of legal reasoning in the judgments.

Implementation of article 30 of the African Charter on the Rights and Welfare of the Child: a decade of progress and challenges since the adoption of General Comment 1

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ABSTRACT: This article examines the domestic implementation of article 30 of the African Charter on the Rights and Welfare of the Child concerning the children of incarcerated parents and primary caregivers, more than a decade after the adoption of General Comment 1 on article 30, in November 2013 during the 22nd Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child (Committee). The article analyses 56 initial and periodic reports submitted by 39 state parties, which were considered by the Committee between its 23rd and 42nd Ordinary Sessions. Based on guidance provided in the General Comment, the analysis reveals notable disparities in implementation: while some states have recognised the importance of maintaining parent-child bonds through specific legislative measures, only a minority have established specialised facilities or provided comprehensive non-custodial sentencing options. The article also notes a lack of detailed data and systematic monitoring, and identifies the need for a more robust child-rights-based approach and stronger efforts to ensure full compliance with the General Comment.

TITRE ET RÉSUMÉ EN FRANÇAIS

Mise en œuvre de l'article 30 de la Charte africaine des droits et du bien-être de l'enfant : bilan d'une décennie de progrès et de défis depuis l'Observation générale 1

RÉSUMÉ: Cet article analyse l'application de l'article 30 de la Charte africaine des droits et du bien-être de l'enfant, qui porte sur la protection des enfants de mères incarcérées, plus de dix ans après l'adoption de l'Observation générale No. 1 lors de la 22e session ordinaire du Comité africain d'experts sur les droits et le bien-être de l'enfant (Comité) en novembre 2013. Il s'appuie sur l'examen de 56 rapports initiaux et périodiques soumis par 39 États parties entre la 23e et la 42e session ordinaire du Comité. L'étude révèle des disparités importantes dans la mise en œuvre des directives établies par l'Observation générale. Bien que certains États aient pris des mesures législatives pour renforcer les liens parent-enfant et garantir une meilleure protection des enfants concernés, peu d'entre eux ont établi des infrastructures adaptées ou mis en œuvre des peines alternatives aux sanctions privatives de liberté pour les mères. L'article souligne également l'absence de données désagrégées et le manque de suivi systématique, entravant une évaluation complète des progrès réalisés. Enfin, il met en avant la nécessité d'une approche fondée sur les droits de l'enfant et recommande des efforts accrus pour garantir une pleine conformité avec l'Observation générale 1 et les principes de la Charte.

KEY WORDS: children of incarcerated parents; caregivers; implementation; African Children's Charter; African Children's Committee; General Comment 1

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1 INTRODUCTION AND BACKGROUND

The African Committee of Experts on the Rights and Welfare of the Child (Committee), as the monitoring organ of the African Charter on the Rights and Welfare of the Child (African Children's Charter), has the authority to draft General Comments clarifying the meaning of the provisions of the African Children's Charter to assist state parties in fulfilling their obligations to realise children's rights. During the 22nd Ordinary Session, the Committee adopted its first General Comment, on article 30, which is the only provision in a human rights treaty specifically addressing the issue of children of incarcerated mothers. The measures outlined in article 30 of the African Children's Charter that state parties should undertake to provide special treatment for pregnant women and mothers' infants/young children include prioritising non-custodial sentences,[1] establishing and promoting alternative measures to institutional confinement,[2] establishing specialised alternative institutions,[3] ensuring mothers are not imprisoned with their children,[4] prohibiting the imposition of the death sentence on such mothers,[5] and emphasising the ultimate goal of the penitentiary system as the reformation, integration of the mother back into the family, and social rehabilitation.[6] General Comment 1 expands on the understanding of the provision by extending its application to children of incarcerated parents and caregivers, and outlines the legislative, administrative, policy, and practical measures necessary for the full implementation of article 30.

Children of incarcerated parents and caregivers constitute a vulnerable group that necessitates focused attention as there are many issues to consider. Research indicates that the psychosocial development of young children is more likely to suffer when separated from their primary caregiver during the formative years compared to those living in prison with the primary caregiver.[7] However, living in prison environments, which are often restrictive and poorly suited for

1 African Children's Charter, art 30(a).
2 Art 30(b).
3 Art 30(c).
4 Art 30(d).
5 Art 30(e).
6 Art 30(f).
7 M Nowak *The United Nations study on children deprived of liberty* (2019) 351.

children's growth and development, can also significantly compromise their rights and well-being.[8] Such conditions can lead to various rights violations such as survival and development, education, and health.[9] Article 30 is therefore of particular importance in outlining protective measures to safeguard the rights and welfare of such children and their parents or primary caregivers, addressing the unique needs imposed by incarceration.

In the African context, the challenges of the prison systems are exacerbated by inadequate public and prison health systems, crumbling infrastructure, ineffective criminal justice systems, high pre-trial detention rates, and general overcrowding.[10] Taking examples from Zimbabwe and Uganda, which are among the 39 countries whose state party reports are analysed in this article, clearly highlights the broader systematic and right-based challenges confronting prison systems across the continent. In Zimbabwe, the government struggles due to financial constraints to meet the basic needs of children in prisons, such as health, food, and a safe environment.[11] In Uganda, women prisoners reported that arrests were highly disruptive for their children as no information was provided about their whereabouts,[12] and others noted that their infants occasionally suffered from a lack of food and lived in unhygienic conditions.[13]

A decade since the adoption of General Comment 1, this article assesses the strides and persisting challenges in the domestic implementation since its adoption. The article begins by discussing relevant normative standards at the regional and international level concerning children of imprisoned parents or primary caregivers, providing a foundation for analysing the domestic implementation of General Comment 1. Subsequently, the article explores the legislative, administrative, and policy measures implemented across 39 state parties to the African Children's Charter, drawing on a qualitative analysis of the 56 initial and periodic reports considered by the Committee over this decade. The following section presents a discussion of the findings, highlighting trends observed across countries and the gaps in implementation. Finally, the article concludes with recommendations for member states on how the implementation can be improved.

8 As above.

9 General Comment 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on 'Children of incarcerated and imprisoned parents and primary caregivers', ACERWC (8 November 2013), para 4.

10 MC Van Hout & R Mhlanga-Gunda '"Mankind owes to the child the best that it has to give": prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons' (2021) 13 *BMC International Health and Human Rights* 19 (2019) 2.

11 Parliament of Zimbabwe 'Children of incarcerated parents' (2021) Reports & Policy Briefs https://parlzim.gov.zw/children-of-incarcerated-parents/ (accessed 15 December 2024).

12 F Sheehan & D Mukisa *A shared sentence: children of imprisoned parents in Uganda: A report on the implementation of General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child* (2015) 9.

13 Sheehan & Mukisa (n 12) 16.

2 NORMATIVE STANDARDS PROTECTING CHILDREN OF INCARCERATED PARENTS AND CAREGIVERS

The African Children's Charter and the Convention on the Rights of the Child (CRC) establish foundational frameworks for the rights of children of incarcerated parents and caregivers, but worth noting is also the discourse around the rights of these children has broadened to include a broader spectrum of international standards. Article 46 of the African Children's Charter specifically mandates that the Committee draw upon international human rights law and other relevant United Nations and African instruments enriched by African values and traditions. This provision provides the justification and contextualisation of discussing regional and international normative standards in section 2.2, many of which predate the General Comment and shape the context within which the rights of children of incarcerated caregivers are considered. Within this framework, a detailed analysis of the domestic implementation of article 30 of the African Children's Charter and General Comment is undertaken.

2.1 African Charter on the Rights and Welfare of the Child

General Comment 1 provides a nuanced interpretation of article 30, elaborating on the scope of obligations for state parties, international organisations, civil society, and community-based structures in ensuring the rights and welfare of children whose primary caregivers are involved with the criminal justice system.[14] An emphasis is placed on ensuring protection across all stages of criminal proceedings, from arrest through to release and reintegration, regardless of whether the primary caregiver is subject to custodial or non-custodial measures.[15] Generally, it advocates for an individualised and qualitative approach based on actual data about incarcerated caregivers and their children. This approach contrasts with a purely quantitative or categorical method, ensuring that implementation efforts are tailored to meet the specific needs of this vulnerable group in a more meaningful way.[16] General Comment 1 outlines detailed legislative measures that state parties should implement to ensure compliance, expanding upon the measures which already existed under article 30. Specifically, these include ensuring that their respective legislation gives priority consideration to non-custodial measures when courts sentence or decide on pre-trial measures for a child's sole or primary carer, subject

14 ACERWC (n 9) para 10. The GC explicitly recognises that the principles do not only apply to children of incarcerated mothers but also apply to children affected by the incarceration of their sole or primary caregiver.

15 ACERWC (n 9) para 11.

16 ACERWC (n 9) para 15.

to the need to protect the public and child and bearing in mind the gravity of the offence while considering the best interests of the child.[17]

Article 30 calls for 'special treatment to expectant mothers and to mothers of infants and young children'; as the General Comment clarifies that this provision extends to all parents and primary caregivers, the phrase 'special treatment' signifies a higher level of obligation for state parties reflecting the heightened vulnerability of children of incarcerated parents and primary caregivers. The consideration of non-custodial sentences necessitates a thorough review of the sentencing process. Courts must determine whether the accused is a primary caregiver and assess the adequacy of conditions for the children should a custodial sentence be deemed unavoidable. The General Comment also emphasises the importance of alternative measures at both pre-trial and post-trial stages. Pre-trial alternatives include bail, summons, written notices to appear in court, and life bonds.[18] Post-trial alternatives encompass community service, correctional supervision, fines, and restorative justice sentences, all aimed at minimising the impact of incarceration on children and caregivers.[19] Additionally, safeguards should be provided for pregnant prisoners or those with children where it is considered for judges to impose custodial sentences on such prisoners.[20] State parties should also put in place legislative and administrative mechanisms to ensure that a decision for a child to live in prison with his/her mother or caregiver is subject to judicial review.[21] Finally, state parties are also urged to establish legislative and administrative measures to ensure that they include consideration of the child's views, and take into account the importance of maintaining direct contact with parents or caregivers regularly, particularly during early childhood, as well as the overall conditions of incarceration.[22]

There are five key indicators to measure and evaluate the progress made in the implementation of article 30. First, detailed information should be provided on the constitutional and legislative measures adopted to implement article 30, demonstrating the specific frameworks in place. Second, state parties are expected to explain how their national policy frameworks and action plans translate these constitutional and legislative measures into concrete and measurable actions to implement article 30. Third, there should be a clear indication of the implementation mechanisms, detailing how policies, action plans, and programmes are executed to ensure the effective realisation of article 30. Fourth, state parties must report on the level of enjoyment of the rights under article 30, indicating the extent of their implementation efforts and progress towards full realisation. Finally, state parties are required to outline the evaluation and monitoring

17 ACERWC (n 9) para 24(a).
18 ACERWC (n 9) para 46
19 ACERWC (n 9) para 48.
20 ACERWC (n 9) para 24(b).
21 ACERWC (n 9) para 24(c).
22 ACERWC (n 9) para 24(d) and (e).

mechanisms they have established to oversee the effective implementation of article 30.[23]

2.2 Related human rights frameworks

The CRC, under article 9, addresses children separated from their parents, arguably including children of incarcerated parents. It requires that state parties ensure children are not separated from their parents against their will unless competent authorities, subject to judicial review, determine such separation to be necessary in the child's best interests, in accordance with applicable law and procedures.[24] Moreover, if separation results from actions initiated by a state party, such as detention or imprisonment, the state party must, upon request, provide the parents, the child, or another family member with essential information regarding the whereabouts of the absent family member(s), unless disclosing such information would be detrimental to the well-being of the child.[25] The Committee on the Rights of the Child further emphasised the rights of children of incarcerated parents or caregivers in General Comment 14, which underscores that the best interest of the child should always be of primary consideration. It recommends considering alternatives to detention for parents or caregivers who commit a crime, assessing each case individually to ensure the best interests of the affected child or children are fully considered.[26]

In 1990, the General Assembly adopted the Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), offering a variety of non-custodial measures that authorities can consider in decisions concerning an offender's rehabilitation, societal protection, and victim interests, as per Rule 8(2). These alternatives include:[27]

> (a) verbal sanctions, such as admonition, reprimand and warning; (b) conditional discharge; (c) status penalties; (d) economic sanctions and monetary penalties, such as fines and day-fines; (e) confiscation or an expropriation order; (f) restitution to the victim or a compensation order; (g) suspend or deferred sentence; (h) probation and judicial supervision; (i) a community service order; (j) referral to an attendance centre; (k) house arrest; (l) any other mode of non-institutional treatment.

The Tokyo Rules apply universally to all individuals, underscoring a universal approach to less restrictive alternatives to imprisonment. Building upon the Tokyo Rules, the adoption of the Rules for the Treatment of Women Prisoners and Non-custodial Measures for

23 ACERWC (n 9) para 66.

24 CRC, art 9(1).

25 CRC, art 9(4).

26 General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1) CRC Committee (29 May 2013) UN Doc CRC/C/GC/14 (2013) para 69.

27 Resolution 45/110 United Nations Standard Minimum Rules for Non-custodial Measures, UN General Assembly (14 December 1990) UN Doc A/RES/45/110 (1990) para 8.

Women Offenders (the Bangkok Rules) introduced gender-specific standards addressing the needs of women prisoners and offenders while also incorporating safeguards for children of incarcerated mothers.[28] These specific safeguards ensure that children in prison with their mothers are never treated as prisoners,[29] mothers must be allowed as many opportunities as possible to spend time with the children who are imprisoned with them,[30] the environment provided for such children's upbringing shall be as close as possible to life outside of prison,[31] decisions regarding whether a child should be separated from its mother must be based on individual assessments and the best interests of the child,[32] and non-custodial alternatives to custody be applied wherever possible if someone facing imprisonment has sole caring responsibilities.[33]

The Guidelines for the Alternative Care of Children serve as another critical framework to inform policy and practice.[34] Concerning children of incarcerated parents and caregivers, the Guidelines emphasise the prioritisation of non-custodial measures in cases where a child's primary caregiver faces potential deprivation of liberty due to preventive detention or sentencing, ensuring the best interests of the child are paramount. States are urged to carefully consider the best interests of children born in prison or residing with a caregiver or parent in prison, treating their potential removal from such environments with the same care as other separation situations. Additionally, efforts should be directed towards ensuring that children who remain in custody with a parent receive adequate care and protection while maintaining their status as free individuals with access to community activities.[35] Moreover, states should particularly focus on facilitating contact between children in alternative care due to parental imprisonment and their parents, providing necessary counselling and support accordingly.[36]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 (Maputo Protocol) parallels the Bangkok Rules by emphasising gender-specific standards, particularly addressing protections for incarcerated women, including mothers. Article 24(b) requires state parties to ensure 'the right of pregnant or nursing women … in detention by providing them with an environment which is suitable to their condition and the right to be

28 Resolution 65/229 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, UN General Assembly (21 December 2010) UN Doc A/RES/65/229 (2010) (UN Rules).

29 UN Rules (n 28) Rule 49.

30 UN Rules (n 28) Rule 50.

31 UN Rules (n 28) Rule 51.

32 UN Rules (n 28) Rule 52.

33 UN Rules (n 28) Rule 64.

34 Resolution 64/14 Guidelines for the Alternative Care of Children, UN General Assembly (18 December 2009), UN Doc A/RES/64/142 (2009) (Alternative Care Guidelines).

35 Alternative Care Guidelines (n 34) para 48.

36 Alternative Care Guidelines (n 34) para 82.

treated with dignity'. Additionally, article 4(2)(j) prohibits the imposition of the death penalty on pregnant and nursing mothers.

Together, these normative standards complement the protective measures outlined in General Comment 1 and article 30 of the African Children's Charter, providing a holistic approach to safeguarding the rights and welfare of children affected by the incarceration of their parents or primary caregivers.

3 DOMESTIC IMPLEMENTATION OF ARTICLE 30

In measuring and evaluating the progress of implementing article 30 of the African Children's Charter, the Committee mandates state parties to provide detailed information on their progress, successes, and challenges, including statistical data in their Initial and Periodic Reports. The Guidelines on the Form, Content, and Consideration of Initial and Periodic State Party Reports explicitly reference General Comment 1, requiring state parties to report on special measures for expectant mothers and mothers of infants and young children accused or found guilty of a criminal offence. Specifically, they are required to provide information on the provision of non-custodial sentences, alternatives to institutional confinement, special institutions for mothers, the prevalence of children incarcerated with mothers, and the legal status concerning the imposition of the death sentence on such mothers.[37] The Committee has considered 56 state party reports, comprising Initial and Periodic Reports, since the adoption of the General Comment. These reports have been submitted by 39 state parties representing all regions of Africa, including North, West, Central, East, and South. In assessing the implementation, the focus is on the legislative, administrative, and policy measures undertaken within the state parties.

3.1 Legislative and administrative measures

The state party reports reveal disparities in the legislative and administrative measures undertaken to protect the rights of children of incarcerated parents and caregivers. Notably, while 24 state parties[38] have recognised the importance of maintaining parent-child bonds through legislation allowing children to reside with their imprisoned

37 ACERWC (n 9) para 29(e).

38 There are different age thresholds across legislation allowing children to stay with their imprisoned mothers up to a certain age are across the legislation of the different states: up to 18 months (Ethiopia and Uganda); up to 24 months only if they are born in prison (Eritrea and Eswatini); up to age 2 (Côte d'Ivoire, Lesotho and South Africa), up to age 3 (Algeria, Angola, Benin, Burundi, Madagascar, Mozambique, Rwanda, and Senegal); up to age 4 (Gabon, Kenya and Zambia); up to age 5 (Liberia and Mauritania); no prescribed age limit noted in the state party Report (Ghana, Sierra Leone, Tanzania and Zimbabwe).

mothers up to a certain age, only ten state parties[39] have enacted specific legislation for the provision of non-custodial sentences for pregnant women and mothers with young children. Moreover, only nine state parties that reported[40] have established special institutions or units within prisons, such as Mother and Baby Units, to cater to the specific needs of incarcerated mothers and their children. Six state parties[41] have legal provisions providing for alternative care arrangements or support systems to prevent children from growing up in the prison environment. Regarding the death sentence, three states[42] have completely banned it, with three others[43] specifically prohibiting it for pregnant women or mothers with young children, and two state parties[44] delaying it until after childbirth. Only five state parties[45] presented specific data, five state parties[46] made no reference to measures undertaken to implement article 30, and four state parties[47] noted that there is an absence of legislation concerning the rights of children of incarcerated caregivers.

Despite the enactment of laws in numerous states allowing children to stay with their incarcerated mothers temporarily, article 30(d) stipulates that 'a mother shall not be imprisoned with her child'. This provision underscores the African Children's Charter's emphasis on fostering a 'family environment in an atmosphere of happiness, love and understanding' and reinforces the obligation of state parties to provide alternatives to pre and post-trial custody for primary caregivers.[48] Approaches to handling the incarceration of primary caregivers with children or infants vary among state parties. For instance, in Madagascar, mothers in prison are allowed to stay with their children up to the age of three for breastfeeding and care within a designated penal facility, while religious associations have established a nursery for children of incarcerated mothers.[49] Likewise, in Zimbabwe, where a daycare centre has been established at the country's largest female prison to provide a normal environment for children accompanying their mothers in prison.[50] An observation from the state

39 Algeria, Burkina Faso, Burundi, Eritrea, Ghana, Niger, Nigeria, Rwanda, Senegal and Zambia.

40 Benin, Chad, Ghana, Kenya, Mauritania, Mozambique, Nigeria, Rwanda and South Africa.

41 Botswana, Eritrea, Eswatini, Ghana, Guinea, and Lesotho.

42 Benin, Gabon and South Africa.

43 Eritrea, Ghana and Zambia.

44 Madagascar and Niger.

45 Benin (Initial and 1st Periodic Report), Chad (1st Periodic Report), Ethiopia (1st Periodic Report), Republic of Guinea (Initial Report) and South Africa (1st Periodic Report).

46 Cameroon, Djibouti, Guinea Bissau, Malawi and Seychelles.

47 Burkina Faso, Comoros, Republic of Congo and Niger.

48 As above, para 54.

49 République de Madagascar, 'Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child' (2014) para 392.

50 Republic of Zimbabwe, 'Initial Report of the Government of the Republic of Zimbabwe under the African Charter on the Rights and Welfare of the Child' (2013) para 9.3.2.

reports reveals that many only specify an age threshold for children staying in prisons but rarely address the conditions of the environment and the considerations provided to children living in such settings, including measures to ensure their health and development comparable to children outside of prisons. The General Comment underscores that determining the best interests of children of incarcerated primary caregivers cannot rely solely on formalistic approaches; it makes reference to prevalent narratives such as the 'child at risk' and 'good mother' in African laws and policies, which oversimplify the matter, leading to misconceptions about incarcerated parents and their children by suggesting a uniformity of responses that may not be applicable in all cases.[51] Therefore, in light of this and the progress made thus far, there is a need for a more comprehensive and intentional approach to legislation regarding the incarceration of parents or caregivers with their children.

Moreover, only six state party[52] reports address alternative care arrangements for children outside the prison system, suggesting a gap in comprehensive support services fully supporting the rights and well-being of children of incarcerated parents and caregivers. In Botswana, section 64 of the Children's Act 2009 outlines precise provisions in this regard. According to this section, if a parent, relative, guardian, or custodian is convicted under this Act, a social worker must, within 14 days, seek an order from the children's court to place the child into alternative care.[53] Similarly, in Ghana, a system is in place where family members are informed to take custody of infants ready to be weaned. If they fail to do so by the age of two, the children are transferred to a Children's Home. Furthermore, the Department of Social Welfare in Ghana facilitates communication between convicted mothers and their families, allowing visits for bonding purposes.[54] The General Comment underscores the obligation of state parties to ensure appropriate alternative care for children of imprisoned parents and caregivers, as stipulated in article 25 of the African Children's Charter. Ideally, the process of identifying alternative care should commence immediately following arrest, with regular supervision and review thereafter.[55] In a similar vein, the issue of periodic judicial review for children residing in prison is inadequately addressed in the state party reports, except for in the state party report of Zimbabwe. In Zimbabwe, while not a formal judicial review process, there is a mention of a periodic presidential amnesty, during which nursing mothers are considered for early release.[56] However, across other state parties, there is a significant gap

51 ACERWC (n 9) para 14.

52 Botswana, Eritrea, Eswatini, Ghana, Lesotho and Guinea.

53 Republic of Botswana, 'Combined 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Report Submitted by the Republic of Botswana to the African Committee of Experts on the Rights and Welfare of the Child on the Implementation of the African Charter on the Rights and Welfare of the Child (2003-2021)' (2021) para 259.

54 Republic of Ghana, 'Initial, First, and Second Consolidated Report to the African Committee of Experts on the Rights and Welfare of the Child (2005-2013)' (2014) para 280.

55 ACERWC (n 9) para 40.

56 Republic of Zimbabwe (n 50).

in legislative mechanisms ensuring that decisions regarding a child's residency in prison with their mother or caregiver are subject to judicial review, as required in the General Comment.[57]

From the state party reports, only some countries explicitly outline provisions or measures of non-custodial measures for pregnant women and mothers with young children (and some that apply to all people, indeed including this group). For instance, Sections 221-225 of the Nigeria Child Rights Act mandates courts to consider non-institutional sentences for expectant or nursing mothers as an alternative to imprisonment. Should imprisonment be mandatory, expectant and nursing mothers are directed to be held at a Special Mother's Centre until their child reaches six years of age.[58] Conversely, in both Algeria and Eritrea, legislation permits the postponement of sentencing for pregnant women or mothers of young children. In Algeria, article 16 of Law 05-04 allows for the postponement of the execution of custodial sentences for pregnant women or mothers of children under 24 months.[59] Similarly, in Eritrea, article 206(a) of the Transitional Criminal Procedure Code permits the postponement of penalty execution for women sentenced to arrest or simple imprisonment not exceeding one year.[60] In Burkina Faso, according to Law No 007-2004/AN of 6 April 2004, which governs the administration of community service, courts handling correctional matters have the authority to impose community service sentences. However, this option is available only to defendants convicted of offences punishable by imprisonment. Despite its general applicability to all individuals, this law can indeed apply to pregnant women and mothers with young children.[61] It is worth noting that article 19 of the African Children's Charter grants a child the entitlement to parental care and protection, affirming that only a judicial authority can separate a child from parental care, and only if it is in the child's best interest. The sentencing of parents to prison or custodial settings violates the rights of a child, according to article 19 of the African Children's Charter. Therefore, the courts of state parties must take into account the best interest of children as per article 4, read with article 30(1)(a) and 19(1) regarding the separation of a child from parental care when considering custodial sentences for convicted parents and caregivers.[62]

The existence of specialised prison units like Mother and Baby Units (MBUs) in a few states signifies a targeted effort to cater to the

57 ACERWC (n 9) para 24(c).

58 Federal Republic of Nigeria, 'Nigeria's 2nd and 3rd Combined Country Periodic Report on the Implementation of the African Union Charter on the Rights and Welfare of the Child' (2014) para 6.6.1.

59 People's Democratic Republic of Algeria, 'Initial Report on the African Charter on the Rights and Welfare of the Child' para 362.

60 The State of Eritrea, 'Consolidated First, Second, Third, and Fourth Periodic National Reports on the Implementation of the African Charter on the Rights and Welfare of the Child' (2015) para 308.

61 Burkina Faso, '*Quatrième, Cinquième et Sixième Rapports Périodiques Cumulés du Burkina Faso sur la Mise en Œuvre de la Charte Africaine des Droits et du Bien Être de l'Enfant Pour la Période de 2011 à 2015*' (2016) para 187.

62 Alternative Care Guidelines (n 34) para 38.

specific needs of this demographic. Article 30 envisions special treatment for pregnant mothers and mothers of infants and young children accused or found guilty of infringing the penal law. The term 'special' implies a heightened level of obligation for state parties, reflecting the increased vulnerability of these children who require specific measures.[63] Article 30(1)(c) the African Children's Charter calls on state parties to establish special alternative institutions for holding mothers with a focus on realising children's rights. For instance, programs that facilitate mothers residing with their infants in prison nurseries could be expanded and employed if considered in the child's interests.[64] In response to this, some countries have taken concrete steps to create specialised units tailored to the needs of mothers and their young children within correctional facilities.

South Africa has made commendable progress in establishing specialised prison units, such as MBUs, and is one of the few state parties to extensively report on the measures undertaken in this regard. The Department of Correctional Services initiated the creation of MBUs to provide child-friendly facilities specifically designed for incarcerated mothers and their children.[65] These units not only ensure the physical separation of mothers from the general female prison population but also offer essential amenities, such as baby cots, toys, and kitchens, to meet the needs of children and their incarcerated mothers.[66] Mothers are accommodated in either single cells with a bed and cot, or in communal cells with cots placed adjacent to the mothers' beds.[67] Early Childhood Development centres are integrated within these units to support the holistic development of children residing in prisons with their mothers. These centres focus on various aspects of child development, including emotional, cognitive, sensory, moral, physical, and social growth, aligning with the best interests of the child.[68]

In addition to South Africa, other state parties such as Chad, Kenya, and Rwanda, have also introduced measures to provide for specialised facilities for incarcerated mothers. In Chad, Law No 19/PR/2017 on the Penitentiary Regime of 28 July 2017 provides pregnant women with special protection. Articles 26 and 27 of this law provide that pregnant women are ensured a separate area for the last two months of pregnancy and the following two months postpartum. Throughout their pregnancy, they are entitled to comprehensive support and care to ensure their well-being.[69] Similarly, in Kenya, the Persons Deprived of

63 Alternative Care Guidelines (n 34) para 34 and 35.

64 Alternative Care Guidelines (n 34) para 50 and 51.

65 South Africa, 'South Africa's second Country Report to the African Committee of Experts on the Rights and Welfare of the Child on the African Charter 'on the Rights and Welfare of the Child' (n.d.) paras 303 and 306.

66 As above.

67 South Africa, 'South Africa's Third Periodic Country Report to the African Committee of Experts on the Rights and Welfare of the Child: Implementation of the African Charter on the Rights and Welfare of the Child' (n.d.) para 417.

68 South Africa (n 60) para 304.

69 Republique Du Tchad, '*Rapport National Périodique Cumule (5ème et 6ème) sur la Mise en Œuvre des Dispositions de la Charte Africaine des Droits et Bien Être de l'Enfant*' (2022) para 177.

Liberty Act No. 23 of 2014 mandates separate facilities for mothers with infant children. Additionally, these mothers receive nutritional supplements to support their child's growth and development. The government has allocated resources to ensure that children, pregnant women, and lactating mothers in prison receive a nutritious diet.[70] In Rwanda, mothers with children under three years are detained in special wards reserved for them. Furthermore, the government has established Early Childhood Development Centres within prison facilities. These centres cater to children under three years who reside with their mothers in prison, ensuring they receive appropriate food supplements for their nutritional needs.[71] However, despite these efforts, many state party reports suggest that resources have been insufficiently allocated to ensure the establishment of special alternative institutions that adequately protect children's rights, indicating a persisting challenge since the adoption of the General Comment.

The outright ban on the death penalty, including specific provisions for pregnant women and mothers in certain state parties, reflects a protective measure aimed at safeguarding maternal rights and child welfare. While the majority of countries worldwide prohibit the death penalty for pregnant women, certain state parties to the African Children's Charter opt to postpone execution until shortly after birth, thus violating article 30(1)(e), despite its provisions.[72] Legislative reform is, therefore, essential, as the obligation under article 30 does not merely involve postponing execution but requires that such sentences not be imposed in the first place.[73] Recognising the continued practice of *de facto* moratoriums that postpone executions, as reported by countries like Niger,[74] particularly in cases involving pregnant women, General Comment 1 establishes interim safeguards to protect children until comprehensive legislative reforms are implemented. These measures include informing children about the status of their caregivers on death row; commuting the sentences of prisoners who have spent prolonged periods on death row; integrating comprehensive rehabilitation and development programs that address their specific needs; promoting and maintaining regular contact between incarcerated caregivers and their families; and the development of pre-release initiatives, such as halfway houses.[75]

Moreover, a few countries have attempted to provide data on the number of children living with incarcerated parents or caregivers,

70 Republic of Kenya, 'The Second and Third State Party Periodic Report 2012-2017 on the African Charter on the Rights and Welfare of the Child Presented to the African Union' (2018) page 71.

71 Republic of Rwanda 'Second and Third Periodic Reports on the Implementation of the African Charter on the Rights and Welfare of the Child' (2014) para 130.

72 ACERWC (n 9) para 56.

73 ACERWC (n 9) para 59.

74 Republic of Niger, 'Report submitted by Niger under article 43(1)(b) of the African Charter on the Rights and Welfare of the Child' (2017) (English translation) para 464.

75 ACERWC (n 9) paras 58 and 59.

which, despite not being incredibly comprehensive or disaggregated by factors like age and gender, indicates progress and a willingness to ensure the implementation of article 30 and addressing the needs of this vulnerable group. However, underlining the need for an individualised, informed, and qualitative approach, the General Comment stresses the importance of routinely gathering statistics about children of incarcerated parents and caregivers by relevant agencies to inform policy and practice in state parties.[76]

While some progress has been made in legislative and administrative measures to protect the rights of children of incarcerated parents and caregivers, the overall lack of comprehensive dates and information underscores the need for continued and strengthened efforts to ensure full compliance with the General Comment.

3.2 Policy measures

The General Comment, though not in explicit detail, requires that state parties include comprehensive information illustrating how national policies and action plans convert constitutional and legislative frameworks 'into concrete and measurable actions to implement article 30'.[77] Additionally, it is strongly recommended that these policies should prioritise reducing the separation between imprisoned parents and their children.[78] Yet, a review of the state party reports since the General Comment reveals that none of the 56 reports discuss prison-related policies or action plans that address the rights of children of incarcerated parents and caregivers and the measures are in place to uphold the rights of their parents in accordance with the provisions of article 30 of the African Children's Charter. Although some reports acknowledge the contributions of non-governmental organisations in supporting the implementation of article 30, there is seldom a direct acknowledgment of the state parties' efforts to meet their obligations.[79] This oversight is a notable limitation and warrants criticism of both the state parties and the Committee. Often, the Concluding Observations and Recommendations sent to the state parties include a paragraph regarding children of incarcerated parents, wherein the Committee urges the state party to consider General Comment 1 of the African Children's Charter in the implementation of article 30, but this recommendation tends to be generic rather than tailored to individual circumstances highlighted in the respective state party reports,

76 ACERWC (n 9) para 16.

77 ACERWC (n 9) para 66.

78 ACERWC (n 9) para 52.

79 For example, in Ethiopia, the Prison Fellowship provides formal education to children and skills training to mothers across 90 prisons, with over 100 children enrolled in classes. In the Republic of Guinea, NGOs like Terre des Hommes, Sabou Guinée, and SOS Children engage in activities inside and outside prisons, such as constructing dining facilities, renovating dormitories, training prison staff, providing healthcare for children, and more.

reflecting a lack of the individualised approach that the General Comment promotes state parties to undertake.

4 DISCUSSION

The overall reporting on the measures undertaken to implement article 30 and General Comment 1 remains inadequate for several reasons, as discussed below. The five indicators in section 2.1. to evaluate progress include constitutional and legislative measures, translation into national policies, implementation mechanisms, the extent of enjoyment of article 30, and evaluation frameworks. However, only the first indicator, detailing constitutional and legislative measures, is addressed. There is a very strong focus in the state party reports on legislative measures only, which evidently results in a lack of detailed information on the implementation and practical outcomes for children of incarcerated parents and primary caregivers, as revealed in the 56 state party reports reviewed. The reports generally lack detailed accounts of how legislative measures are being practically implemented, which fails to meet the second indicator of translating how national policy frameworks and action plans translate the legislative and constitutional measures into concrete and measurable actions.

While there are legislative actions and some policy measures in place to support the rights of children of incarcerated parents, there is a considerable lack of comprehensive action and detailed reporting that would demonstrate a full commitment to the five indicators. There is a lack of data on the prevalence of children of incarcerated parents and caregivers, and the monitoring and evaluation of the practices in place, as well as clear indication of implementation mechanisms in place to execute the action plans and policies. These are all key elements discussed in the General Comment. However, as indicated in section 3.1, only five[80] of the 39 state parties include data in their reports, despite clear guidance to routinely compile and review such statistics to inform effective policy and practice. Moreover, the reports frequently lack detailed information, with many providing only brief mentions of legislation, spanning just one to three paragraphs without exploring the efficacy of these laws in practice, which illustrates a disregard for reporting on measures undertaken to implement article 30. The fourth indicator requires reports on the level of enjoyment of rights under article 30, including successes and challenges. Considering only five states presented specific data, this indicates a failure to fully meet this indicator. Moreover, five state parties[81] made no reference to measures undertaken to implement article 30, and four state parties[82] noted that there is an absence of legislation concerning the rights of children of incarcerated caregivers.

80 Benin (both reports); 1st Periodic Report: Chad, Ethiopia and South Africa.

81 Cameroon, Djibouti, Guinea Bissau, Malawi and Seychelles.

82 Burkina Faso, Comoros, Republic of Congo and Niger.

Regarding the final indicator, which concerns evaluation and monitoring mechanisms, although the reports lack detailed descriptions of these processes, it is notable that 11 state parties had more than one report considered by the Committee.[83] A review of these specific countries arguably illustrates notable progress is evident in their adherence to article 30 of the African Children's Charter, alongside the implementation of measures outlined in the General Comment. Chad provides a clear example of legislative improvements following the Concluding Observations and Recommendations and Recommendations of the Committee after the consideration of the Initial Report. These recommendations encouraged the state party to consider General Comment 1 in the implementation of article 30. Chad's First Periodic Report references the adoption of Law No 19/PR/2017 on the Penitentiary Regime which mandates special protection for pregnant women in custody.[84] Similarly, Benin's Initial Report covering the period up to 2015, two years after the adoption of the General Comment by the Committee, references a new Child Code that included protection of the rights of children affected by parental incarceration. Although the specific year of enactment is unspecified, the provisions of the Child Code align closely with principles articulated in General Comment 1. These provisions cover rights for children born in prison, regulations allowing children to remain with their incarcerated mothers until a specified age, and protections for pregnant women in detention.[85] A similar trend is observed in the First Periodic Report of the Republic of Guinea. Article 50 of the new Child Code, responding to the Concluding Observations and Recommendations of the Committee, allows for the possibility of a child residing in prison with their mother (provided the conditions are suitable), that a specialised facility is established, and it incorporates the elements of article 30(f), emphasising that the focus of the prison system should ultimately be on the rehabilitation and reintegration of the parent and primary caregiver.[86] These legislative developments reflect a degree of domestic implementation of the General Comment despite the reports themselves not explicitly acknowledging the influence of the General Comment.

The indicators outlined in the General Comment served as the primary basis for assessing the measures undertaken by state parties to implement article 30, and the depth of information provided in the state party reports to the Committee, as discussed above. However, beyond these indicators, a broader analysis reveals significant gaps in the effective realisation of children's rights, largely rooted in a lack of political will among state parties. The Concluding Observations and Recommendations of the Committee consistently reveal a recurring

83 Benin, Chad, Eritrea, Ethiopia, Guinea, Ivory Coast, Kenya, Lesotho, Rwanda, Senegal and South Africa.

84 République du Tchad (n 68).

85 Republique du Benin '*Deuxième (2ème) rapport périodique de mise en œuvre de la Charte Africaine des Droits et du Bien-Être de l'Enfant*' (2022) 43-44.

86 Republique de Guinee '*Deuxieme, troisieme, Quatrieme, Cinquieme et Sixieme rapports périodique sur l'application de la Charte Africaine des Droits et du Bien Être de l'Enfant (CADBE)*' (2019) para 176.

trend of insufficient prioritisation of children's rights, often reflected in the low budgetary allocation towards the implementation of the rights and welfare of children as enshrined in the Charter. The Committee has repeatedly called on state parties to increase budgetary allocations. This is particularly evident among the 11 state parties[87] that have undergone more than one state party report review over the ten years since the adoption of the General Comment, each receiving at least two Concluding Observations and Recommendations during the reporting cycles. Budgetary allocation, which falls under the general measures of implementation in the Concluding Observations, is a key area where the commitment to children's rights is assessed. The Committee continues to emphasise the importance of sufficient budgetary allocation as a foundational measure to ensure effective implementation of the rights of children, and monitoring the implementation of these rights.

For instance, the Committee observed a significant decline in budget allocations for the South African Human Rights Commission, particularly for its role in promoting children's rights. This decline was noted across two reporting cycles, suggesting a lack of sustained commitment to children's issues despite ongoing recommendations for increased funding.[88] Similarly, in Rwanda, while there was a slight increase in budget allocations for child rights, the Committee highlighted that these increments were inadequate relative to population growth and inflation, ultimately affecting the quality of health and education services for children.[89] In Lesotho, the Committee pointed out that the Ministry of Social Development's mandate extends beyond child rights, resulting in limited dedicated funding for children's issues.[90]

87 Benin, Chad, Eritrea, Ethiopia, Guinea, Ivory Coast, Kenya, Lesotho, Rwanda, Senegal and South Africa.

88 ACERWC, Concluding Observations and Recommendations of the African Committee of Experts on The Rights and Welfare of the Child to the Government of the Republic Of South Africa on its Second Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child (2023) para 6; ACERWC, Concluding Observations and Recommendations of the African Committee of Experts on The Rights and Welfare of the Child to the Government of the Republic Of South Africa on its First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child (2019) para 7.

89 ACERWC, Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare (ACERWC) of the Child on the Second Periodic Report of the Republic of Rwanda on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2019) paras 9 and 10; Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare (ACERWC) of the Child on the Second and Third Periodic Report of the Republic of Rwanda on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (n.d.) para 8.

90 ACERWC, Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare to the Kingdom of Lesotho on the First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child (2023) paras 6 and 7.

This general lack of political will becomes more apparent when examining the prioritisation of a vulnerable group of children, children of incarcerated parents and caregivers, especially given the lack of the child rights-based approach to the implementation of article 30 at the domestic level, particularly evident in three key areas. First, there is a significant lack in the establishment of specialised facilities for children of incarcerated parents and caregivers. Second, there is a lack of non-custodial measures across the state party reports. Third, there is limited mention of periodic judicial review for children who are living in prison with their parents or caregivers. As indicated in section 3.1., nine state parties have established special facilities or units such as Mother and Baby Units, however, this is not a widespread practice as it is not even mentioned in the other state party reports. Moreover, despite the absence of special facilities to house mothers and their children, there is also a gap in the number of reports that make reference to the provision of non-custodial measures or alternative arrangements for children in this situation. This shortfall is especially concerning when considering the comprehensive options for non-custodial measures outlined in the Tokyo Rules, which include a wide range of less restrictive alternatives to facilitate offender rehabilitation and protect societal and victim interests. These measures range from verbal sanctions and economic penalties to probation, community service, and house arrest, underscoring a universal approach to minimising incarceration. Last, the periodic judicial review of the conditions and status of children who remain in custody with their parents appears to be inadequately addressed. These points beg the question of whether the best interest principle of the child is being considered in the sentencing of the parent and or primary caregiver, and the possible consequence on the affected child.

5 CONCLUSION AND RECOMMENDATIONS

In conclusion, the domestic implementation of article 30 following a decade since the adoption of General Comment 1 reveals a substantial variation in the level of compliance, highlighting a concerning inconsistency in the adoption of the principles of article 30 across the continent. Legislative measures, while significant in a few countries, are not universally reflective of a commitment to the underlying principles of article 30. Notably, only a select number of states have established specialised facilities or adapted their judicial processes to prioritise non-custodial measures for incarcerated parents, directly impacting the welfare of the children involved. Moreover, the inadequacy of detailed data collection and systematic monitoring mechanisms is concerning because without comprehensive data, it is challenging to assess the full impact of implemented measures or to understand the scope of ongoing issues fully. This gap not only impedes the effectiveness of current policies but also complicates the development of targeted interventions that could address the specific needs of affected children. Despite the legislative intentions, the practical outcomes for children of incarcerated parents and caregivers remain largely unaddressed, with many states lacking the

infrastructure or policy provisions to effectively support the non-custodial and rehabilitative aspirations envisioned by the African Children's Charter and the General Comment.

This is not only a criticism of the progress made and challenges that persists, but also a call to action. The future efforts of state parties must focus on ensuring that the protections intended by article 30 are not only legislated but also effectively implemented and monitored to adequately protect the rights and welfare of children affected by the incarceration of their parents or primary caregivers. In this regard, this article recommends the following:

> State parties to the African Children's Charter should strengthen information provided in the state reports submitted to the Committee by ensuring the five indicators outlined in the General Comment are reflected: (i) ensure detailed reporting on constitutional and legislative measures implementing article 30; (ii) clarify how national policy frameworks and action plans operationalise these measures into concrete and measurable actions to implement article 30; (iii) establish clear implementation mechanisms outlining the execution of policies, action plans, and programs for effective realisation of article 30; (iv) report on the extent to which rights under article 30 are enjoyed, indicating implementation efforts and progress toward full realisation; and (v) outline evaluation and monitoring mechanisms established to oversee the effective implementation of article 30.

State parties to the African Children's Charter should incorporate a child-rights based approach as the foundation for legal and policy frameworks, upholding the four general principles (non-discrimination, best interest of the child, survival and development, and child participation) of the Charter throughout all stages of the imprisonment process, from pre-trial to imprisonment, and the reintegration period following release.

State parties to the African Children's Charter ensure the necessary legal protections and administrative procedures are established and implemented that prioritise non-custodial sentences over custodial ones for parents and primary caregivers during sentencing, including pre-trial and trial phases, whenever feasible. Alternatives to incarceration should be provided for and implemented on a case-by-case basis, taking into full account the potential impact of different sentences on the well-being of the affected child and upholding the best interest of the child as the primary consideration.

State parties to the African Children's Charter should, following article 30(1)(c) of the African Children's Charter and article 24(b) of the Maputo Protocol, establish special institutions for holding pregnant women and mothers of young children/infants in prison. These institutions should be designed to focus on realising children's rights, potentially including programs and prison nurseries.

State parties to the African Children's Charter ensure that children incarcerated with their parent or primary caregiver are not discriminated against based on the status of their caregiver and are provided with comprehensive social services, including adequate healthcare and educational resources.

State parties to the African Children's Charter should completely prohibit the death penalty for parents and primary caregivers, both in law and practice in accordance with article 30(1)(e); and adopt and implement alternative care policies that provide for children whose parent or primary caregiver are incarcerated, following guidance provided in UN Guidelines for the Alternative Care of Children.

In addition to the above recommendations to state parties, the role of the Committee is also emphasised. The Committee must take a more proactive role in its engagement in the state party reporting procedure. Beyond setting standards and developing documents, it is important to not only to monitor but also to push for the enforcement of the General Comment 1 until the outcomes of state party reports align closely with the objectives of the General Comment and that there is a demonstrable improvement in meeting the specified indicators. This article, therefore, not only underscores the necessity for enhanced commitment and accountability but also highlights the collaborative imperative across all levels to ensure that the rights and welfare of children affected by parental incarceration are actively and effectively protected.

Annex 1: Sessions and state reports considered since the Committee's adoption of General Comment 1

Date	Session	Reports Considered
9 Apr - 16 Apr 2014	23rd Ordinary Session	Initial Report: Liberia
7 Oct - 11 Oct 2014	1st Extra-Ordinary Session	Initial Report: Ethiopia, Republic of Guinea, Mozambique, South Africa 1st Periodic Report: Kenya
1 Dec - 6 Dec 2014	24th Ordinary Session	No reports considered
20 Apr - 24 Apr 2015	25th Ordinary Session	Initial Report: Madagascar, Namibia, Rwanda, Zimbabwe
16 Nov - 19 Nov 2015	26th Ordinary Session	Initial Report: Algeria, Congo, Gabon, Lesotho
2 May - 6 May 2016	27th Ordinary Session	No reports considered
21 Oct - 1 Nov 2016	28th Ordinary Session	Initial Report: Cameroon, Eritrea, Ghana
2 May - 9 May 2017	29th Ordinary Session	Initial Report: Chad, Comoros, Ivory Coast 1st Periodic Report: Tanzania
6 Dec - 16 Dec 2017	30th Ordinary Session	Initial Report: Angola, Sierra Leone
24 Apr - 4 May 2018	31st Ordinary Session	Initial Report: Burkina Faso, Burundi, Malawi, Niger
12 Nov - 20 Nov 2018	32nd Ordinary Session	Initial Report: Zambia 1st Periodic Report: South Africa
18 Mar - 28 Mar 2019	33rd Ordinary Session	Initial Report: Benin, Eswatini 1st Periodic Report: Nigeria, Rwanda, Senegal
25 Nov - 5 Dec 2019	34th Ordinary Session	Initial Report: Mauritania
31 Aug - 8 Sep 2020	35th Ordinary Session	2nd Periodic Report: Kenya
23 Nov - 4 Dec 2020	36th Ordinary Session	No reports considered
15 Mar - 26 Mar 2021	37th Ordinary Session	Initial Report: Guinea Bissau 1st Periodic Report: Guinea
15 Nov - 26 Nov 2021	38th Ordinary Session	1st Periodic Report: Ethiopia
21 Mar - 1 Apr 2022	39th Ordinary Session	Initial Report: Seychelles 1st Periodic Report Eritrea, Uganda
23 Nov - 2 Dec 2022	40th Ordinary Session	1st Periodic Report: Republic of Congo
26 Apr - 6 May 2023	41st Ordinary Session	Initial Report: Botswana and Djibouti 1st Periodic Report: Ivory Coast, Lesotho 2nd Periodic Report: South Africa

8 - 17 Nov 2023	42nd Ordinary Session	1st Periodic Report: Benin, Chad 2nd Periodic Report: Senegal

Developing quasi-criminal review in Africa: lessons from the Inter-American Court of Human Rights

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ABSTRACT: This article aims to address the pervasive implementation crisis in global human rights systems through an analysis of the measures regional courts take to ensure state compliance with their rulings. Utilising a comparative methodology, this study examines the post-judgment phase efforts of the Inter-American Court of Human Rights (Inter-American Court) and the African Court on Human and Peoples' Rights (African Court) to enforce compliance through innovative remedies. The article begins by exploring the concept of compliance within the context of regional human rights systems, drawing on the effective adjudication framework developed by Helfer and Slaughter and Roach and Budlender's typology of governmental responses to non-compliance. The article then examines the development and procedural elements of quasi-criminal jurisdiction by the Inter-American Court, which includes orders for states to investigate, prosecute, and penalise perpetrators of gross human rights violations, followed by court-monitored compliance. Comparative analysis reveals that both the Inter-American Court and African Court have adopted similar quasi-criminal measures, suggesting a trend towards more robust enforcement mechanisms in response to persistent non-compliance. The findings indicate that while declaratory orders are effective for negligent governments, more assertive remedies are necessary for addressing incompetence and obstinacy. This study concludes that while the African Court has adopted most elements of quasi-criminal review, more still needs to be done for this practice to be as successful as it has been in the Inter-American Court. More specifically, the African Court needs to develop its monitoring practices and the Draft Framework for Reporting and Monitoring Execution of Judgments and other Decisions of the African Court represents a step in the direction for this purpose.

TITRE ET RÉSUMÉ EN FRANÇAIS

Renforcer le contrôle quasi-pénal en Afrique : enseignements de la Cour interaméricaine des droits de l'homme

RÉSUMÉ: Cet article analyse les réponses des juridictions régionales des droits de l'homme face à la crise persistante de mise en œuvre de leurs décisions par les États, en se concentrant sur les mécanismes développés pour garantir leur exécution. À travers une approche comparative, il examine les pratiques de la Cour interaméricaine des droits de l'homme (Cour interaméricaine) et de la Cour africaine des droits de l'homme et des peuples (Cour africaine), particulièrement dans le cadre des mesures quasi-pénales prises après le prononcé des arrêts. L'étude débute par une exploration du concept de conformité dans les systèmes régionaux de protection des droits de l'homme, en mobilisant le cadre d'adjudication efficace proposé par Helfer et Slaughter, ainsi que la typologie des réponses gouvernementales à la non-conformité établie par Roach et Budlender. Elle s'attarde ensuite sur l'évolution de la compétence quasi-pénale de la Cour interaméricaine, qui englobe des injonctions

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adressées aux États en vue d'enquêter, de poursuivre et de sanctionner les auteurs de violations graves des droits humains, sous le contrôle direct de la Cour. L'analyse comparative met en lumière les similitudes entre les mesures quasi-pénales adoptées par la Cour interaméricaine et celles de la Cour africaine, signalant une tendance générale vers des mécanismes de mise en œuvre plus robustes pour faire face au non-respect persistant. Les résultats indiquent que si des ordonnances déclaratives suffisent pour traiter les cas de négligence étatique, des mesures plus contraignantes sont indispensables pour lutter contre l'obstination ou l'incompétence des gouvernements. L'étude conclut que, bien que la Cour africaine ait incorporé plusieurs éléments du contrôle quasi-pénal, des efforts supplémentaires sont nécessaires pour atteindre un niveau d'efficacité comparable à celui de la Cour interaméricaine. En particulier, la Cour africaine doit renforcer ses pratiques de suivi et son projet de cadre pour l'établissement de rapports et le contrôle de l'exécution des arrêts représente une avancée significative dans cette direction.

KEY WORDS: non-compliance; Inter-American Court of Human Rights; African Court; quasi-criminal review; Africa

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1 INTRODUCTION

A growing body of scholarship has identified an 'implementation crisis' affecting human rights systems across the globe.[1] Researchers provide detailed accounts on the different manifestations of this crisis in response to rulings delivered in Europe, America, and Africa.[2] These courts are not blind to the ongoing challenge and, as a result, regional courts and commissions are increasingly focused on the post-judgment phase in which they scrutinise how effectively states implement their decisions and probe the reasons for non-implementation.

The persistent non-compliance by states raises fundamental concerns. First, the legitimacy of any court, whether domestic, regional, or international, hinges on the effectiveness of its orders. According to Helfer and Slaughter, effective adjudication involves not only a court's authority to compel a response from defendants, but also its ability to enforce compliance with judgments.[3] In short, a court is not effective if it fails to enforce its judgments.

1 VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3; C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: what role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71; AV Huneeus 'Compliance with judgments and decisions' in CP Romano, KJ Alter & Y Shany (eds) *Oxford handbook of international adjudication* (2014) 438-59.

2 As above.

3 LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 283.

Confronted with this ongoing challenge, regional courts have intensified efforts to fortify mechanisms aimed at redressing human rights violations promptly and effectively. Scholars have noted significant amendments to the Rules of Procedure by the African Commission, the adoption of monitoring and reporting processes by the African Court on Human and Peoples' Rights (African Court), judicial monitoring initiatives at the Inter-American Court of Human Rights (Inter-American Court), and the establishment of a compliance follow-up unit within this Court.[4]

The adoption of these rather intensive, and, arguably invasive, measures can be explained through the framework developed by Roach and Budlender, which justifies escalating responses to non-compliance where governments exhibit inattentiveness, incompetence, or intransigence.[5] While this typology was developed with reference to compliance with domestic judgments, this framework proves pertinent within the realm of regional human rights systems. Contrary to the managerial theory posited by Chayes and Chayes, which suggests that states have a general propensity to comply with international law,[6] regional contexts underscore the relevance of Roach and Budlender's typology. According to these authors, while declaratory orders may suffice for negligent governments, more robust remedies such as mandatory relief and mandated government reporting to courts become necessary when governments display incompetence or obstinacy in implementing judgments.[7]

This typology helps explain innovative remedies such as the practice of quasi-criminal review which was crafted by the Inter-American Court. Quasi-criminal review allows regional bodies to make orders instructing states to initiate investigations, undertake prosecutions, and impose penalties upon those responsible for gross human rights violations.[8] Thereafter, the courts can monitor compliance through various follow-up mechanisms.[9] A similar trend is observable in Africa, suggesting that quasi-criminal jurisdiction of supranational courts emerges as a remedial response to states' non-compliance with court rulings.

This article provides an in-depth analysis of this innovative remedy, juxtaposing its application by the Inter-American Court and the African Court. The first section explores the concept of quasi-criminal review and how it facilitates compliance with regional court judgments. This is followed by an examination of the development of quasi-criminal

4 R Murray 'Addressing the implementation crisis: securing reparation and righting wrongs' (2020) 12 *Journal of Human Rights Practice* 2.

5 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325.

6 A Chayes & AH Chayes *The new sovereignty: compliance with international regulatory agreements* (1995) 3.

7 Roach & Budlender (n 5) 327.

8 AV Huneeus 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts' (2013) 107 *American Journal of International Law* 2.

9 As above.

jurisdiction by the Inter-American Court, with a focus on specific procedural elements. Subsequently, the article investigates whether recent practices within the African human rights system can be classified as quasi-criminal review, with reference to the African Court's jurisprudence.

2 THE ROLE OF QUASI-CRIMINAL REVIEW IN ENSURING COMPLIANCE

The handing down of rulings by supranational bodies can significantly impact human rights practices by drawing attention to alleged human rights violations, honouring victims, and advancing human rights jurisprudence.[10] However, the most tangible effect of these rulings is seen in states' compliance. By adhering to court decisions, states offer remedies to individual victims and implement structural and systemic changes to prevent future violations. Full compliance with these rulings exemplifies international human rights law at its most effective.[11]

What constitutes compliance varies on a case-by-case basis. Although there is no universal definition for 'compliance', and most international law instruments do not provide a concise definition, the UN Charter makes reference to 'non-compliance' which is defined as a state party's failure to perform the obligations assigned to it through the International Court of Justice's (ICJ) orders.[12] Leading voices in international law scholarship have offered more or less the same definition for the term 'compliance'. Raustiala and Slaughter define compliance as 'a state of conformity or identity between an actor's behaviour and a specified rule'.[13] Similarly, Huneeus views compliance as a relational concept referring to a correspondence between a ruling's demands and the behaviour of the parties subject to the ruling.[14] Andreas von Staden views compliance as the conformity of behaviour with what is required or prohibited based on an obligation rooted in a norm, a decision or another normative pronouncement.[15]

It is easy to confuse compliance with 'implementation' and sometimes, the terms are used synonymously. However, implementation refers to the process of taking individual or collective measures – such as legislation, judicial decisions, administrative actions, executive decrees, or other steps – to enforce an adverse

10 C Hillebrecht *Domestic politics and international human rights tribunals* (2013) 11.

11 As above.

12 Art 94(2), United Nations Charter.

13 K Raustiala and AM Slaughter 'International law, international relations and compliance' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2002) 539.

14 AV Huneeus 'Compliance with judgments and decisions' in Romano, Alter & Shany (n 1) 443.

15 A von Staden 'Implementation and compliance' in R Murray & D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 22.

decision or judgment.[16] Thus, implementing the decisions of courts or tribunals typically involves a blend of actions.

Navarro argues that more focus should be placed on implementation rather than compliance as the latter simply indicates that the state's laws and practices align with the requirements of a judgment, while implementation involves domestic actors recognising, incorporating, and taking ownership of the judgment.[17] In Navarro's view, compliance does not adequately capture all the aspects related to a judgment's effectiveness, such as delayed or partial compliance as well as any innovative measures adopted by courts and their reasons for doing so.[18]

In my view, it would be prudent not to create a hierarchy between implementation and compliance for two reasons. On the one hand, as von Staden argues, implementation is not necessarily an absolute condition for compliance, as compliance may occur without the implementation of any new measures.[19] On the other hand, implementation can be viewed as a process entailing a series of steps taken to achieve an outcome (compliance). Monitoring bodies examine whether the measures implemented constitute partial compliance, full compliance or non-compliance.[20] The distinction ultimately lies on the degree of compliance by a state: partial compliance refers to a situation where a state complies with some but not all of a court's orders, if a state complies with all of the orders then that qualifies as full compliance, while non-compliance refers to cases where a state does not comply with any of the court's orders.

It is argued that a court's authority to compel litigants to adhere to its judgments partly derives from its capacity to leverage the state's coercive power.[21] For international courts and tribunals, leveraging state power to directly enforce compliance is challenging because their jurisdiction is limited to determining whether a state is internationally responsible for certain violations.[22] As a result, they can only implement their decisions through member states. In contrast, supranational bodies, such as regional human rights courts, have the authority to issue decisions that are directly binding on member states, as well as on public and private enterprises and individuals within those states.[23]

16 Von Staden (n 15) 18.

17 GCB Navarro 'Effectiveness of international courts: the impact of the Inter-American human rights system' in A von Bogdandy and others (eds) *The Impact of the Inter-American human rights system: transformations on the ground* (2024) 140.

18 As above.

19 Von Staden (n 15) 22.

20 RC Liwanga 'From commitment to compliance: enforceability of remedial orders of African human rights bodies' (2015) 41 *Brooklyn Journal of International Law* 99, 133.

21 Helfer & Slaughter (n 3) 284.

22 Huneeus (n 8) 2.

23 Helfer & Slaughter (n 3) 288.

Since supranationalism recognises that states are composed of governments interacting with a wide array of non-state entities, corporations, individuals and organizations, there is a direct connection between supranational institutions and private parties which allows these tribunals to form direct or indirect relationships with various branches of domestic governments.[24] Through these relationships, a supranational tribunal can leverage the power of domestic governments to enforce its rulings, similar to how domestic court orders are enforced. Hillebrecht argues that state compliance with international human rights tribunals' rulings is fundamentally a domestic affair.[25] Even human rights tribunals with extensive oversight and enforcement capacities rely entirely on state actors and domestic political forces for compliance.

In handing down a judgment, the government of the state in question, usually the executive, is addressed. Therefore, the executive is the branch that is ultimately responsible for compliance.[26] Once a ruling has been issued, the executive typically delegates the tasks necessary for compliance to various state entities.[27] Using Niger as an illustration, the *Koraou* judgment issued by the ECOWAS Community Court of Justice (ECCJ) provides a clear example of executive involvement in the implementation of a regional court decision. Despite the fact that Niger had criminalised slavery in its penal code before the *Koraou* case, an estimated 43,000 people were still believed to be enslaved in Niger as of 2010.[28]

In response to the ECCJ's finding that the Government of Niger failed to prevent violations committed by third parties, the Ministry of Justice issued a circular instructing judges to handle cases – particularly those related to slavery – with greater diligence.[29] It has been argued that this approach alone was insufficient. A more comprehensive strategy was required, involving policy measures to ensure coordinated efforts across various state institutions in the enforcement of anti-slavery provisions.[30]

In the absence of full compliance with its judgments, the effectiveness of a supranational tribunal is questionable. This is because the success of an institution of this nature is based on its ability to ensure compliance with its judgments by persuading domestic government institutions, both directly and through pressure from private litigants, to use their authority in its favour.[31]

24 As above.

25 Hillebrecht (n 10) 3.

26 Hillebrecht (n 10) 22.

27 E Asaala 'Assessing the mechanisms and framework of implementation of decisions of the African Court on Human and Peoples' Rights fifteen years later' (2021) *De Jure Law Journal* 449.

28 HS Adjolohoun 'The ECOWAS Court as a human rights promoter – assessing five years' impact of the Koraou slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 352.

29 As above.

30 Adjolohoun (n 28) 353.

31 Helfer & Slaughter (n 3) 290.

Non-compliance fuels remedial innovation. Taylor explains that where positive action is required to implement court decisions, non-compliance erodes respect for the rule of law and constitutes a systemic threat to human rights.[32] Furthermore, non-compliance weakens the legitimacy of the supranational body in question. To avoid this, court orders have become more precise and prescriptive, eventually leading to the implementation of novel remedial methods to achieve full compliance.[33]

Supranational bodies have started to realise the extent to which other government institutions can play a role in integrating international law, including rulings from international human rights tribunals, into domestic jurisprudence through investigations, litigation, and the establishment of legal precedents. For instance, an independent judiciary capable of administering reparations, conducting investigations, and issuing rulings is arguably the most valuable asset for ensuring compliance with international human rights law.

Bearing in mind that judiciaries can expedite the compliance process by offering the necessary legal channels and expertise to interpret and implement their rulings,[34] human rights courts are increasingly relying on quasi-criminal review.[35] This practice enables regional courts to address challenges in assessing state compliance. By retaining jurisdiction after issuing a judgment, the courts can identify the measures states have implemented regarding specific proclamations. This is facilitated by the courts' ability to request follow-up information and reports from various actors, including civil society. Additionally, as the required scope and depth of compliance may change over time,[36] quasi-criminal review allows the courts to maintain an ongoing dialogue with the involved parties, thereby ensuring continuous assessment and adaptation.

3 COMPLIANCE AT THE INTER-AMERICAN COURT

The Inter-American Court blazed a new trail with its innovative response to persistent non-compliance by states. To date, it has overseen domestic prosecutions in more than fifty instances. In 1979, the American Convention on Human Rights came into force,[37] and through it, the Inter-American Court, which has the jurisdiction to hear all cases concerning the interpretation and application of the provisions

32 H Taylor 'Forcing the Court's remedial hand: non-compliance as a catalyst for remedial innovation' (2019) 9 *Constitutional Court Review* 250.

33 As above.

34 Hillebrecht (n 10) 22.

35 Huneeus (n 8) 5.

36 Von Staden (n 15) 27.

37 Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969.

of this Convention was created.[38] The Court has advisory as well as contentious jurisdiction. However, individual petitions must first go via the Inter-American Commission before being submitted to the Court.[39]

In addition, the Inter-American Commission can refer cases to the Court if 'the State has not complied with the recommendations of the report approved in accordance with article 50 of the American Convention.'[40] The Commission regularly refers cases to the Court, even where it has given a state various opportunities to implement its recommendations.

At the time that the Court was established, the American region was plagued by a culture of impunity, which was described in the *White Van* case as a 'the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention'.[41] It is this culture of impunity, the dynamics of human rights violations in America, and the role of the state in the commission of such violations, that has shaped the remedial practices of the Inter-American Court.[42]

Tasked with overseeing a body of authoritarian states, the Inter-American Court has taken a more activist stand and forged closer relations with civil society groups and the victims. Around 1996, the Inter-American Court started issuing orders for states to prosecute individuals for specific human rights violations.[43] Subsequently, it intensified its oversight of these prosecutions to ensure they met human rights standards. The Court also initiated ongoing dialogues involving the state, victims, and the Commission to address obstacles encountered in prosecuting particular cases.[44]

The Court has developed its quasi-criminal jurisdiction in such a way that it often retains supervisory jurisdiction over its orders. Since the American Convention does not contain explicit rules instructing the Inter-American Court on how to monitor implementation, the Court has taken advantage of this legal lacuna to set up various procedures such as ongoing communication with victims, states and the Commission.[45] Jurisdiction over a case is retained until the Court is

38 Art 62(3) of the American Convention on Human Rights, 1969.

39 Art 46 of the American Convention states that 'admission by the Commission of a petition or communication lodged in accordance with arts 44 or 45 shall be a necessary requisite for its examination by the Court, except in cases where the provisions of Article 61 are applicable'. This means before an individual or their representatives can bring a case before the Inter-American Court of Human Rights, they must first submit a petition to the Inter-American Commission on Human Rights, and the Commission must admit the petition for it to be examined by the Court.

40 Art 44 of the American Convention.

41 *White Van (Paniagua Morales et. al.) Case (Guatemala)* (1998), Merits, Inter-Am. Ct. H.R. (Ser. C) No 37, at para 173.

42 Huneeus (n 8) 11.

43 V*elásquez Rodríguez* C=case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988.

44 Huneeus (n 8) 12.

45 Sandoval, Leach & Murray (n 1) 74.

satisfied that all its various demands have been met. Sometimes the Court's judgments highlight the steps that must be taken to comply with its orders. Other tools used by the Court include implementation hearings (both private and public), in-country visits and provisional measures.[46]

The application of the Inter-American Court's quasi-criminal review first became evident in the landmark *Velásquez-Rodríguez* case.[47] The facts concerned the arrest and unresolved disappearance of a Honduran student activist. The circumstances surrounding the disappearance of the individual in question were not definitively determined. Therefore, it was not clear whether the disappearance was caused directly by state officials or with their implicit consent. However, it was acknowledged that the act occurred within the context of the then-common state practice of enforced disappearances. In a complaint submitted by the Inter-American Commission to the Court, it was argued that the state had violated numerous rights including the right to life, the right to humane treatment (in relation to allegations of torture), and personal liberty.[48] The Court confirmed these violations and asserted that Article 1 of the American Convention places a duty on states parties to

> organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. [...] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.[49]

In short, the Court translated article 1(1) of the American Convention as an obligation on states to prevent, investigate and punish any violation of the rights in the Convention.[50] In the *Velásquez-Rodríguez* case, the Court required Honduras to punish the offenders to ensure that Manfredo Velásquez could exercise his human rights freely and fully. This approach was confirmed in the *Bámaca Velásquez* case, where the Court held that if a state party fails to punish those responsible for

46 Sandoval, Leach & Murray (n 1) 77.

47 *Velásquez Rodríguez* Case (n 43).

48 *Velásquez Rodríguez* case (n 43) para 2.

49 *Velásquez Rodríguez* case (n 43) para 166.

50 According to the Court (194) 'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can leadto international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'

human rights abuses, it violates its obligation to respect the victim's rights under the Convention.[51]

The Court regards punishment as a form of retrospective protection that is owed in each individual case. It is considered a means to secure the victim's right to life and liberty, and it is not limited to prevention. In the *Velásquez-Rodríguez* case, the Court found a violation of Manfredo Velásquez's rights, not because of the failure to prosecute prior cases and prevent his disappearance, but because of the failure to investigate and punish his abusers.[52] Therefore, the Court considers punishment an essential measure for protecting the rights of individual victims of human rights abuses.

Following the precedent established in the *Velasquez Rodriguez* case, the Inter-American Court has solidified its quasi-criminal jurisdiction in subsequent cases, by expanding its remedial powers beyond monetary compensation and mandating states to initiate investigations and prosecutions for certain violations through a progressive interpretation of the American Convention.[53] In *Vargas Areco v Paraguay*,[54] the case involved the murder of 15-year-old Gerardo Vargas Areco following his arrest for failing to return to his military post. The Court ordered the state to conduct a thorough and effective investigation through civilian authorities, rather than military ones, in order to identify, prosecute, and punish all those responsible for Vargas Areco's death, including perpetrators, instigators, and others involved, with the goal of combating impunity. In *Garibaldi v Brazil*, Resolution Monitoring Compliance, IACtHR (20 February 2012),[55] the case concerned the state's failure to investigate the murder of land rights activists during an extrajudicial eviction of landless workers in 1998. While the Court acknowledged that the state had complied with its 2009 order to provide compensation, it noted that Brazil had not fulfilled its obligation to conduct an investigation or initiate criminal proceedings against those responsible for the violations.

Consequently, the jurisprudence of the Inter-American Court has become the common foundation for promoting and safeguarding human rights in the region.[56]

However, this means the Court is entangled with a particular state for years while extensive investigations are conducted and the Inter-American Court has acknowledged the limited scope of its authority in reviewing domestic criminal proceedings. It recognises that it is the

51 *Bámaca Velásquez v Guatemala*, 2000 Inter-Am. Ct. H.R. (ser. C) No 70, (25 November 2000) para 197.

52 V*elásquez Rodríguez* case (n 43) para 176.

53 Huneeus (n 8) 12.

54 I/A Court H.R., *Case of Vargas-Areco v Paraguay*, Merits, Reparations, and Costs, Judgment of 26 September 2006. Series C No. 155, at paras 111–134.

55 *Garibaldi v Brazil*, Resolution Monitoring Compliance, IACtHR (20 February 2012),

56 SH Carrasco 'The Inter-American Court of Human Rights and the state response to the prosecution of crimes against humanity in the Americas: a critical assessment' LLM Dissertation, University of Ottawa, 2010 13.

responsibility of national courts to ensure that criminal proceedings are conducted in a manner that is consistent with international human rights standards. In the case of *Nogueira de Carvalho et al v Brazil*,[57] the Court emphasised that its role is not to dictate specific methods or procedures for investigating and adjudicating a particular case. Instead, the Court's function is to evaluate whether the actions taken by the state to comply with its obligations under articles 8 and 25 of the American Convention. Therefore, the Court's role is not to replace national jurisdictions, but to ensure that states comply with their international obligations.

To carry out this duty effectively, the Inter-American Court enables dialogue by holding hearings with involved parties.[58] This is imperative for states to be successful in implementing court orders. Dialogue should be understood as a reviewing process employed by human rights bodies to monitor the implementation of their decisions. This process involves the use of mechanisms that encourage parties to search for ways of moving implementation forward, either between themselves or with the direct help of the monitoring body.

Ayeni and Von Staden highlight that human rights courts can achieve better compliance by engaging in dialogic monitoring, such as setting deadlines, holding public hearings with various actors, and issuing follow-up decisions based on what they learn on the ground.[59] The idea is that these practices promote dialogue among public authorities and civil society actors, leading to positive outcomes like improving coordination among disconnected state agencies. The use of dialogic tools is encouraged in the monitoring phase because they allow the Court to learn more details of the prosecution through supervision, and thus become more specific and realistic about what the state must do to satisfy its orders and meet the needs of the victims.[60]

Both the Court and the Commission have the authority to call implementation hearings, however the Court more frequently relies on this mechanism in cases with long delays. Parties to a case may also ask for such a hearing and during these proceedings the Court will entertain submissions, ask relevant questions and make suggestions, often with compliance schedules.[61] For instance, in the *Awas Tingni* case,[62] the Court held a hearing where a work plan was drafted and carried out within six months. This is one of many instances where the Court's creative dialogue resulted in successful implementation.

In cases of non-compliance, the Inter-American Court can either issue recommendations,[63] or refer to the General Assembly of the

57 *Case of Nogueira de Carvalho et al. v. Brazil*, Preliminary Objections and Merits, 2006 Inter-Am. Ct. H.R. (ser. C) No. 161, (28 November 2006) para. 80.

58 Huneeus (n 8) 1.

59 Ayeni & Von Staden (n 1) 6-7.

60 Huneeus (n 8) 12

61 Sandoval, Leach & Murray (n 1) 81.

62 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, 3 April 2009.

63 Art 65 of the American Convention

OAS.[64] The referral measure has thus far been employed where state parties were obstinate, such as in the cases of Venezuela and Trinidad and Tobago.[65] Venezuela's obstinance was brought up in the case of *El Amparo v Venezuela*,[66] which concerned the 1988 killing of 14 fishermen by military and police forces during an operation. The Court emphasised that Venezuela was not fulfilling its duty to inform the Court about the actions taken to comply with the 1995 judgment, highlighting the state's failure to provide sufficient updates on its efforts to address the violations. In these instances, the Court considered it necessary to 'name and shame' intractable states within a political context involving other states.[67] Nevertheless, the OAS General Assembly has not taken additional steps beyond this, perhaps because, as a political body, it does not have the benefit of neutrality that technical bodies such as the European Department for the Execution of Judgments carry.[68]

4 THE AFRICAN HUMAN RIGHTS SYSTEM

The African region's long struggle with human rights can be traced back to its history of oppression and exploitation at the hands of colonialists.[69] Following the demise of the colonial system, there was an increased push to establish a regional human rights regime in Africa. For instance, the architects of the African Charter did so in response to the United Nations General Assembly's call for the establishment of a regional human rights mechanism.[70]

As a relatively young court, the African Court faces implementation challenges similar to those of other supranational bodies. The reluctance of state leaders to abide by the Court's orders can be traced to its establishment which took decades due to insufficient political will.[71] There was insufficient support for a human rights court due to the claim that such a mechanism was 'alien' to African justice, which emphasises restorative over retributive forms of justice.[72] At the time of the Charter's adoption, adversarial and adjudicative procedures were perceived as 'Western' methods and precluded in favour of the

64 As above.

65 Sandoval, Leach & Murray (n 1) 86. It is worth noting that Venezuela presented an instrument of denunciation of the American Convention on Human Rights in 2012 and Trinidad & Tobago presented a denunciation in 1998.

66 *Case of El Amparo v Venezuela*, Resolution Monitoring Compliance, IACtHR (20 February 2012).

67 As above.

68 As above.

69 M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and People's Rights* (2012) 5.

70 G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51 *Journal of African Law* 152.

71 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 75.

72 Ssenyonjo (n 69) 9.

diplomatic and bilateral settlement of disputes.[73] As a result, the architects of the African Charter left out a provision for the creation of a human rights court because they were of the view that state leaders would be reluctant to ratify the Charter if it included a provision for compulsory judicial settlement.[74]

Scholars argue that African states were, in fact, not prepared to accept judicial scrutiny for human rights violations as this would likely interfere in their internal affairs at a time where state sovereignty was highly prioritised.[75] The absence of a human rights court to hand down legally binding judgments made the African system diverge from the approach taken in other regional human rights conventions.

Unlike the European and American Conventions, the African Charter opted for a quasi-judicial instead of judicial enforcement system when it solely established an African Commission on Human and Peoples' Rights (African Commission). The African Commission is tasked with advancing, safeguarding, and interpreting the provisions of the African Charter, albeit with structural and normative inefficiencies.[76]

The Commission is only empowered to make non-binding recommendations to the relevant parties.[77] Hence, some academic commentators have described this body as 'toothless' as far as the protection and promotion of fundamental rights is concerned.[78] Cognisant of this perception, the Commission goes the extra mile in monitoring the implementation of its decisions. Using an established state reporting process, it has been able to follow up with states on individual orders.[79] Thus, other authors recognise that through the exercise of quasi-criminal review, the Commission has been able to establish when a state is responsible for Charter violations that amount to international crimes, and accordingly call for investigations and/or prosecutions by way of communications.[80]

After years of relying on the African Commission, state leaders finally came together in 1998 and adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[81] However, the African Court only became operational in 2006 because states recognised that it would not be viable for the AU to operate two judicial organs, namely

73 Udombana (n 71) 74.

74 MA Plagis & L Riemer 'From context to content of human rights: the drafting history of the African Charter on Human and Peoples' Rights and the enigma of article 7' (2020) 23 *Journal of the History of International Law* 556.

75 As above.

76 See art 45 of the African Charter.

77 Art 53 of the African Charter.

78 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 151.

79 Murray and others (n 78) 77.

80 Huneeus (n 8) 1-2.

81 The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's Rights, 10 June 1998.

the African Court and the African Court of Justice (ACJ) as envisaged by article 5 and 8 of the AU Constitutive Act.[82] According to these provisions, the ACJ was to be the principal judicial organ of the AU with the power to, amongst other things, interpret and apply all of the AU's treaties and other subsidiary instruments, and all agreements entered into by state parties. Although there were suggestions to merge the two judicial institutions, it was decided that the African Court would be in operation until the merger.[83]

4.1 First step of quasi-criminal review: ordering specific measures

To strengthen the enforcement mechanisms within the African Human Rights system, the African Court's decisions are final and not subject to appeal or political confirmation by any AU body.[84] The binding nature of the Court's decisions is confirmed under article 30 of the Protocol, which provides that states parties must guarantee the execution of the Court's judgments within the stipulated time frame. Rule 72(2) of the Court's Rules also makes it clear that court orders are enforceable against state parties.[85]

The Protocol of the Court provides a clear legal basis for the provision of remedies, allowing the Court to issue appropriate orders to remedy violations. According to article 27(1), once the Court finds that a human rights violation has taken place, it has the authority to order suitable remedial actions, including the payment of just compensation or reparations. I argue that this provision can be interpreted to make orders very specific, for example that the Court can request the state to institute a prosecution or an investigation where it has failed to do so. To this end, article 27(1) can be read in line with article 7 of the African Charter which enshrines the right to a fair trial. State parties to the African Charter are required to guarantee, both legally and practically, that victims of human rights violations enshrined in the African Charter have access to and receive redress.[86]

This approach was followed by the Court in 2015, when the African Court ordered an investigation into crimes committed against journalists in *Norbert Zongo and Others v Burkina Faso* (*Zongo*

82 R Murray 'The human rights jurisdiction of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & CO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: development and challenges* (2022) 965.

83 As above.

84 See art 1 of the Protocol on the Statute of the African Court of Justice and Human Rights.

85 African Court on Human and Peoples' Rights, *Rules of the Court*, https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf (accessed 25 October 2024).

86 African Commission on Human and Peoples' Rights General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5).

case).[87] The Court declared that, under article 7 of the African Charter, Burkina Faso was obligated to make every necessary effort to search for, prosecute, and bring to trial the perpetrators of crimes such as murder. According to the facts, Norbert Zongo, an investigative journalist in Burkina Faso, his two collaborators and his younger brother were assassinated in 1998.[88] Their burnt bodies were later found in their car. The Burkinabe judicial system launched an investigation into the assassination, which was believed to be connected to Zongo's investigations into political, economic, and social scandals.[89] Although an Independent Commission of Enquiry was established and a suspect charged in 2001, the case was dismissed in July 2006 due to lack of evidence. Subsequent appeals by the Zongo family were unsuccessful, leading to the abandonment of the case.[90]

In this case, the African Court determined that the Burkina Faso government failed to uphold its duty of due diligence because no trial had been held in more than fifteen years due to a lack of evidence, and ordered that the investigation be reopened.[91] Relying on existing African Charter rights, specifically the right to a fair trial, the African Court ordered the re-opening of the investigation and publication of the final judgment.[92] The Burkina Faso government was also ordered to compensate the victims and make amendments to its defamation laws. Burkina Faso was quick to implement these measures: compensation was paid within the six-month time limit; legislation was amended; and the responsible individuals were prosecuted following extensive investigations; finally, the judgment was published in the official gazette and national newspaper.[93]

In *Lohé Issa Konaté v Burkina Faso*,[94] the Court delivered a watershed judgment pertaining to the freedom of the press. Here, the Court overturned the conviction of a journalist who faced harsh criminal penalties levied by Burkina Faso after a conviction on defamation charges. The charges in question emanated from several newspaper articles penned by the applicant, Lohé Issa Konaté, in which he exposed alleged corruption by a state prosecutor.[95] The African Court held that the conviction was a disproportionate interference with the applicant's guaranteed rights to freedom of expression.[96]

87 *Beneficiaries of late Norbert Zongo and others v Burkina Faso*, Admissibility and merits, Application No 013/2011, IHRL 4117 (ACtHPR 2014), 28 March 2014, African Court on Human and Peoples' Rights (*Zongo*).

88 *Beneficiaries of Late Norbert Zongo and others v Burkina Faso* Application 013/2011 Ruling (Preliminary Objections) paras 2-6.

89 *Zongo* (n 87) para 16.

90 As above.

91 *Zongo* (n 87) at paras 152-156.

92 *Zongo* (n 87) para 199.

93 R Murray 'Implementation of the judgments of the African Court on Human and Peoples' Rights' (2019) *The ACtHPR Monitor* https://www.acthprmonitor.org/implementation-of-the-judgments-of-the-african-court-on-human-and-peoples-rights/ (accessed 25 October 2024).

94 *Lohé Issa Konaté v Burkina Faso* App 4/2013.

95 *Konaté* (n 94) para 3.

96 *Konaté* (n 94) paras 163-164.

Furthermore, the Court ordered Burkina Faso to amend its defamation laws in line with international standards by removing criminal penalties for acts of defamation.[97] The state was also ordered to adapt its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality.[98]

In *Alex Thomas v Tanzania* (*Thomas* case),[99] Alex Thomas, a Tanzanian national, claimed that his trial and subsequent conviction for armed robbery were marred by procedural irregularities and human rights violations.[100] The African Court found several violations of Thomas's rights and ordered the Tanzanian government to take all necessary measures to rectify the injustices, precluding 'the reopening of the defence case and retrial of the applicant'.[101] The exception was intended to prevent any further prejudice to the Applicant who had already served a significant portion of his 30-year sentence.[102] Therefore, the Court clarified that one of the necessary measures would be his release from prison.

In *Association pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (APDH* case*)*,[103] an Ivorian human rights organisation brought a case against the government of Côte d'Ivoire, contending that certain candidates, particularly the President of Côte d'Ivoire, were disproportionately represented on the Independent Electoral Commission (IEC). This over-representation came at the expense of independent candidates and those from the opposition, contravening the state's obligation to protect the right of its citizens to equality and equal protection of the law.[104] The African Court ordered Côte d'Ivoire to amend the legal framework governing the IEC to ensure its independence and impartiality and to investigate any electoral irregularities and human rights abuses.[105]

What becomes clear from these cases is that the African Court embraces a creative interpretation of its mandate. Similar to the Inter-American Court, the African Court is increasingly requiring specific actions from states. In several instances, the Court has also mandated prosecutorial action as a remedy. Just as the Inter-American Court bases its orders to investigate and punish on the right to a fair trial enshrined in the American Convention, the African Court is doing the same by invoking article 7 of the African Charter.

97 *Konaté* (n 94) paras 176 (8).
98 As above.
99 *Alex Thomas v Tanzania* App 5/2013.
100 *Thomas* case (n 99) para 4.
101 *Thomas* case (n 99) para 4, order ix.
102 *Alex Thomas v Tanzania* App 1 2017 – Interpretation of Judgment of 20 November 2015 par 42.
103 *Association pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*, App 1/2014.
104 Art 3 of the African Charter.
105 *APDH* (n 103) Order 7 of the Judgment.

4.2 Second step of quasi-criminal review: supervision of court orders

From the above discussion, it is evident that quasi-criminal review is not a novel concept within the African human rights system. Despite making a number of direct orders as highlighted in the preceding paragraphs, the African Court has elected a 'light-touch approach' in monitoring states' compliance with its judgments.[106] It is my view that much more needs to be done when it comes to the subsequent step – supervision of court orders. To illustrate, I refer to the three features of this phase that Huneeus considers integral as applied by the Inter-American Court.[107] First, the Court occasionally engages deeply with the criminal process – it offers detailed opinions and directs the state on specific lines of investigation to pursue, names individuals who should be investigated, and suggests analytical connections between cases.[108] It further imposes both substantive and procedural requirements.[109]

While it is possible for states to apply to the Court for the interpretation of a judgment procedure so that they receive clarification where necessary,[110] the African Court leaves the manner of implementation to the state. This was confirmed in *APDH v Côte d'Ivoire*, where the Respondent state was ordered to submit a report on the implementation of the Court's decision within a reasonable time (not exceeding one year).[111] The Ivorian Parliament passed an executive bill designed to comply with the *APDH* judgment by changing the composition of the IEC.[112] However, on 10 September 2019, the African Court received a new application in *Suy Bi Gohore & 8 Others v Côte d'Ivoire* (*Suy Bi Gohore* case),[113] contending that the new Electoral Commission law did not meet the standards set by the *APDH* judgment and relevant international instruments. In its judgment, the Court made it clear that it was the state's responsibility to determine how to make legislation governing the electoral body compliant with human rights instruments.[114] The Court's duty was simply to interpret the said instruments and determine whether the legislation is in violation of them. In *Suy Bi Gohore*, the Court held that applicants failed to sufficiently demonstrate that impugned law falls short of the relevant human rights standards.[115]

106 Murray (n 93).
107 Huneeus (n 8) 23.
108 Huneeus (n 8) 27.
109 Huneeus (n 8) 23.
110 Art 41(2) of the Protocol to the African Charter on Human and Peoples' Rights.
111 *ADPH* (n 103) Order 8 of the Judgment.
112 Adjolohoun 'A crisis of design and judicial practice? curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 17.
113 *Suy Bi Gohore & Others v Côte d'Ivoire*, AfCHPR (Order, 28 November 2019).
114 *Suy Bi Gohore & Others v Côte d'Ivoire* (n 113) para 261.
115 *Suy Bi Gohore* case (n 113) para 261.

Secondly, the Inter-American Court reviews ongoing prosecutions with the assistance of the parties involved and the Commission who monitors and reports on the state's prosecution efforts.[116] In short, the monitoring process of the Court runs parallel to the domestic prosecution. This is not the case at the African Court where an assessment of compliance generally takes place *after* the state has implemented the relevant measures. The Protocol provides only for the mechanism by which the Court can specify where a state has not complied with its judgment in a report submitted to the AU Assembly in its regular sessions.[117] While the publication of activity reports provides information on the measures employed by states in compliance with its judgment, the reports do not comment on whether such measures are satisfactory.[118] For instance, in response to the orders of the African Court in the *Zondo* and *Konaté* cases, Burkina Faso promptly and fully implemented the specific orders,[119] therefore, the Activity Report indicates full compliance with the Court's orders. On the other hand, in *Alex Thomas v Tanzania*, the state was ordered to inform the Court within 6 months of measures taken. The Tanzanian government has taken steps to review some cases following the Court's judgments, although full compliance and systemic reforms are ongoing issues.[120]

Thirdly, the supervision phase at the Inter-American Court is dialogic, meaning the Court receives and responds to inputs from all parties. The information received about the prosecution through this supervision influences the Court's directives which become more specific regarding the exact measures that must be done for the state to fulfil the Court's order and for the victims to be satisfied.[121]

Rule 81 of the Court's Rules of Procedure, 2020 outlines the process for overseeing compliance with the Court's decisions,[122] and mandates that state parties submit reports, which may be shared with the applicants for their input.[123] This approach enables the Court to take follow-up actions as soon as a judgment is communicated to the state. Furthermore, the Court may gather relevant information from trustworthy sources to evaluate compliance with its decisions. However, the Court has been hesitant to do so in the past due to concerns about the integrity, independence, and impartiality of these sources.[124]

116 Huneeus (n 8) 27.

117 Art 31 of the Protocol on the Statute of the African Court of Justice and Human Rights.

118 Murray (n 93).

119 As above.

120 As above.

121 Huneeus (n 8) 28.

122 African Court on Human and Peoples' Rights, Rules of the Court, available at: https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf (accessed 25 October 2024).

123 Rules Court Rules of Procedure, 2020, Rule 81(1)1.

124 Activity Report of the African Court (2020) (n 104) para 37.

Another shortcoming of the reporting process is that most African states are not up to date with their reports. Of the few states that do hand in their reports, most submit reports with incomplete or inadequate information and make only scant references, if at all, to the decisions of the Commission or the Court.[125] In response to these issues, and for purposes of implementing the Court's decisions, the Protocol of the Court created a number of organs that monitor state compliance. The Court relies heavily on the involvement of AU policy organs as they provide critical political support and a necessary interface with the states. This symbiotic relationship is acknowledged in the Protocol of the Court and the corresponding Rules of Procedure.[126]

Article 29(2) of the Protocol of the African Court and Rule 64(2) of the Interim Rules of the Court mandate the Executive Council to monitor the execution of judgments on behalf of the Assembly. Article 29 also requires the Court to inform the Executive Council of any judgment to enable the Council to oversee its implementation on behalf of the AU Assembly. Currently, it appears that the Council solely performs this function based on the Court's reports submitted to it, and there is no evidence that the Executive Council takes any additional steps following the Court's reports.[127]

Secondly, the AU Assembly, which serves as the supreme organ of the African Union has monitoring duties as well. Its members include the Heads of State and Government of member states or their representatives, and it receives, considers and takes decisions on reports and recommendations from other Union organs.[128] The Assembly is mandated to monitor the implementation of policies and decisions of the Union and ensure compliance by all member states.[129] In turn, the African Court is mandated to report any cases of non-compliance to the AU Assembly.[130] Although state parties to the Protocol of the Court undertake to comply with its orders and guarantee execution in any case to which they are parties, there is no specific recourse provided in the Protocol against a state that deliberately refuses to comply with the Court's judgment.

Each activity report of the Court since 2014 outlines the status of compliance with its decisions; however neither the Executive Council nor the AU Assembly has taken any enforcement measures against non-complying states.[131] The Assembly has been criticised as ineffective since the African Charter does not specify what action is to be taken

125 Ayeni & Von Staden (n 1) 18.

126 Art 29 of the African Court Protocol; Rules of Procedure of the African Court 2020, Rule 81(4).

127 Coalition for an Effective African Court on Human and Peoples' Rights, *Booklet on the implementation of the decisions of the African Court on Human and Peoples' Rights* (2021) 7.

128 See art 9(1)(b) of the AU Constitutive Act.

129 See art 9(1)(e) of the AU Constitutive Act.

130 See Activity Report of the African Court (2014) paras 26-31.

131 Ayeni & Von Staden (n 1) 11.

once it receives reports from the Commission and the Court.[132] Furthermore, due to the principle of non-interference, it cannot interfere with the internal affairs of state parties.[133]

The lack of a mechanism for compelling states to comply with the African Court's judgments is the principal reason why compliance is dire. To support this claim, the African Court's Activity Report presented to the AU Assembly for the 2019 period indicates that most judgments of the African Court have either been partially complied with, or not complied with at all.[134] In response to this ongoing challenge, the African Court has produced the Draft Framework for Reporting and Monitoring Execution of Judgments and other Decisions of the African Court (Draft Framework) which proposes the implementation of a hybrid model on monitoring state compliance through the combination of both judicial and political mechanisms.[135]

In my view, this Draft Framework will bring the African Court on par with its American counterpart in as far as the supervision of national prosecutions is concerned. In terms of the framework, the African Court will establish a Monitoring and Reporting Unit. States will be required to submit 'execution reports' to the Unit and these reports will be used by the Court, together with information from other sources such as non-governmental organisations, the United Nations, and institutions/organs of the African Union, to assess the level of compliance by the state.[136] The Draft Framework teases the possibility of holding compliance hearings in cases of non-compliance with the Court's orders.[137] This is already an established mechanism under Rule 81(3) of the Court's internal rules, which gives the Court authority to hold hearings, amongst other things, to assess the status of implementation of its decisions' in cases of non-compliance. However, the Court has not conducted any such hearings yet, although this was proposed for the recent reparations ruling in the case of the Ogiek indigenous community in Kenya.[138]

Under the Draft Framework, compliance hearings will be held under two circumstances, either based on a request from any party to the case or pursuant to a decision arrived at by the African Court based on its '*suo motu*' powers.[139] The African Court may only hold

132 Olukayode (n 1) 50.

133 As above.

134 African Union 'Assembly of the Union Thirty Second Ordinary Session 10-11 February 2019, Addis Ababa, Ethiopia' available at: https://au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf (accessed 25 October 2024).

135 Lungu 'An appraisal of the Draft Framework for Reporting and Monitoring Execution of Judgments of the African Court on Human and Peoples' Rights' (2020) 4 *African Human Rights Yearbook* 146.

136 Draft Framework for Reporting and Monitoring Execution of Judgments and Other Decisions of the African Court on Human and Peoples' Rights, para 11.

137 Draft Framework, para 13.

138 *African Commission on Human and Peoples' Rights v Kenya* (Reparations) app. no 006/2012. judgment of 23 June 2022, at para xvi.

139 Draft Framework, para 13(b).

compliance hearings using its *suo motu* powers in four specific circumstances. First, when there is a dispute between parties regarding the implementation of a decision.[140] Second, when a Respondent state fails to submit a compliance report to the African Court.[141] Third, when a state's compliance report is not responded to by the Court.[142] Fourth, when the Court is provided with information indicating that a respondent state is in violation of its order or has failed to comply with the African Court's judgment.[143]

The Draft Framework authorises the Court to issue compliance judgments that are then sent to AU policy organs such as the Council and the Assembly for further monitoring. At the compliance stage, the African Court may undertake fact-finding missions on-site to assess the implementation progress of its judgment, or it may approve consensual compliance agreements.[144] A compliance judgment must not only 'refer to the original judgment as to which aspects of the order have or have not been implemented' but expressly 'underscore the outstanding elements necessary to attain full compliance by the state'.[145]

Instances in which a state fails to comply will be classified as 'non-compliant'.[146] Such classification will occur when either party neglects to respond,[147] or when a report is not submitted within the designated time frame.[148] The Assembly possesses the authority to levy sanctions against non-compliant states, as specified in article 23 of the Constitutive Act. However, sanctions may only be imposed in deserving cases. The definition of what constitutes 'deserving cases' remains unspecified in both the Constitutive Act and the proposed Draft Framework.

From the above discussion on the role of the Court in monitoring judgments, the judicial approach of the hybrid model proposed under the Draft Framework is evident. This is quite similar to the remedial practice of the Inter-American Court. However, the Draft Framework diverges from the quasi-criminal review of the Inter-American Court in that the latter is more active in ensuring that states comply with its orders, and the American Convention does not establish a body that is designed to monitor the orders of the Court. Although the OAS Assembly is tasked with receiving compliance reports, it does not have monitoring duties.[149]

The more political angle of the Draft Framework becomes evident when we discuss the involvement of political structures in the supervision of the African Court's orders. It remains to be seen whether

140 Draft Framework, para 13(i).
141 Draft Framework, para 13(ii).
142 Draft Framework, para 13(iii).
143 Draft Framework, para 13(iv).
144 Draft Framework, para 13(c).
145 Draft Framework, para 15.
146 Draft Framework, para 18.
147 As above.
148 As above.
149 Lungu (n 135) 152.

the second leg of the Draft Framework's hybrid model will be successful as it is dependent on respect for the independence of the Court by the political organs, which has been largely absent in the African region.[150] Furthermore, political organs are generally constrained by their diplomatic duties as indicated by the failure of the AU to cooperate with the ICC in the arrest of Sudanese President Omar al-Bashir.[151]

This raises concerns that the domestic judicial systems may not be willing to hold Heads of States accountable for international crimes and the inclusion of a clause in Article 46Abis of the Malabo Protocol that reiterates the immunity of sitting presidents, deputy presidents, and other senior government officials from prosecution, can be interpreted as an intention to exclude real accountability. In the words of Olukayode, 'effective enforcement is sacrificed at the altar of political solidarity'.[152] While the Draft Framework promises to be successful in future, at present, the African system has no coherent approach for monitoring implementation with the Court's decisions.[153]

5 LESSONS FROM THE INTER-AMERICAN COURT

The preceding sections examining the African Court and Inter-American Court's practices highlight the growing importance of human rights courts as oversight bodies. It is clear that regional human rights tribunals now prioritise implementation within their judicial processes. Two key factors explain this evolving judicial approach in the human rights arena. First, as mentioned in the introduction of this paper, the previously accepted managerial theory of compliance, which assumed that states generally adhere to court decisions, has been discredited.[154] By acknowledging that state non-compliance can also be attributed to recalcitrance, courts have seen the need for stronger remedies.

Second, there is a growing recognition that courts are disconnected from reality if they rely solely on the executives of offending states to ensure compliance. National judiciaries have consistently shown their effectiveness in encouraging states to comply with regional court orders. Consequently, supranational bodies, particularly human rights tribunals, have recognised the value of leveraging this effectiveness to promote justice. Article 29(2) of the African Court Protocol and Rule 64(2) of the Interim Rules of the Court, which require the Executive Council to oversee the execution of judgments on behalf of the Assembly, reflect the drafters' foresight in recognising the need for

150 Murray (n 93).

151 D Akande 'Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case' 2009 https://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/ (accessed 25 October 2024).

152 Olukayode (n 1) 50.

153 Sandoval, Leach & Murray (n 1) 14.

154 Chayes & Chayes (n 6).

monitoring court decisions. However, these provisions alone are insufficient, as the Court depends on other entities to perform a role it should fulfil itself.

The Inter-American Court of Human Rights, without explicitly citing specific provisions of its statute or procedural rules, has adopted a flexible approach by instructing domestic courts to implement its orders and then monitoring these courts. While compliance with the Inter-American Court's rulings could improve, the main lesson for the African Court is that flexible and innovative application of rules, particularly in human rights promotion and protection, achieves far better outcomes than a rigid approach. Therefore, one of the initial steps the African Court should consider is the adoption of its Draft Framework which will promote dialogue between the parties and the Court and allow the Court to actively monitor compliance with its decisions during the process rather than after implementation is complete.

6 CONCLUSION

This paper underscores how the Inter-American Court has significantly advanced its implementation mechanisms through the practice of quasi-criminal review. Notably, following the Court's directives, states have initiated new criminal investigations, overturned amnesties, circumvented statutes of limitations, and established new institutions and procedures to facilitate the prosecution of such crimes. Given its historical context, the African Court would benefit from adopting similar approaches to strengthen its ability to enforce compliance. An examination of the Court's jurisprudence highlighted that it is willing to expand its mandate such that it can order national prosecutions, investigations and other specific measures.

Although the second phase of quasi-criminal review needs to be developed at the African Court, the Draft Framework signals the Court's readiness to enhance its monitoring mechanisms to support domestic investigations and prosecutions. Its design, which integrates flexibility in both judicial and political avenues to ensure state adherence to judgments, demonstrates that the African Court is actively learning from the practices of other regional human rights tribunals.

An exposition of Africa's regional environmental laws, policies and systems for safeguarding the human rights to a clean, healthy and secured environment

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ABSTRACT: In Africa, there has been a growing concern about the high rate of environmental degradation and the consequential effect on the ecosystem. The environmental issues in Africa range from climate change; air, water and soil pollution; harmful mining and extractive activities; biodiversity and land degradation; deforestation; and adverse agricultural practices. In terms of governance, several measures have been undertaken at the regional level to conserve the environment and respond to some of these most critical challenges. The creation of regional environmental treaties, initiatives and institutions in Africa has ushered in significant milestones in the development of the African regional environmental governance framework. These treaties, organisations and policy strategies have played a crucial role in shaping the region's environmental governance. The establishment of these frameworks has fostered cooperation among African countries in addressing environmental challenges at the regional level. It has further provided a platform for the exchange of knowledge, best practices and resources, as well as paved the way for judicial environmentalism. This article examines some of these legal instruments and governance frameworks in place and also highlights their strengths and weaknesses. It indicates other areas of improvement for maximum effectiveness and management. The analysis also reveals that while there are some mechanisms in place to address certain environmental issues, gaps exist in the enforcement and implementation of these regulations and policies.

TITRE ET RÉSUMÉ EN FRANÇAIS

Aperçu des cadres législatifs, politiques et institutionnels environnementaux en Afrique : une approche pour la protection des droits humains à un environnement propre, sain et sécurisé

RÉSUMÉ: Le taux alarmant de dégradation de l'environnement en Afrique et ses impacts sur les écosystèmes soulèvent des préoccupations croissantes. Les défis environnementaux auxquels le continent est confronté incluent le changement climatique, la pollution de l'air, de l'eau et des sols, les activités minières et extractives préjudiciables, la perte de biodiversité, la déforestation et la dégradation des sols due à des pratiques agricoles inappropriées. Sur le plan de la gouvernance, des initiatives significatives ont été entreprises au niveau régional pour préserver l'environnement et relever les défis qui y sont associés. La création de traités, d'initiatives et d'institutions environnementales africaines a constitué une étape clé dans le renforcement du cadre régional de gouvernance environnementale. Ces instruments juridiques et politiques ont joué un rôle essentiel dans l'élaboration de normes régionales et dans la promotion de la coopération interétatique pour faire face aux crises environnementales. En outre, ces mécanismes ont permis l'échange de connaissances, de pratiques exemplaires et de ressources, tout en ouvrant la voie à un recours accru à

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l'environnementalisme judiciaire. Cette étude examine un ensemble d'instruments juridiques et de cadres institutionnels existants, en mettant en lumière leurs forces et faiblesses. Elle identifie également des domaines nécessitant des améliorations pour optimiser leur efficacité et leur mise en œuvre. L'analyse révèle que, bien que des mécanismes existent pour aborder certaines questions environnementales, des lacunes subsistent en matière d'application et de mise en œuvre. L'amélioration de ces cadres juridiques et politiques reste essentielle pour garantir une protection durable des droits humains à un environnement propre, sain et sécurisé.

KEY WORDS: human rights; environmental rights; judicial environmentalism; multilateral environmental agreements; climate change; biodiversity

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1 INTRODUCTION

The environment is nature's greatest gift to mankind. It provides many resources vital to human health, prosperity and living a good life.[1] Protecting the environment, therefore, is an imperative means to human survival and development. In recent times, however, environmental issues in Africa have highlighted the need to be more deliberate about conserving the environment and mitigating environmental degradation.

African societies are increasingly facing severe repercussions due to the failure to adequately and effectively manage the environment.[2] These challenges are exacerbated by a notable lack of accountability in environmental evaluation and monitoring processes, which fails to ensure that natural resources are being used sustainably and responsibly.[3] Many communities, especially in urban areas, are

1 M Falayi, J Gambiza & M Schoon 'A scoping review of environmental governance challenges in Southern Africa from 2010 to 2020' (2021) 48 *Environmental Conservation* 235-243.

2 A Ayanlade and others 'Extreme climate events in sub-Saharan Africa: a call for improving agricultural technology transfer to enhance adaptive capacity' (2022) 27 *Climate Services* 100311; World Bank *Sub-Saharan Africa: from crisis to sustainable development: a long term perspective study* (1989).

3 Falayi and others (n 1); L Yang, S Bashiru Danwana & FY Issahaku 'Achieving environmental sustainability in Africa: the role of renewable energy consumption, natural resources, and government effectiveness: evidence from symmetric and asymmetric ARDL models' (2022) 19 *International Journal of Environmental Research and Public Health* 8038.

grappling with a rise in air pollution levels, driven by industrial emissions, vehicular traffic and inadequate waste disposal practices.[4]

Public participation in disaster risk reduction initiatives remains alarmingly limited, preventing communities from voicing their concerns and contributing to solutions that could mitigate risks and enhance resilience.[5] Compounding these issues, many regions are witnessing a critical shortage of clean water resources which, coupled with rising food insecurity, low agricultural productivity and climate change, threatens livelihoods and overall stability.[6] The loss of biodiversity is another pressing concern, as habitats are destroyed and species face extinction due to human activities or neglect.[7]

While the foregoing concerns are shared by many regions around the world, in Africa, desertification, exacerbated by deforestation, is a distinct major challenge, especially in the Sahel region of Africa.[8] Relentless deforestation and desertification exacerbate land degradation, reducing arable land and impacting agricultural productivity.[9] To add to these, poor waste management practices lead to environmental pollution and health risks, creating further obstacles in the fight for sustainable development in the region.[10] Addressing these environmental issues is crucial for sustainable development and the health of both people and ecosystems in Africa.

African regional environmental law, policies and initiatives can play a vital role in addressing these environmental challenges on the African continent.[11] The importance of the regional treaties lies in the ability to provide a legal framework for addressing pressing environmental problems at the continental and national levels. By promoting sustainable development, incorporating key environmental principles and facilitating environmental governance, several treaties, initiatives and strategic policies ensure the preservation of Africa's natural resources and ecosystems for the current and future generations to come. Beyond establishing standards, many multilateral environmental agreements (MEAs) promote regional cooperation, ensuring that African countries can pool their resources, share

4 AL Mabogunje 'The environmental challenges in sub-Saharan Africa' (1995) 37 *Environment: Science and Policy for Sustainable Development* 4.

5 Z Nkombi & GJ Wentink 'The role of public participation in disaster risk reduction initiatives: the case of Katlehong township' (2022) 14 *Jamba* 1203.

6 Ayanlade and others (n 2).

7 World Bank (n 2)

8 Green Earth 'Desertification – Sahel case study' 20 January 2022, https://www.green.earth/blog/desertification-sahel-case-study (accessed 30 October 2024); FOA 'The magnitude of the problem', https://www.fao.org/4/x5318e/x5318e02.htm (accessed 30 October 2024).

9 MAE AbdelRahman 'An overview of land degradation, desertification and sustainable land management using GIS and remote sensing applications' (2023) 34 *Rendiconti Lincei* 767-808.

10 Z Zhang and others 'Municipal solid waste management challenges in developing regions: a comprehensive review and future perspectives for Asia and Africa' (2024) 930 *Science of the Total Environment* 172794.

11 World Bank *Enhancing the climate resilience of Africa's infrastructure: the power and water sectors* (2015).

knowledge and expertise and develop coordinated strategies to tackle these challenges.

Establishing institutions such as the African Union (AU), the African Ministerial Conference on the Environment and regional economic communities (RECs), further strengthens the governance and enforcement of environmental regulations. Environmental rights in the African Charter on Human and Peoples' Rights (African Charter) are available to guarantee individuals and communities the right to a clean and healthy environment, access to environmental justice and the opportunity to participate in decision-making processes. Furthermore, the right to the environment underscores the moral and legal obligation to safeguard natural resources for current and future generations. The African Court on Human and Peoples' Rights (African Court) and other robust regional judicial institutions and their case law also add impetus to the framework for environmental protection in Africa.

Despite the availability of robust regulations, the challenges to the environment persist and the implementation by nations vary widely.[12] This article provides a critical overview of the regional legal system for environmental protection and outlines their importance in securing human rights. The exploration also identifies the current legal and policy landscape with respect to the effectiveness in addressing its thematic environmental issues. Furthermore, the examination is made with the view to identifying the challenges to implementation and enforcement. It concludes by discussing the future prospects of African regional environmental law in addressing emerging and prevailing environmental issues. In general, this analysis serves to set the stage for effective implementation by the relevant bodies.

2 CONCEPTUAL FOUNDATION AND FRAMEWORK: RIGHT TO ENVIRONMENTAL PROTECTION, CONSERVATION AND MANAGEMENT

The recognition of the right to environmental protection, conservation and management has gained significant momentum in recent years, emerging as a fundamental component for ensuring the well-being of both individuals and the planet as a whole.[13] A growing body of international human rights treaties and declarations now explicitly acknowledges the right to a healthy environment, which provides a

12 K Ambalam 'Challenges of compliance with multilateral environmental agreements: the case of the United Nations Convention to Combat Desertification in Africa' (2014) 5 *Journal of Sustainable Development Studies* 145.

13 JR May 'The case for environmental human rights: recognition, implementation, and outcomes' (2024) 42 *Cardozo Law Review* 983; E Cima 'The right to a healthy environment: reconceptualising human rights in the face of climate change' (2022) 31 *Review of European, Comparative and International Environmental Law* 38.

crucial legal framework for advocating robust environmental protections and promoting more comprehensive policies.[14]

Adopting a human rights perspective in environmental protection is essential for a multitude of reasons. First and foremost, a human rights lens promotes the concept of sustainable development, which emphasises the necessity of achieving economic growth without compromising human dignity or causing undue harm to the environment.[15] This approach ensures that the benefits of economic advancement are equitably distributed and encourages careful consideration of the long-term impacts of harmful human activities and resource extraction, and environmental degradation on vulnerable communities.

Second, protecting the environment is fundamentally linked to human rights, as a healthy environment is essential for the realisation of numerous rights, including the rights to life, health, food, water and an adequate standard of living.[16] Reports indicate that environmental degradation and climate change disproportionately affect marginalised communities, leading to increased vulnerability and exacerbated social inequalities.[17] Thus, ensuring environmental protection fosters social justice, empowers communities and supports the realisation of human dignity, making it a critical element of the broader human rights agenda.

Moreover, addressing environmental issues through a human rights framework establishes a solid legal basis for holding states, individuals and corporations accountable for their actions.[18] By integrating human rights principles into environmental law and policy, it becomes possible to enhance accountability for environmental harms. This shift fosters a culture of responsibility, whereby states and corporations can be held liable for violations that adversely affect both the environment and human rights. Consequently, protecting the environment becomes an imperative, not only for the sake of ecological integrity but also as a means of upholding and enhancing human rights.

In the context of the African continent, the right to a healthy, clean and safe environment is explicitly recognised in the African Charter on Human and Peoples' Rights (African Charter).[19]

14 As above.

15 AJ van Niekerk 'Inclusive economic sustainability: SDGs and global inequality' (2020) 12 *Sustainability* 5427; OHCHR 'Understanding human rights and climate change' Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf (accessed 30 October 2024).

16 As above.

17 UN Report: Inequalities exacerbate climate impacts on poor, https://www.un.org/sustainabledevelopment/blog/2016/10/report-inequalities-exacerbate-climate-impacts-on-poor/ (accessed 30 October 2024).

18 OO Salazar-Duran 'A human rights approach to corporate accountability and environmental litigation' (2009) 43 *University of San Francisco Law Review* 733.

19 African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986 21 ILM 58 art 24 (African Charter).

2.1 African Charter on Human and Peoples' Rights

The African Charter is a legal instrument designed to cater to human rights in the African region. The Charter recognises the importance of integrating environmental concerns into development plans and strengthening environmental governance and institutions. This legal acknowledgment lays a critical foundation for a concerted and comprehensive approach to addressing environmental issues as integral to the protection of human rights. It also promotes sustainable consumption and production patterns. By framing environmental concerns as human rights issues, stakeholders can better advocate necessary changes that prioritise both ecological sustainability and respect for human dignity, ultimately contributing to a more equitable and just world for all. The African Charter contains various provisions aimed at environmental protection in Africa,[20] including the right to a clean and healthy environment,[21] the protection of biodiversity and ecosystems[22] and the sustainable use of natural resources.[23]

2.1.1 Right to a decent, clean and healthy environment

The African Charter emphasises the right to a decent, clean and healthy environment in Article 24 as follows: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'[24] Scholars agree that this right recognises the importance of safeguarding a clean, safe, decent and healthy environment for the well-being of individuals and communities.[25] A distinctive aspect of this proviso is its tripartite angle – it incorporates the protection of individuals' rights in relation to their environment, the protection of collective and community rights, and the conservation of the environment itself. In this manner, it highlights the need for measures to prevent pollution, promote sustainable development and protect ecosystems. This provision in the African Charter also emphasises the responsibility of governments to respect, protect, fulfil and ensure the enjoyment of this right by their citizens. By recognising the importance of a decent, clean and healthy environment, the African Charter sets the foundation for environmental protection initiatives in Africa.

The right to environment is significantly linked to the right to health. The African Charter provides in article 16 that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'. Furthermore, 'state parties to the present Charter shall

20 JH Knox & R Pejan *Human rights and the environment under African Union law* (2028) 62-77.

21 Arts 24 & 16 African Charter.

22 Art 24 African Charter.

23 Art 21 African Charter.

24 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149.

25 D Shelton 'Human rights, environmental rights and the right to environment' (1991) 28 *Stanford Journal of International Law* 103-138.

take the necessary measures to protect the health of their people'. This progressive link between health and the environment has been recognised by the African Commission on Human and Peoples' Rights (African Commission) in *SERAC*[26] regarding Shell Oil's exploration activities in the Niger Delta. The plaintiffs argued that the oil exploration activities of Shell, under the licence given by Nigerian authorities, disregarded the safety of local communities and violated the rights of the Niger Deltans. The plaintiffs argue that Shell's activities have led to severe environmental degradation and health issues in the region, violating both national and international laws, particularly articles 16 and 24 of the African Charter. Additionally, they claim that the Nigerian government failed to enforce regulations and protect its citizens. The African Commission ruled in favour of SERAC, holding Shell accountable for its negligence and failure to implement safety measures, as well as implicating the Nigerian government in its complicity. While recognising the Nigerian state's right to extract oil, it also made clear that the government had not taken the necessary precautions to guarantee sustainable development and the defence of the environmental and human rights of the region's native population, particularly the Ogoni people. As a result, the Commission determined that the Nigerian state had violated articles 16 and 24 of the African Charter regarding the right to a clean and healthy environment.

The verdict has set a crucial legal precedence that impacts future cases involving environmental activism. Furthermore, it prompted compensation and remediation efforts for the affected communities, along with changes in Shell's operations and corporate social responsibility policies. Importantly, the verdict and its implications mark a crucial turning point in the fight for environmental rights as supported by the provisions of the African Charter.

Gbemre v Shell Petroleum Development Company Nigeria Limited & Others is another landmark case on the right to environmental protection and health.[27] The applicants argued that they have a right to 'enjoy the best attainable state of physical and mental health as well as a right to a general satisfactory environment favourable to their development'. Accordingly, the degradation of the environment by the respondents violated these human rights. In this case, the judge ruled in favour of the applicants' argument and the environmental and health rights of the affected communities.

26 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRC 60 (ACHPR 2001) (*SERAC*).

27 (2005) AHRLR 151 (NgHC 2005) para 62.

3 SUPPORTING THE RIGHT TO A DECENT, CLEAN, AND HEALTHY ENVIRONMENT: AFRICAN REGIONAL ENVIRONMENTAL TREATIES AND POLICIES

Although not explicitly stated, various regional instruments, plans of action and MEAs support environmental rights and the accompanying duties regarding these rights. They establish frameworks that further the objective of the environmental rights as stated in the African Charter. The availability of regional environmental treaties reflects the pressing challenges and present opportunities for environmental management, conservation and protection for sustainable development.[28] Importantly, they provide a framework for cooperation and the implementation of measures to protect the environment.[29] These treaties also serve as gripping reminders of the shared ambition and commitment of African nations to drive a concerted mission towards facilitating sustainable development in Africa and ultimately contribute to the Sustainable Development Goals (SDGs).

The next part will examine the available treaties, frameworks and policies with respect to a range of issues, including climate change, waste management and biodiversity conservation.

3.1 Climate change

Africa is not immune to some of the consequences of climate change raging across the world.[30] The repercussions of climatic shifts are multifaceted, affecting essential elements such as food security, water availability, public health and overall economic stability.[31] Rising temperatures, coupled with shifting precipitation patterns, are leading to more frequent and intense droughts and floods.[32] Some regions are experiencing extreme dryness, while others face the threat of

28 African Union 'Multilateral Environmental Agreements (MEAs)', https://au.int/en/meas#:~:text=History%20of%20MEAs%20in%20Africa&text=The%20Convention%20among%20other%20issues,social%20development%20policies%20and%20programmes (accessed 30 October 2024).

29 NJ Vig 'Introduction: governing the international environment' in NJ Vig & RS Axelrod (eds) *The global environment: institutions, law and policy* (1999) 1-26.

30 World Metrological Organisation 'Africa suffers disproportionately from climate change' 4 September 2023, https://wmo.int/media/news/africa-suffers-disproportionately-from-climate-changes (accessed 30 October 2024).

31 RW Abrams, JF Abrams & A L Abrams 'Climate change challenges for Africa' in *Encyclopedia of the anthropocene 2: reference module in earth systems and environmental sciences* (2018) 177-194; AR Chapman & AK Ahmed 'Climate justice, human rights, and the case for reparations' (2021) 23 *Health and Human Rights Journal* 81.

32 As above.

flooding.[33] Literature also shows that one of the most alarming consequences of this is the disruption of agricultural productivity, which is vital for many African economies.[34] For example, prolonged dry spells can decimate crops, while sudden heavy rains can cause soil erosion and the destruction of harvests, leaving farmers without livelihoods and communities without food.[35] This agricultural instability not only threatens the immediate food supply but also contributes to rising food prices, escalating malnutrition and food scarcity, particularly among vulnerable populations.[36]

Water resources are also under severe strain as climate change alters rain patterns and increases evaporation rates.[37] This inconsistent availability of water affects not only agriculture and livestock productivity, but also drinking water supplies and sanitation, further jeopardising lives and public health.[38] Increased water scarcity can give rise to a reliance on unsafe water sources, leading to waterborne diseases, compounding health challenges and placing additional strain on already overburdened healthcare systems.[39]

Moreover, the effects of climate change are driving climate-induced displacement, as communities are forced to leave their homes in search of better living conditions and resources.[40] This migration places additional pressure on urban areas and neighbouring regions, often resulting in conflict over limited resources and escalating social tensions.[41] Successive assessment reports from the Intergovernmental Panel on Climate Change (IPCC) have highlighted a pressing concern: the interplay between climate change and population growth is

33 H Chikoore & MR Jury 'South African drought, deconstructed' (2021) 33 *Weather Climate Extremes* 100334; W Thoithi, RC Blamey & CJC Reason 'Dry spells, wet days, and their trends across Southern Africa during the summer rainy season' (2021) 48 *Geophysical Research Letters* e2020GL091041.

34 MB Sylla and others 'Climate change to severely impact West African basin scale irrigation in 2 °C and 1.5 °C global warming scenarios' (2018) 8 *Scientific Reports* 14395; A Dai 'Drought under global warming: a review' (2011) 2 *Advanced Review* 45e65.

35 AJ Dietz, R Ruben & A Verhagen (eds) 'The impact of climate change on drylands with a focus on West Africa' (2001) NOP-ICCD Research Project 952240.

36 African Union 'Climate change and resilient development strategy and action plan' (2022-2032), https://au.int/sites/default/files/documents/41959-doc-CC_Strategy_and_Action_Plan_2022-2032_08_02_23_Single_Print_Ready.pdf (accessed 30 October 2024).

37 Sylla and others (n 34); TD Bhaga and others 'Impacts of climate variability and drought on surface water resources in sub-Saharan Africa using remote sensing: a review' (2020) 12 *Remote Sensing* 4184.

38 M Hyland & J Russ 'Water as destiny – the long-term impacts of drought in sub-Saharan Africa' (2019) 115 *World Development* 30-45.

39 As above; Ayanlade (n 2).

40 S Adaawen and others 'Drought, migration, and conflict in sub-Saharan Africa: what are the links and policy options?' (2019) 2 *Current Directions in Water Scarcity Research* 15-31.

41 As above; CS Hendrix & SM Glaser 'Trends and triggers: climate, climate change and civil conflict in sub-Saharan Africa' (2007) 26 *Political Geography* 695-715.

expected to significantly exacerbate the deterioration of our natural resources.[42]

3.1.1 Legal and policy interventionsles

Although there is no regional MEA for climate change *per se,* some countries have enacted specific laws addressing climate change, often aligned with regional environmental objectives and international commitments.[43] These laws typically cover emissions reductions, adaptation and mitigation measures, renewable energy and sustainable land use. In Nigeria, for example, the Climate Change Act of 2021 serves as a binding legal framework for the country to address climate-related issues.[44] Fifty-four countries in Africa have ratified the Paris Agreement (and Kyoto Protocol) and are working to meet their nationally-determined contributions (NDCs) under the Paris Agreement, which outlines individual climate action plans and commitments.[45] Many countries have also taken steps to submit their national adaptation plans (NAPs) as part of their commitments to reduce emissions and adapt to climate change.[46]

At the continental level, Agenda 2063 is a framework that emphasises sustainable development and environmental resilience.[47] It aims to address climate change as a key obstacle to achieving development goals.[48]

The Africa Climate Change Strategy 2020-2030 represents a critical and comprehensive continent-wide policy framework designed to address the multifaceted challenges posed by climate change across

42 IPCC 'Climate change 2013: the physical science basis' in TF Stocker and others (eds) *Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013); Intergovernmental Panel on Climate Change (IPCC) 'Climate change 2001: impacts, adaptation and vulnerability' in JJ McCarthy and others (eds) *Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (2001) 1032.

43 J Setzer & C Higham 'Global trends in climate change litigation: 2023 snapshot' (2023) London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

44 Grantham Research Institute 'Nigeria's Climate Change Act', https://climate-laws.org/document/nigeria-s-climate-change-act_5ef7 (accessed 30 October 2024).

45 USAID 'USAID announces new partnership with African Union Commission to reach Paris Agreement Goals in Africa', https://www.usaid.gov/press-release/usaid-announces-new-partnership-african-union-commission-reach-paris-agreement-goals-africa (accessed 30 October 2024).

46 As above.

47 African Union 'Agenda 2063: The Africa we want', https://au.int/en/agenda2063/overview (accessed 30 October 2024).

48 As above.

the African continent.[49] This strategy acts as a strategic roadmap to effectively combat climate change through a combination of adaptation, mitigation, early warning systems and resilient development strategies. A vital aspect of the strategy is its call for the strengthening and expansion of national meteorological and hydrological services. This enhancement is necessary to ensure that these services can provide timely and accurate weather forecasts as well as effective early warning systems for extreme weather events, including floods, droughts and heatwaves, experienced across the continent. It prioritises equitable access to financial resources, facilitates technology transfer, and emphasises regional collaboration to build resilience against the increasingly severe threats posed by climate change.[50] Furthermore, it seeks to leverage Africa's unique natural assets to promote sustainable economic growth.

Another cornerstone of the strategy is the promotion of climate-resilient infrastructure. Countries in the African region are urged to prioritise investments in the development of resilient infrastructure, which includes essential components such as advanced water management systems, sustainable agricultural practices and comprehensive disaster risk reduction measures. These initiatives must be specifically tailored to address local climate vulnerabilities, ensuring that each country can effectively respond to its unique challenges.

In addition, the strategy emphasises the importance of sustainable land use practices. It advocates practices such as agroforestry, reforestation and sustainable grazing to protect ecosystems and enhance carbon sequestration efforts. The strategy also outlines an acceleration of efforts focused on adopting renewable energy sources such as solar, wind and geothermal power. This transition is to be supported through policy incentives, capacity-building initiatives and investments in clean energy technologies. Furthermore, the implementation of energy-efficiency measures across various sectors – including building construction, transportation, and industry – is prioritised to mitigate energy consumption and reduce greenhouse gas emissions.

In a significant milestone for climate action on the continent, the African Union (AU) Heads of State and Government formally adopted the African Union Climate Change and Resilient Development Strategy and Action Plan for the period from 2022 to 2032 in February 2022.[51] This landmark achievement establishes a foundational basis for

49 Draft African Union strategy on climate change AMCEN-15-REF-11. Addis Ababa: African Union, https://archive.uneca.org/sites/default/files/uploaded-documents/ACPC/2020/africa_climate_change_strategy_-_revised_draft_16.10.2020.pdf, African Union Climate Change And Resilient Development Strategy and Action Plan (2022-2032) https://au.int/sites/default/files/documents/41959-doc-CC_Strategy_and_Action_Plan_2022-2032_08_02_23_Single_Print_Ready.pdf (accessed 30 October 2024).

50 African Union Draft Africa Climate Change Strategy 2020-2030.

51 African Union 'African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)', https://au.int/sites/default/files/documents/41959-doc-CC_Strategy_and_Action_Plan_2022-2032_08_02_23_Single_Print_Ready.pdf (accessed 30 October 2024).

coordinated climate action at the continental level.[52] It provides a comprehensive framework within which African countries and communities can pursue a unified climate change agenda and resilience development strategy. The plan aims to foster partnerships among countries and stakeholders, while rallying support for its effective implementation, thus bolstering Africa's collective response to one of the most pressing challenges.

The African Union Green Recovery Action Plan 2021-2027 also aims to 'tackle the combined challenges of the COVID-19 recovery and climate change, by focusing on critical areas, including climate finance, renewable energy, resilient agriculture, resilient cities, land use and biodiversity'.[53]

Another important regional climate change initiative is the Kampala Ministerial Declaration on Migration, Environment, and Climate Change (KDMECC-AFRICA), which was adopted in 2021.[54] This Declaration is particularly noteworthy as it specifically addresses the complex interplay between migration, environmental degradation and climate change across the African continent. It aims to foster an integrated approach and establish an action-oriented framework that deals with human mobility driven by climate change and environmental factors. A key aspect of the KDMECC-AFRICA is its emphasis on human rights, advocating the protection of the rights of migrants impacted by environmental and climate-related issues. This focus on human rights underscores the necessity of recognising and upholding the dignity and rights of all individuals, irrespective of their migration status. The Declaration highlights the fact that environmental degradation and the adverse effects of climate change are substantial contributors to migration and displacement in Africa. Therefore, it calls for a comprehensive and cohesive strategy to tackle these intertwined challenges.

An essential component of the Declaration is the call for cross-sectoral approaches and regional cooperation, which is paramount to the successful implementation of all regional instruments and policy agendas. It champions the integration of migration, environmental and climate change policies at both national and regional levels, which is crucial for formulating comprehensive frameworks capable of effectively tackling the multifaceted nature of these issues. Furthermore, it encourages enhanced collaboration among African nations to exchange knowledge, resources and best practices aimed at addressing the challenges posed by climate change and migration.

52 AICCRA 'Africa's new climate change strategy offers a continental roadmap' 18 October 2022, https://aiccra.cgiar.org/news/africas-new-climate-change-strategy-offers-continental-roadmap (accessed 30 October 2024).

53 African Union 'Africa Environment and Wangari Maathai Day' 3 March 2023, https://au.int/en/wangari-maathai-day#:~:text=The%20African%20Union%20Green%20Recovery,cities%2C%20land%20use%20and%20biodiversity. The Action plan can be found at https://au.int/en/documents/20210715/african-union-green-recovery-action-plan-2021-2027 (accessed 30 October 2024).

54 IOM 'African countries sign continental agreement to address climate mobility', https://www.iom.int/news/african-countries-sign-continental-agreement-address-climate-mobility (accessed 30 October 2024).

While the KDMECC-AFRICA is still in its early stages of implementation, it stands as a critical instrument reinforcing Africa's commitment to engaging in global efforts to combat climate change and address migration concerns.

In addition to the KDMECC-AFRICA, several other initiatives have emerged to bolster adaptation, mitigation and climate control actions in Africa. The Africa Adaptation Initiative (AAI) exemplifies this effort by focusing on the direct impacts of climate change.[55] Its objectives include enhancing observational infrastructure and early warning systems; supporting the establishment and strengthening of national institutions and policies; implementing specific adaptation projects; and mobilising financial resources and investments. Through the AAI, African national governments are expected to take the lead in implementing initiatives, while a Continental Adaptation Support Unit will be formed to coordinate these efforts and amplify action.

The African Agriculture Initiative (AAA), launched at COP22, aims to mitigate Africa's vulnerability to climate change and enhance food security on the continent.[56] The AAA concentrates on a variety of critical projects, such as improving soil management techniques, enhancing agricultural water control, developing strategies for effective climate risk management, and promoting capacity-building initiatives and funding solutions. Presently, the AAA enjoys active support from 25 African nations, various international organisations, including the United Nations Framework Convention on Climate Change (UNFCCC) and the Food and Agricultural Organisation (FAO), and has potential avenues to significantly contribute to agricultural projects despite confronting various implementation challenges.[57]

Another noteworthy initiative is the Africa Hydromet Programme, which is being implemented in collaboration with the World Bank Group and the World Meteorological Organisation.[58] This regional framework aims to achieve several critical objectives. First, it focuses on capacity building for meteorological institutions, enhancing the knowledge and skills of these institutions to improve their ability to provide accurate and timely hydrometeorological services. Second, it seeks to strengthen data collection and analysis capabilities, ensuring that reliable and comprehensive information is available for decision making related to weather and climate. Lastly, the initiative aims to enhance forecasting and modelling techniques, thereby advancing the accuracy and reliability of weather and climate predictions essential for effective planning and response.

55 African Development Bank Group *Africa thriving and resilient: the African Development Bank Group's Second Climate Change Action Plan (2016-2020)* (African Development Bank Group) 19.

56 As above.

57 United Nations 'UN, initiative for the adaptation of african agriculture to climate change non-governmental organisation (NGO)', https://sdgs.un.org/partnerships/initiative-adaptation-african-agriculture-climate-change (accessed 30 October 2024).

58 World Bank 'Africa Hydromet Programme', https://www.worldbank.org/en/programs/africa_hydromet_program (accessed 30 October 2024).

These initiatives collectively contribute to a robust framework for addressing the multifaceted challenges posed by climate change in Africa, highlighting the continent's proactive commitment to sustainable development and resilience in the face of climate adversity.

To assist member states in lowering the risk of loss and damage from extreme weather events and natural catastrophes, the Agreement for the Establishment of the African Risk Capacity Agency (ARC) was adopted in 2012.[59] The ARC was also established as a specialised agency of the AU to help member states of the AU to improve their capacities to better plan, prepare and respond to extreme weather events and natural disasters.[60] The ARC further assists AU member states to reduce the risk of loss and damage caused by extreme weather events and natural disasters affecting Africa's populations by providing targeted responses to disasters in a more timely, cost-effective, objective and transparent manner.[61]

Various other strategies, plans of action and sub-regional frameworks are available to address the unique climate change challenges in the continent. For example, the East African Community (EAC) has developed a regional climate change policy, the EAC Climate Change Policy (EACCCP), which focuses on adaptation, mitigation and capacity building among member states.[62] The Southern African Development Community (SADC) also has a number of regional climate change strategies aimed at enhancing resilience to climate change impacts, particularly in sectors such as agriculture and water management.[63]

The ECOWAS Strategic Programme on Reducing Vulnerability and Adapting to Climate Change 2020-2030 is a West African-focused strategy to reduce vulnerability to climate change and to build the resilience of affected communities. Similarly, the ECOWAS Environment Policy highlights the need for a comprehensive and coordinated approach to address environmental challenges in the

59 AU *African Union handbook* (2020), https:// au.int /sites /defa ult /files / docume nts /31829-doc-au _ha ndbo ok _2 020 _ engl ish _ web.pdf (accessed 30 October 2024); arts 1 & 2 of the ARC Agreement; N Ngem 'Chapter 15: The Agreement for the Establishment of the African Risk Capacity (ARC) Agency' in N Ngem *An introduction to the African Union environmental treaties* (2023) 92.

60 Art 2 ARC Agreement.

61 Art 3 ARC Agreement.

62 JF Jarso 'The East African Community and the climate change agenda: an inventory of the progress, hurdles, and prospects' (2012) 12 *Sustainable Development Law and Policy* 19.

63 These include the SADC Policy Paper on Climate Change, the SADC Water Sector Climate Change Adaptation Strategy and the Regional Climate Change Programme. See S Munzhedzi 'Climate change adaptation Southern African Development Community (SADC) adaptation scenarios Factsheet Series, Factsheet 1 of 7' Department of Environmental Affairs, Climate Change Branch, https://www.dffe.gov.za/sites/default/files/reports/ltasfactsheet_perspectivefor SADC.pdf (accessed 30 October 2024).

region.[64] This policy recognises the importance of sustainable development and the preservation of natural resources. It aims to enhance environmental governance and promote the adoption of environmentally-friendly practices in member states. By establishing clear objectives and goals, as well as key principles and strategies, the policy framework provides a roadmap for effective implementation and monitoring mechanisms. Additionally, this climate strategy for the ECOWAS region emphasises the importance of mitigating and adapting to the impacts of climate change, while also promoting the use of renewable energy sources. The policy is important to the ECOWAS region for several reasons. The ECOWAS region faces significant environmental challenges, including deforestation, land degradation, water scarcity, pollution and loss of biodiversity.[65] Recognising the importance of addressing these issues, the policy and strategy have been developed to mitigate and adapt to the impacts of climate change in the region in relation to these issues. It also promotes the use of renewable energy as a key solution to reducing greenhouse gas emissions. The policy framework sets objectives and goals and establishes key principles and strategies for implementation. Effective monitoring mechanisms would ensure the successful implementation of this policy.

Organisations, projects and institutions that contribute to sustainable environmental development and protection in Africa include the African Climate Policy Centre;[66] The African Climate Foundation;[67] the ClimDev Special Fund (CDSF);[68] the Africa Phytosanitary Programme (APP).

While these initiatives, agreements, action plans, strategies and policies are significant in tackling climate change, it is worth noting that they do not create binding obligations on states. Many of these offer policy guidance without a corresponding legal enforcement obligation. The effectiveness is also hindered by the absence of explicit legally-binding provisions to institute actions against individuals and

64 The ECOWAS Regional Climate Strategy and its 2030 Action Plan were formally adopted by the 88th ordinary session of the ECOWAS Council of Statutory Ministers held from 30 June to 1 July 2022 in Accra, Ghana. Directorate of Environment and Natural Resources of ECOWAS *The ECOWAS regional climate strategy and its 2022-2030 action plan* (2022), https://climatestrategy.ecowas.int (accessed 30 October 2024).

65 ECOWAS & USAID *ECOWAS Environmental Action Plan 2020-2026* March 2020 (ECOWAS),

66 UNECA 'African Climate Policy Centre', https://www.uneca.org/acpc (accessed 30 October 2024).

67 *Africa thriving and resilient: the African Development Bank Group's Second Climate Change Action Plan (2016-2020)* (African Development Bank Group) 19; African Climate Foundation 'Developing, supporting, elevating and catalysing climate action in Africa', https://africanclimatefoundation.org/#:~:text=The%20African%20Climate%20Foundation%20%7C%20Unlocking%20Green%20Development (accessed 30 October 2024).

68 African Development Bank Group 'The ClimDev Special Fund (CDSF)', https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/climate-for-development-in-africa-climdev-africa-initiative (accessed 30 October 2024).

organisations that fail to carry out adaption, mitigation or control measures.

Africa's limited infrastructure and financial resources significantly hinder efforts to adapt to these changes and build resilience against climate-related shocks. Many countries struggle to implement effective adaptive strategies due to a lack of investment in technology, infrastructure and education. This creates a cycle of vulnerability from which it is difficult to escape.

Another identifiable challenge lies in the content and nature of these efforts. As noted by Gadani and others, the governments in the African region demonstrate a low to moderate level of commitment to greenhouse gas (GHG) mitigation efforts, with none exhibiting a high level of ambition.[69] This situation can largely be attributed to their significant vulnerability to climate change impacts, which leads to a stronger emphasis on adaptation strategies rather than aggressive mitigation initiatives.[70] Furthermore, African countries contribute relatively little to global GHG emissions, which also influences their policy focus.[71]

To effectively tackle these challenges, there is a critical need for international cooperation and support. While the Paris Agreement provides a robust framework, there is also a need to have African-oriented and focused MEAs which would take into account the unique challenges that African countries face and the collaborative effort to be undertaken to fight climate change in the region. This system should include the promotion of sustainable development strategies that emphasise the importance of environmental conservation and resilience building. It should emphasise investment in renewable energy sources, such as solar and wind power, which can provide alternative energy solutions while reducing dependence on fossil fuels.

The system should stress the focus and support for climate-smart agricultural practices, which should be tailored to fit the local contexts of different regions, ensuring that farmers have the tools and knowledge necessary to adapt to changing climatic conditions. By addressing these challenges through collaborative efforts and innovative strategies, Africa can work towards a more sustainable and resilient future in the face of ongoing climate change.

3.2 Waste management and control

Environmental waste management in Africa faces a multitude of significant challenges that are largely rooted in the context of rapid urbanisation, inadequate infrastructure and insufficient regulatory

69 G Gadani, I Galarraga & E Sainz de Murieta 'Regional climate change policies: an analysis of commitments, policy instruments and targets' SEEDS Working Paper 5/2020 (2020).

70 As above.

71 As above.

frameworks.[72] As cities expand at an unprecedented rate, many urban areas are increasingly burdened by inefficient waste collection and disposal systems. This inefficiency often leads to the accumulation of solid waste in public spaces, such as streets and waterways, creating not only visual pollution but also serious public health risks. Diseases linked to waste accumulation, such as respiratory infections and gastrointestinal illnesses, disproportionately affect vulnerable communities, exacerbating existing health inequalities.[73]

An alarming trend is the rising generation of plastic waste, particularly in densely-populated urban centres where consumption habits drive high levels of single-use plastics in coastal areas.[74] The majority of these cities struggle with low recycling rates, often due to a lack of adequate facilities and public infrastructure dedicated to sorting and processing recyclable materials.[75] Informal waste management systems, which often rely on scavenging and rudimentary methods of disposal, dominate the landscape.[76] This lack of formal systems not only hinders recycling efforts but also poses additional risks, as many recyclables are not processed properly.[77]

Electronic waste, or e-waste, presents another layer of complexity in environmental waste management.[78] Discarded electronics, which contain hazardous materials such as lead and mercury, frequently end up in landfills without proper treatment.[79] Vulnerable communities, often located near these disposal sites, face significant health risks from exposure to toxic substances, which can lead to long-term health complications.[80] Alongside this, inadequate funding for healthcare systems, insufficient training and a lack of awareness about policies and legislation for managing medical waste have resulted in increased

72 NEPAD 'What a waste: innovations in Africa's waste material management' 19 July 2021, https://www.nepad.org/blog/what-waste-innovations-africas-waste-material-management (accessed 30 October 2024).

73 Chapman & Ahmed (n 31).

74 World Bank *Plastic pollution in coastal West Africa* (2023), https://documents1.worldbank.org/curated/en/099025507112355521/pdf/IDU0fcd59fba00cfa04ae109c6801aea6f2c8918.pdf (accessed 30 October 2024).

75 As above; Z Sadan & L de Kock 'Plastic pollution in Africa: identifying policy gaps and opportunities' (2021), WWF South Africa, Cape Town, South Africa, https://wwfafrica.awsassets.panda.org/downloads/wwf_plastic_pollution.pdf (accessed 30 October 2024).

76 OO Oguntoyinbo 'Informal waste management system in Nigeria and barriers to an inclusive modern waste management system: a review' (2012) 126 *Public Health* 441-447.

77 JM Chisholm and others 'Sustainable waste management of medical waste in African developing countries: a narrative review' (2021) 39 *Waste Management and Research* 1149-1163.

78 LS Ankit and others 'Electronic waste and their leachates impact on human health and environment: global ecological threat and management' (2021) 24 *Environmental Technology and Innovation* 102049,

79 World Health Organisation 'Electronic waste (e-waste)' 1 October 2024, https://www.who.int/news-room/fact-sheets/detail/electronic-waste-(e-waste) (accessed 30 October 2024).

80 M Vrijheid 'Health effects of residence near hazardous waste landfill sites: a review of epidemiologic literature' (2000) 1 *Environmental Health Perspectives* 101.

improper handling of waste in hospitals, healthcare facilities, and the transportation and storage of medical waste.[81]

Moreover, transboundary waste issues in Africa are increasingly problematic, as many countries across the continent face illegal dumping and trafficking of hazardous waste, including e-waste and toxic materials, primarily from more industrialised countries.[82]

3.2.1 Legal and policy interventions

Some efforts have been made at the regional level to control harmful waste, especially hazardous transboundary waste management.[83] The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention) is one of the most significant instruments in this respect.[84] The Bamako Convention is an agreement aimed at addressing the environmental challenges related to hazardous waste in Africa.[85] The Bamako Convention was created in response to article 11 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), which enjoins state parties to engage in bilateral, regional and multilateral agreements on hazardous waste to further the Basel Convention's goals. The Basel Convention's inability to prevent the transfer of hazardous waste to less developed countries (LDCs) and the discovery that numerous developed countries were exporting toxic garbage to Africa served as the impetus for the Bamako Convention. The need for the Convention was strengthened following several prominent cases, such as the 1988 Koko incident, when a small fishing town in Southern Nigeria was the site of an unlawful disposal of nearly 2 000 drums, bags and containers containing hazardous wastes, including polychlorinated biphenyls (PCBs), a highly carcinogenic chemical compound, by Italian businesses.[86] The vendor stated that the garbage would help poor farmers as fertiliser, but it ended up being a nightmare.

81 J Vidal 'Toxic e-waste dumped in poor nations, says United Nations' *Our World* 16 December 2013, ttps://ourworld.unu.edu/en/toxic-e-waste-dumped-in-poor-nations-says-united-nations (accessed 30 October 2024).

82 J Clapp 'Africa, NGOs, and the international toxic waste trade' (1994) 3 *Journal of Environment and Development* 17-46.

83 IUCN ELC 'UNEP register of international treaties and other agreements in the field of the environment, 1996' 2005, https://www.ecolex.org/details/treaty/bamako-convention-on-the-ban-of-the-import-into-africa-and-the-control-of-transboundary-movement-and-management-of-hazardous-wastes-within-africa-tre-001104/ (accessed 30 October 2024).

84 Full text available at https://au.int/sites/default/files/treaties/7774-treaty-0015_-_bamako_convention_on_hazardous_wastes_e.pdf (accessed 30 October 2024).

85 OC Ruppel 'Environmental law and policy in the African Union' in OC Ruppel & KR Ruppel-Schlichting (eds) *Environmental law and policy in Namibia* (2013) 133.

86 JO Ihonvbere 'The state and environmental degradation in Nigeria: a study of the 1988 toxic waste dump in Koko' (1994-95) 23 *Journal of Environmental Systems* 207-227.

Essentially, the Bamako Convention prohibits the import of hazardous waste into Africa, regulates the transboundary movement of such waste, and establishes guidelines for the management and disposal of hazardous waste in Africa, except for pollutants from ship discharges. Hazardous wastes are defined under the Convention as hazardous substances that are prohibited, cancelled or refused registration by government regulatory action for reasons related to health or the environment. Article 2 of the Convention also addresses radioactive wastes. Legislation designating and classifying hazardous wastes not previously included in the Convention will be enacted by the parties, according to article 3. Article 4 requires parties to take preventive measures with regard to waste generation and to implement a ban on the import of hazardous waste as well as the dumping of hazardous waste in internal and maritime seas. Every party shall also refrain from exporting hazardous wastes to states that have made such imports illegal by law or international agreement, or if it has reasonable grounds to suspect that the wastes in question cannot be managed in an environmentally-sound manner.

In order to report and take action regarding the transboundary transport of hazardous wastes, members are required to set up monitoring and regulating bodies (articles 5, 6, 7, 8 and 9). Parties are to also share information on hazardous waste events as well as strategies for resolving the issues that have been discovered (article 13).

This Convention is comprehensive for its objective and targeted purpose. By implementing the Convention, African countries can safeguard their environments and protect their populations from the risks associated with hazardous waste. This framework, if properly implemented and adhered to, can also contribute to a cleaner and healthier environment in Africa by preventing the influx of harmful substances and ensuring proper management of hazardous waste on the continent. Through the directive of this Convention, African countries can develop national legislation and enforcement mechanisms to ensure the safe handling, transportation and treatment of hazardous waste.

This regional cooperation also strengthens capacity building, technical assistance programmes and knowledge exchange to enhance Africa's ability to effectively manage and regulate hazardous waste. By implementing effective regulations and enforcement mechanisms, under the directives of this Convention, African countries can safeguard their environments and protect the health of their populations from the harmful impacts of hazardous waste.

In Africa, other measures have been implemented to regulate the management and disposal of specific waste. The Abidjan Convention, officially recognised as the Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, serves as a vital framework designed to tackle a variety of marine and coastal environmental issues,

with a significant focus on the growing crisis of plastic pollution.[87] This wide-ranging agreement fosters a collaborative approach to the sustainable management of marine resources, highlighting the urgent necessity for legally-binding measures to effectively combat plastic waste and its detrimental effects on marine biodiversity and ecosystems. In response to escalating concerns regarding plastic pollution in coastal regions, the Convention is crucial for addressing the transboundary nature of marine pollution, which often requires collective action and shared responsibilities. Furthermore, the Abidjan Convention encourages member states to develop robust national action plans tailored to their specific environmental challenges, ensuring that these plans include effective strategies for waste management, reduction and recycling.

In addition to promoting national initiatives, the Convention facilitates the exchange of best practices among countries. This collaborative sharing of successful strategies is essential for improving waste management approaches and fostering innovation in combating plastic pollution. By advocating stricter regulatory frameworks and collective action, the Abidjan Convention plays an instrumental role in bolstering the global fight against plastic pollution, particularly in the vulnerable coastal regions of West and Central Africa, which are increasingly exposed to the adverse impacts of improperly-managed plastic waste.

Africa's nuclear weapon-free zone[88] was established by the African Nuclear-Weapon-Free Zone Treaty, also referred to as the Pelindaba Treaty.[89] The Treaty effectively prohibits the development, production, testing, stockpiling, acquisition, custody, control, or stationing of nuclear weapons in addition to the radioactive waste disposal ban.[90] The treaty also bans treaty parties from attacking any nuclear sites in the zone and mandates that they uphold the strictest physical security guidelines for nuclear materials, facilities and equipment, all of which may only be utilised for peaceful reasons.

It takes the environment into account by requiring state parties to comply with the measures outlined in the Bamako Convention and not to take any action to assist or encourage the dumping of radioactive wastes and other radioactive matter anywhere within the African nuclear weapon-free zone.

One important regional initiative aimed at addressing the burgeoning issue of electronic waste is the African Union's Electronic Waste Management Plan (EWMP). This comprehensive strategy is designed to tackle the increasing challenges associated with e-waste

87 Full text at https://apps1.unep.org/resolutions/uploads/1981-_convention-west_and_central_africa_region.pdf (accessed 30 October 2024).

88 For the purpose of the Treaty and its Protocols, 'African nuclear-weapon-free zone' means the territory of the continent of Africa, island states members of the OAU and all islands considered by the OAU in its resolutions to be part of Africa.

89 Full text at https://www.peaceau.org/uploads/treaty-en-african-nuclear-weapon-free-zone.pdf (accessed 30 October 2024).

90 Art 3 Pelindaba Treaty.

across the continent, which poses significant risks to both the environment and public health.[91] The EWMP encourages member states to establish and enforce national laws and regulations tailored specifically to e-waste management. Such regulatory frameworks are crucial for promoting responsible disposal and effective recycling practices. In addition, the plan emphasises the importance of maximising the recovery of valuable materials found in e-waste, such as metals and rare earth elements, which can contribute to sustainable economic growth. Furthermore, the EWMP advocates the creation of eco-efficient and sustainable business models within the e-waste sector. The plan also underscores the necessity of considering the social implications of e-waste management strategies, ensuring that local contexts and community needs are taken into account. Capacity building is another key component of the EWMP, which aims to enhance knowledge sharing and communication among stakeholders. The EWMP also identifies best practices for recycling e-waste, highlighting the use of innovative, environmentally-friendly technologies.

In November 2019 the African Ministerial Conference on Environment convened and adopted the Durban Declaration, marking a significant milestone as the first comprehensive continent-wide policy dedicated to fostering support for resource recovery and the principles of a circular economy.[92] This Declaration aims to significantly mitigate waste production and environmental degradation by promoting practices such as reusing, repairing and recycling materials and products across Africa.

At the sub-regional level, the Environmental Action Plan (EAP) for the years 2020 to 2026 has been developed with considerable backing from the USAID-funded West Africa Biodiversity and Climate Change (WABICC) Project.[93] This action plan is crafted to address emerging environmental issues and current trends in management practices. It emphasises the urgent need to confront climate change while conserving the region's natural capital, which includes essential resources such as forests, wildlife and their habitats, as well as protecting vital soil and water resources. Additionally, the EAP aims to tackle pressing concerns such as pollution, particularly the challenge posed by plastic waste, as well as hazardous chemicals and waste management.

91 African union 'Electronic Waste (E-Waste) Management Plan and Guidelines – APRIL 2023', https://au.int/sites/default/files/documents/42723-doc-AUC_E-Waste_Management_Plan_EWMP_BIASHARA_P180117_April_2023.pdf (accessed 30 October 2024).

92 LLSD, SDG Knowledge Hub 'In Durban Declaration, African ministers seek action for sustainability and prosperity', https://sdg.iisd.org/news/in-durban-declaration-african-ministers-seek-action-for-sustainability-and-prosperity/ (accessed 30 October 2024).

93 ECOWAS Environmental Action Plan 2020-2026 March 2020, https://ecowap.ecowas.int/media/ecowap/file_document/2020_ECOWAS_ECOWAS_ENVIRONMENTAL_ACTION_PLAN_Final_Version_-_ENG.pdf (accessed 30 October 2024).

By adhering to the regulations outlined in these frameworks, African nations can significantly reduce the risks associated with hazardous waste, ultimately safeguarding the health of their populations and protecting vital natural resources.

Although effective regulation of waste management is a crucial aspect of environmental protection in Africa and a means of securing the rights of African citizens, the successful implementation of these waste management strategies is often undermined by several challenges, including inadequate waste disposal systems, outdated technological equipment and insufficient management skills in urban areas.[94] These deficiencies coexist with weak strategic, institutional and organisational structures, despite the existence of robust legal frameworks.[95] Moreover, African nations vary greatly in terms of economic development, institutional capacity and access to environmental resources, creating challenges for uniform practical and policy implementation across diverse regions. Issues such as corruption and a lack of accountability in waste management practices can lead to the misallocation of resources, ineffective service delivery, and poor enforcement of regulations – including those governing the interregional cross-border trade of plastic waste.

In this context, the Bamako Convention, which was established to control and reduce the transboundary movement of hazardous waste, faces significant challenges due to its inconsistent enforcement. This lack of uniformity results in loopholes that permit the ongoing illicit trade of hazardous materials. To effectively address these complex issues, there is a pressing need for stronger regional cooperation, stricter enforcement of existing international agreements, the establishment of enhanced monitoring systems, and comprehensive public awareness campaigns aimed at reducing waste generation and promoting responsible disposal practices.

Joint action thus is essential not only to combat plastic pollution, but also to create a unified market characterised by high environmental standards and legal certainty for businesses operating in the region. This concerted effort can facilitate a more sustainable approach to waste management while fostering economic growth and environmental stewardship across Africa.

To effectively tackle these lingering waste management issues, African nations must also adopt and implement comprehensive waste management policies tailored to the unique challenges they face. Investment in sustainable waste management technologies is crucial, including the development of efficient waste collection and sorting systems.

94 JK Debrah, & GK Teye & MAP Dinis 'Barriers and challenges to waste management hindering the circular economy in sub-Saharan Africa' (2022) 6 *Urban Science* 57; JK Debrah, DG Vidal & MAP Dinis 'Raising awareness on solid waste management through formal education for sustainability: a developing countries evidence review' (2021) 6 *Recycling* 6.

95 As above; L Godfrey and others 'Solid waste management in Africa: governance failure or development opportunity?' in N Edomah (ed) *Regional development in Africa* (2020) 1.

Following its environmental obligations and commitment, governments and organisations should promote recycling initiatives that engage local communities and create awareness around the importance of reducing waste and recycling. Public education campaigns that highlight the significance of environmental stewardship are essential in fostering a culture of sustainability. By encouraging individual and collective responsibility for waste generation and disposal, African nations can work towards creating healthier urban environments, protecting public health, and mitigating the impact of waste on the environment. In doing so, they not only address current environmental challenges but also lay the groundwork for a more sustainable future.

3.3 Biodiversity loss

Biodiversity loss in Africa poses a significant environmental challenge, driven by factors such as habitat destruction, climate change, poaching, invasive species and unsustainable land use practices.[96] The continent is home to a remarkable array of flora and fauna, many of which are endemic, but rapid urbanisation, agricultural expansion and deforestation threaten these ecosystems.[97] This decline in biodiversity undermines essential ecosystem services, including soil fertility, water purification and climate regulation, which are crucial for the livelihoods of millions of people.[98] Moreover, the loss of species can destabilise ecosystems, leading to cascading effects that further hinder conservation efforts and exacerbate human-wildlife conflicts. To tackle this challenge, Africa requires integrated conservation strategies that promote sustainable development, habitat restoration and community involvement, while also enhancing legal protections for vulnerable species and ecosystems.

3.3.1 Legal and policy measures

African nations came together in Algiers, Algeria, in 1968 to sign the African Convention on the Conservation of Nature and Natural Resources, usually referred to as the Algiers Convention. African leaders, in recognition that soil, water, flora and faunal resources constitute a capital of vital importance to mankind, agreed 'to harness the natural and human resources of the African continent for the total

96 UNEP-WCMC *The state of biodiversity in Africa: a mid-term review of progress towards the Aichi targets* (UNEP-WCMC).

97 As above; SP Ariori & P Ozer 'Development of forest resources in Sudano-Sahelian West Africa over the last 50 Years' (2005) 29 *Geo-Eco-Trop* 61-68.

98 World Health Organisation 'Climate change and health', https://www.who.int/teams/environment-climate-change-and-health/climate-change-and-health/biodiversity (accessed 30 October 2024); World Health Organisation 'Biodiversity and health' 3 June 2015, https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health#:~:text=Biodiversity%20loss%20can%20have%20significant%20direct%20human,may%20even%20cause%20or%20exacerbate%20political%20conflict (accessed 30 October 2024).

advancement of our peoples in spheres of human endeavour'.[99] In this regard, they adopted the African Convention[100] along with a list of protected species (Class A and Class B) in Algiers, Algeria on 15 September 1968. The Algiers Convention superseded the Convention Relative to the Preservation of Fauna and Flora in Their Natural State of 1933 but has been replaced by the 2003 African Convention on Conservation of Nature and Natural Resources (revised), in line with global and regional instruments.

The revised 2003 Convention focuses on three key areas, namely, the conservation and management of protected areas; the preservation of endangered species; and the promotion of sustainable development practices. The stated objective of the Convention is to improve environmental protection; encourage resource conservation and sustainable use; and to harmonise and coordinate policies in various areas in order to achieve development policies and programmes that are socially, economically and ecologically sound.[101]

The Convention emphasises the need to balance conservation efforts with the social and economic needs of local communities.[102] It calls for the establishment of protected areas to safeguard ecosystems and biodiversity, and encourages the sustainable use of natural resources to support economic development. By addressing these issues, the Convention seeks to promote long-term environmental sustainability and ensure the protection of Africa's natural heritage for future generations.

This important Convention serves as a means to utilise Africa's abundant natural and human resources for the advancement of its people. The Convention, among other issues, acknowledged the importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view, and escribe the dangers that threaten some of these irreplaceable assets, while also acknowledging that the utilisation of the natural resources must aim at satisfying the needs of man according to the carrying capacity of the environment. Following this, the Convention committed parties and stakeholders to undertake individual and joint action for the conservation, utilisation and development of the natural assets by establishing and maintaining their rational utilisation for the present and future welfare of mankind.

99 African Union 'African Convention on the Conservation of Nature and Natural Resources', https://faolex.fao.org/docs/pdf/mul45449.pdf (accessed 30 October 2024).

100 CAB/LEG/24.1, https://au.int/sites/default/files/treaties/7763-treaty-0003_-_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf (accessed 30 October 2024).

101 Art II African Union Convention (n 100).

102 As above.

The Phyto-Sanitary Convention for Africa is another important framework that contributes to the conservation of biodiversity and natural resources. It was adopted in 1967, making it one of the earliest legislations on environmental and agricultural protection.[103] Plant pests have become increasingly adept at migrating across borders, a phenomenon that is accelerated by climate change, heightened international travel and expanding trade networks.[104] These pests quickly adapt to new environments, posing significant challenges to agricultural systems.[105] As a result, millions of people are pushed into food insecurity when these pests damage vital crops and disrupt wild vegetation.[106] This not only threatens food supplies but also negatively impacts biodiversity and the livelihoods of both commercial and smallholder farmers, many of whom rely on healthy crops for their income and sustenance.[107]

Plant pests can be controlled once they become established, but doing so is difficult and costly. Proactive alertness and mitigation are essential. Making certain improvements to the African agricultural sector, such as strong pest early warning and surveillance systems, increasing the technical proficiency of phytosanitary staff, and improving the efficiency of phytosanitary infrastructure, will increase crop yields, foster socio-economic growth, and facilitate the sustainable trade of agricultural products both inside and outside Africa. The Phyto-Sanitary Convention for Africa provides a timely opportunity to support the attainment of these goals. While it is possible to manage and control plant pests once they establish themselves, the process can be exceptionally complicated and costly. Therefore, a proactive approach to pest management is critical. The Convention aims to prevent the spread of diseases, insect pests and other threats to plants throughout all of Africa; to get rid of or manage these; and to stop them from spreading to other nearby territories.[108] Article III of the Convention makes provision for protective measures.

While this measure is important, the regional partnership to combat harmful pests is challenged by the lack of sophisticated technological know-how and skills for the development of robust early warning systems that can detect and anticipate pest threats before they become widespread, and phytosanitary infrastructure necessary for pest control and management. Implementing effective control

103 African Union 'Treaties', https://au.int/en/treaties/1160 (accessed 30 October 2024).

104 S Skendžić and others 'The impact of climate change on agricultural insect pests' (2021) 12 *Insects* 440; FAO 'Climate-related transboundary pests and diseases', http://www.fao.org/3/a-ai785e.pdf (accessed 30 October 2024).

105 BB Lin 'Resilience in agriculture through crop diversification: adaptive management for environmental change' (2011) 61 *BioScience* 183-193.

106 As above; DM Rizzo and others 'Plant health and its effects on food safety and security in a One Health framework: four case studies' (2021) 3 *One Health Outlook* 1.

107 As above.

108 OAU 'Phyto-Sanitary Convention dor Africa', CAB/LEG/24.4/11, https://au.int/sites/default/files/treaties/7762-treaty-0002_-_phyto-sanitary_convention_for_africa_e.pdf (accessed 30 October 2024).

measures is often hindered by a lack of resources, knowledge and infrastructure.

Therefore, there is a need to enhance the technical skills and expertise of phytosanitary staff across the continent. Training and education in pest management practices can empower these individuals to better identify and respond to pest outbreaks. Additionally, investing in the efficiency of phytosanitary infrastructure is essential for effective monitoring and control efforts.

The sub-regional Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region and the Protocol concerning Co-operation in Combating Pollution in Cases of Emergency aims to address the challenges faced by countries in protecting and developing their marine (biodiversity) and coastal environment.[109] The Convention recognises the importance of safeguarding this environment for sustainable development, economic growth and the well-being of the region's population.[110] It seeks to promote regional cooperation and coordination among member states to effectively address marine pollution and other environmental threats. According to article 3 of the Convention,[111] the West and Central African maritime and coastal environments may be protected by bilateral or multilateral agreements, including regional or sub-regional agreements between the contracting parties in the region, provided that these agreements are compliant with international law and the Convention. To prevent, reduce, combat and control pollution of the Convention area and to ensure sound environmental management of natural resources, the contracting parties shall, individually or jointly, as the case may be, take all appropriate measures in accordance with the provisions of the Convention and its protocols in force to which they are parties.[112] They shall comply with its provisions using the best practical means at their disposal and in accordance with their capacities.

The Protocol concerning Co-operation in Combating Pollution in Cases of Emergency, which is part of the Convention, specifically aims at providing a framework for coordinated action and response to pollution incidents in emergencies, and contingency planning. By establishing clear roles and responsibilities, the Convention and Protocol strive to prevent and reduce pollution, improve emergency

109 United Nations Environment Programme Nairobi Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency (1981).

110 IJ Adewumi, JL Suárez de Vivero & A Iglesias-Campos 'The salient dynamics of cross-border ocean governance in a regional setting: an evaluation of ocean governance systems and institutional frameworks in the Guinea current large marine ecosystem' (2022) 8 *Frontiers in Marine Science* 1777.

111 Full text at https://wedocs.unep.org/bitstream/handle/20.500.11822/36241/AC.pdf?sequence=3&isAllowed=y#:~:text=The%20Abidjan%20Convention%20is%20a,the%20marine%20and%20coastal%20areas.&text=ships%2C%20dumping%2C%20land%2Dbased,from%20or%20through%20the%20atmosphere (accessed 30 October 2024).

112 Art 4.

response capabilities, and promote the rehabilitation and restoration of affected areas. Significantly, the Convention and Protocol also provide a platform for member states to share experiences, achievements and challenges in the implementation of these measures, as well as to explore future prospects for collaboration in protecting and developing the marine and coastal environment of the region. It is also worth noting that many African countries are parties to the UN's Convention on Biological Diversity (CBD) which provide complementary measures for biodiversity conservation, protection and control.

Other regional initiatives, such as the AU Agenda 2063 and The Great Green Wall, have made significant strides in raising awareness and fostering collaborative efforts for the protection of Africa's rich biodiversity.

In spite of these legal and policy measures, monitoring, enforcement and governance challenges in implementing biodiversity conventions and initiatives in Africa undermine their effectiveness. Many of these challenges are complex and multifaceted, including weak institutional capacity and coordination; fragmented governance structures across African countries and national implementation authorities; limited capacity; insufficient technical expertise; human resources; and financial support to effectively implement biodiversity conservation; and inadequate political will to pursue long-term environmental sustainability measures.

Addressing the myriad challenges facing biodiversity in Africa necessitates a comprehensive and multifaceted strategy. This strategy should encompass several critical elements, including the fortification of institutions dedicated to environmental protection; the enhancement of law enforcement capabilities to combat poaching and illegal resource exploitation; and the establishment of adequate financing mechanisms to support conservation initiatives.

Furthermore, fostering meaningful stakeholder engagement is paramount, ensuring that local communities, indigenous populations and various interest groups are actively involved in decision-making processes. This participatory approach not only promotes transparency but also enhances the effectiveness of conservation efforts through shared responsibility and local knowledge.

Building robust political will is also essential in the successful outcome of the available frameworks, as it lays the foundation for sustained commitment to biodiversity conservation. African countries must prioritise the integration of biodiversity conservation into broader sustainable development agendas, recognising its intrinsic value and vital role in supporting livelihoods, ecosystems and resilience to climate change. Moreover, the adoption of inclusive governance models is crucial, as these frameworks encourage collaboration across different sectors and levels of government, allowing for the pooling of resources and expertise. Finally, fostering greater regional and international cooperation is imperative for tackling transboundary challenges, sharing best practices, and mobilising collective action towards the preservation of Africa's rich biodiversity. By embracing

these comprehensive strategies, African nations can advance towards a more sustainable and equitable future.

4 ENFORCING COMPLIANCE TO EXISTING FRAMEWORKS AND GUARANTEEING ENVIRONMENTAL JUSTICE

Can states be held liable for their environmental obligations under binding treaties? The jurisprudence of the African Court appears to suggest that states have an enforceable obligation to respect, promote and fulfil their duties in environmental frameworks and to remedy environmental rights violations in the context of human rights.

A case in reference is the Côte d'Ivoire disaster concerning a load of highly toxic waste that was offloaded in Abidjan in 2006, leading to the death of over 17 people and affecting the health of many. In the ensuing case of *Ligue Ivoirienne des Droits de l'Homme (Lidho) & Others v Côte d'Ivoire*,[113] the applicants asserted that the human rights of numerous victims were infringed due to the dumping of toxic waste in Abidjan, which also resulted in significant environmental damage, particularly to the ground water. In response, the African Court carefully examined the claim and determined that the government bore responsibility for failing to safeguard the health, lives and environment of its citizens when it permitted a third party company to engage in the hazardous act of waste disposal. The Court issued several directives against the state, including an order for the government to undertake legislative reforms aimed at enforcing a comprehensive ban on the importation and disposal of hazardous waste. This was to be done in alignment with various international conventions previously ratified by the state.

The African Court was invited to examine the binding obligations to MEAs when the government argued that the 2003 Algiers Convention on the Conservation of Nature and Natural Resources did not constitute a binding 'human rights instrument'.[114] Had the Court accepted this argument, it would have significantly diminished the practical application of the Convention in similar cases in the future or even affected the legal status of other MEAs. However, the judges in their 2013 decision took a progressive stance by articulating that the Algiers Convention clearly demonstrated a commitment by participating states to act in ways that prevent detrimental impacts on the environment, particularly those arising from toxic and hazardous waste.[115] When examined in conjunction with the African Charter, the Court concluded that state parties had willingly accepted responsibilities that ensured the protection and fulfilment of rights outlined in the African Charter.

113 Application 41/2016 Judgment 5 September 2023.
114 *Ligue Ivoirienne* (n 113) paras 29-31.
115 *Ligue Ivoirienne* (n 113) paras 32-40.

Accordingly,

> [a] combined reading of these various provisions shows that, through the Algiers Convention, State Parties have signed up to obligations that guarantee the enjoyment of the rights provided for in Articles 16 and 24 of 14 the Charter, namely, the right to the enjoyment of the best attainable state of physical and mental health and the right to a general satisfactory environment conducive to development.[116]

This conclusion is important for several reasons. First, it enabled the Court to incorporate the provisions of the Algiers Convention into its deliberations and ultimately influenced its decisions regarding the case at hand. Second, it cemented the position of MEAs as a crucial tool in establishing liabilities and guaranteeing the right to a satisfactory environment. Third, the decision in this case reminds states and relevant authorities to be 'mindful of the growing threat to human health' and take proactive actions.[117] On this point, the Court supported its position by further articulating the obligation of states in the Bamako Convention.[118] The judges stressed that 'the Bamako Convention that it behoves state parties, prevent the importation into their territory of toxic wastes whose impact on human life they should be aware of'.[119] Furthermore, if such harmful waste is placed in its territory, it 'has the obligation to act and limit and repair the harmful consequences on human life'.[120] Beyond finding that rights to life, health and environment were violated,[121] the Court also took the time to establish that states must implement the rights guaranteed by the 'Convention to which they subscribe'.[122]

The *Ogiek* case against the Kenyan government,[123] presented before the African Court, represents another significant milestone in the recognition and protection of indigenous peoples' rights, as well as environmental rights across the continent.[124] This landmark ruling highlighted the struggles of the Ogiek community, an indigenous group with a deep historical connection to the Mau forest in Kenya, who have faced ongoing eviction and land dispossession. The African Court's decision not only affirmed their right to land and resources in the African Charter, but also emphasised the importance of preserving

116 *Ligue Ivoirienne* (n 113) para 39.

117 *Ligue Ivoirienne* (n 113) para 130.

118 As above.

119 *Ligue Ivoirienne* (n 113) para 137.

120 As above.

121 *Ligue Ivoirienne* (n 113) paras 133-135.

122 *Ligue Ivoirienne* (n 113) para 131.

123 African Court of Human and Peoples' Rights (2017) *ACHPR v Kenya* Application 6/2012 Judgment dated 26 May 2017, ACtHPR, Arusha, Tanzania; African Court of Human and Peoples' Rights (2021) *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012 Order (Procedure) 25 June 2021, ACtHPR, Arusha; African Court of Human and Peoples' Rights 2022 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012 Judgment (Reparations) 23 June 2022, ACtHPR, Arusha, Tanzania.

124 L Claridge & D Kobei 'Protected areas, indigenous rights and land restitution: the *Ogiek* judgment of the African Court on Human and Peoples' Rights and community land protection in Kenya' (2023) 57 *Oryx* 313-324.

indigenous cultural practices and livelihoods that are intrinsically linked to their environment. This case has broader implications for environmental justice, as it underscores the necessity of integrating indigenous rights into national and international legal frameworks aimed at protecting natural resources and ecosystems.

In the comparative landmark case of *Kaliña and Lokono Peoples v Suriname*,[125] the Inter-American Court of Human Rights underscored the significance of upholding the rights of indigenous peoples and how this respect can positively influence environmental conservation efforts.[126] The Court articulated that recognising and protecting the rights of indigenous communities not only is a moral and legal obligation, but also essential for fostering sustainable environmental practices. Consequently, it emphasised that the rights of indigenous peoples should be viewed in conjunction with international environmental laws, positioning these frameworks as complementary rather than mutually exclusive. This perspective highlights the interconnectedness of human rights and environmental stewardship, underlining a holistic approach to both indigenous rights and conservation.[127]

Environmental litigation has also gained positive ground in regional institutions.[128] In 2014 a significant ruling was made by the East African Court of Justice, which intervened to halt the Tanzanian government's plans to construct a road winding through the iconic Serengeti National Park.[129] This decision was based on extensive concerns regarding the potentially detrimental effects such development could have on the environment, including threats to wildlife migration patterns and natural ecosystems.[130] The Court's intervention was not an isolated incident but rather part of a broader trend toward strengthening environmental judicial protection across the African continent.[131] Such rulings signify a pivotal shift in prioritising

125 Inter-American Court of Human Rights (IACTHR) (2013) *Case of the Kaliña and Lokono Peoples v Suriname* Judgment of 18 July 2013, IACtHR, San José, Costa Rica, corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf (accessed 30 October 2024).

126 As above.

127 *Kaliña* (n 125) para 173.

128 Network for Greening the Financial System, 'Climate-related litigation: recent trends and developments' (2023), https://www.ngfs.net/sites/default/files/medias/documents/ngfs_report-on-climate-related-litigation-recent-trends-and-developments.pdf (accessed 7 December 2024).

129 *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania* Ref 9 of 2010, Judgment, East African Court of Justice at Arusha First Instance Div 64 Gun 20, 2014, http://eac).org/wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf (accessed 30 October 2024).

130 The decision was affirmed by the Appellate Division of the EACJ which largely upheld that decision in July 2015, *Attorney General of the United Republic of Tanzania v African Network for Animal Welfare (ANAW)* Appeal 3 of 2014, Judgment, East African Court of Justice at Arusha App Div (29 July 2015), http://eacj.org/?cases=the-attorney-general-of-the-united-republic-of-tanzania-vs-african-net work-for-animal-welfare (accessed 30 October 2024).

131 JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism' (2016) 16 *Chicago Journal of International Law* 386.

environmental conservation and underscore the growing recognition of the legal rights of nature and the importance of safeguarding critical habitats from unsustainable development practices.

Similarly, the ECOWAS Court found the Nigerian government responsible for abuses by oil companies operating within its territory, in the case of *Social-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*.[132] According to the Court, article 24 of the African Charter articulates a fundamental principle of environmental right that underscores the intrinsic link between a healthy environment and the overall well-being and progress of communities. In its ruling, the Court reinforced the importance of this principle by affirming that the environment is crucial for the survival and flourishing of every individual. The Court unequivocally stated that 'the quality of human life depends on the quality of the environment', highlighting the interconnectedness of environmental health and human development. Furthermore, the Court emphasised the responsibility of the state to ensure that those who inflict environmental harm, particularly through activities such as oil pollution, are held accountable. It specifically pointed out the necessity for the state to implement effective mechanisms to provide adequate reparation to those affected by environmental degradation. The Court also outlined Nigeria's obligations in this context, mandating the country to take 'additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability'. This includes not only addressing past harms, but also instituting proactive strategies to prevent future environmental damage.

It is important to highlight the Court's articulation regarding the responsibilities outlined in article 24 of the African Charter. The Court specifies that the duty imposed by this article encompasses both an 'obligation of attitude' and an 'obligation of result'. This means that not only must the state adopt a proactive and positive approach towards environmental protection, but it is also required to achieve tangible results through its actions. In this manner, article 24 requires that the state implement a range of legislative or other measures specifically designed to give effect to the right to a healthy environment. These measures must be effectively carried out to foster accountability among various stakeholders and to ensure that victims of environmental harm receive adequate reparations. This comprehensive understanding underscores the necessity for the state to be active in its role, ensuring that laws and actions translate into meaningful protection and restoration of the environment.

The African Commission has also lent its voice to environmental issues by providing important jurisprudence and leading the pace in guaranteeing the right to a healthy environment in other cases. The Commission determined in *SERAC*[133] that the Ogoni people had

132 *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* Preliminary ruling ECW/CCJ/APP/07/10, 10 December 2010.

133 *SERAC* (n 26).

experienced serious violations of their fundamental rights, specifically their right to health as outlined in article 16, and their right to a satisfactory environment conducive to development as specified in article 24 of the African Charter.

Although at the time of writing the regional and sub-regional judicial bodies are yet to specifically entertain issues of climate change,[134] it is only a matter of time before they would touch on these significant issues, especially in holding states, corporations and private individuals accountable for contributing to climate change crises or tackling rising global warming.

5 CONCLUSION: PROSPECTS FOR AFRICA'S ENVIRONMENTAL CONTROL SYSTEM

With a growing recognition of the importance of environmental protection in Africa, there are promising prospects for the future of African regional environmental law. Efforts must be made to strengthen existing legal frameworks and enhance regional cooperation to address emerging environmental challenges. This includes exploring innovative solutions to mitigate climate change, promote sustainable development and protect biodiversity. Other pertinent areas for attention include addressing pollution, ensuring effective waste management, preventing or restoring land degradation, and so forth. In addition, there is a need to focus on enhancing enforcement and compliance mechanisms to ensure the effective implementation of environmental laws. Furthermore, increasing awareness and education about environmental issues and promoting public participation in decision-making processes are crucial for the success of regional environmental initiatives. If adequate measures are put in place, the future prospects of African regional environmental law to foster sustainable development and preserve the continent's natural resources for generations to come will be clearer and better.

Implementing robust environmental regulations and adhering to sustainable trade standards are also pivotal in this transition. Many of the environmental issues confronting the continent transcend national boundaries and, thus, enhanced regional cooperation and support, and technical and financial knowledge is required to effectively address these. By taking these critical actions collectively, African countries can pave the way for a sustainable future that not only addresses current ecological challenges but also safeguards the well-being of future generations.

134 Y Suedi & MFall 'Climate change litigation before the African human rights system: prospects and pitfalls' (2024) 16 *Journal of Human Rights Practice* 146-159.

From Kenya to Tanzania through Mauritania, Cameroon and Sudan: the approach of the African Children's Committee to the principle of non-discrimination in selected communications

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ABSTRACT: The effectiveness of a human rights monitoring body lies in the seamless fusion of its normative and institutional framework that leads to the development of jurisprudence. Out of seven concluded communications, five concern the violation of the principle of non-discrimination. Using a conceptual desktop research approach, this article argues that the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) can do more in realigning the normative underpinnings to the jurisprudential developments regarding the principle of non-discrimination. This article looks at the normative understanding of the principle of non-discrimination under the African Charter on the Rights and Welfare of the Child and evaluates five selected communications that deal with discrimination. Finally, a reflection on the Committee's approach paves the way for proposals in the application of the principle of non-discrimination.

TITRE ET RÉSUMÉ EN FRANÇAIS

Du Kenya à la Tanzanie, en passant par la Mauritanie, le Cameroun et le Soudan : l'approche du Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant face au principe de non-discrimination dans certaines communications

RÉSUMÉ: L'efficacité d'un mécanisme de surveillance des droits de l'homme repose sur une interaction fluide entre son cadre normatif et institutionnel, conduisant au développement d'une jurisprudence cohérente et adaptée. Parmi les sept communications finalisées par le Comité Africain d'Experts, cinq concernent des violations liées au principe de non-discrimination. Cet article examine la compréhension normative du principe de non-discrimination tel qu'il est inscrit dans la Charte Africaine des Droits et du Bien-être de l'Enfant et analyse en profondeur cinq communications pertinentes à ce sujet. En adoptant une méthode de recherche documentaire conceptuelle, cette contribution soutient que le Comité Africain d'Experts pourrait renforcer son approche en alignant davantage ses fondements normatifs sur les évolutions jurisprudentielles concernant la non-discrimination. Une réflexion critique sur l'approche actuelle du Comité ouvre des perspectives pour une application plus efficace et cohérente du principe de non-discrimination.

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KEY WORDS: African Children's Charter; child; African Children's Committee; communication; due diligence; non-discrimination; obligation; persuasive jurisprudence

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1 INTRODUCTION

The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for the African Committee on the Rights and Welfare of the Child (African Children's Committee) as the body that monitors the implementation of the Children's Charter provisions.[1] The working methods of the African Children's Committee include the consideration of communications on alleged violations of the provisions of the African Children's Charter.[2] The Children's Committee uses communication guidelines to direct its engagement with applicants and respondent states to communications.[3] The Guidelines to the Communications Procedure deal with various aspects such as access to the African Children's Committee; form and content of the communications and their preliminary review and processing by the Secretariat; the appointment of Rapporteurs and Working Groups to work on specific communications; and the joinder and disjoinder of communications.[4]

1 African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990) art 32.

2 Art 42 African Children's Charter.

3 Revised Guidelines for the Consideration of Communications and Monitoring the Implementation of decisions, https://www.acerwc.africa/en/page/guidelines-consideration-communications-and-monitoring-implementation-decisions (accessed 19 December 2023).

4 Art 42 African Children's Charter.

Compared to other human rights monitoring bodies, the African Children's Committee has concluded a relatively small number of communications, but that does not tarnish the fact that its jurisprudence is developing.[5] It remains imperative to identify trends in communications on specific aspects. This contribution latches onto the African Children's Committee's development of jurisprudence in the context of the principle of non-discrimination. As such, the article looks at specific cases where the African Children's Committee has found a violation of the principle of non-discrimination. It argues that the African Children's Committee can do more to ensure that the jurisprudential developments are realigned to the normative underpinnings regarding the principle of non-discrimination. First, the article elaborates on the reason for the focus on non-discrimination as an evolving principle in the jurisprudence of the Children's Committee. Second, it revisits five selected communications that hinge on non-discrimination and establishes its evaluation of its normative framework to the communications. A reflection on the African Children's Committee's approach paves the way for proposals in the application of the principle of non-discrimination.

Furthermore, the author takes on a doctrinal approach to evaluate the reasoning behind the African Children's Committee's findings concerning the principle of non-discrimination. This is concretised by the fact that the principle of non-discrimination is one of the four that inform the child rights-based approach under the African Children's Charter. The insights are drawn from the jurisprudential developments on two fronts. First, the contribution takes on a chronological approach and looks at the following communications: *Children of Nubian Descent*;[6] *Mauritanian Enslaved Brothers*;[7] *Sudanese Nationality*;[8] *Cameroonian Child Rape*;[9] and *Tanzanian Girls*.[10] These decisions were made over 11 years and this raises an expectation to look out for development and changes over time.

5 Eg, as of 5 December 2023, the African Commission had received 832 complaints, with 184 pending. A total of 648 communications have been concluded. The African Children's Committee has only received 24 communications and concluded 7, as of 5 December 2023. See https://www.acerwc.africa/en/communications/table (accessed 19 December 2023).

6 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*, No 2/Com/002/2009, (2011) AHRLR 181 (ACERWC 2011), decided 22 March 2011 (*Children of Nubian Descent*).

7 *Minority Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, No 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*).

8 *African Centre of Justice and Peace Studies and People's Legal Aid Centre v Sudan*, No 5/Com/001/2015, decided May 2018 (*Sudanese Nationality*).

9 *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*, No 6/Com/002/2015, decided May 2018 (*Cameroonian Child Rape*).

10 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania*, No 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*).

2 SETTING THE SCENE: WHY NON-DISCRIMINATION?

The African Children's Committee has to date received 23 communications of which seven have been decided on merit.[11] Five communications have been finalised and declared inadmissible and ten communications are pending.[12] This contribution by design looks at the communications decided on the merits. This is because it concerned the Children's Committee's jurisprudence on substantive elements of the African Children's Charter.

Out of the seven concluded communications, five deal with the violation of the principle of non-discrimination. In light of the low number of communications by the African Children's Committee, it makes sense to have an evaluation of the principle of non-discrimination from a normative, institutional or jurisprudential approach as a critical starting point. This is largely because of the gap in literature on this subject. The author is not aware of existing literature that solely evaluates the principle of non-discrimination under the African Children's Charter.[13] The available literature largely points to general overviews of the child rights-based approach by the African Children's Committee and the substantive rights.[14]

In addition, available literature rather points to the engagement of the principle of non-discrimination by the United Nations (UN) Committee on the Rights of the Child.[15] Abrahamson looks at the principle of non-discrimination from the perspective of the Convention on the Rights of the Child (CRC).[16] In his comparison of the provisions of CRC on non-discrimination concerning other human rights treaties, he does not add the African Children's Charter on the basis that it is not strictly an international human rights treaty.[17] He looks at the United

11 See results, https://www.acerwc.africa/en/communications/table?title=&field_member_state_target_id=All&field_decision_target_id=479 (accessed 19 December 2023).

12 See https://www.acerwc.africa/en/communications/table (accessed 19 December 2023).

13 The author can attest to recent academic engagements to develop a commentary on the African Children's Charter poised to be launched in late 2024.

14 See results of a search, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Julia+sloth+nielsen+non-discrimination&btnG=here; https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=benyam+dawit+mezmur+non-discrimination&btnG=; and https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=African+charter+on+human+and+peoples+rights+non-discrimination&btnG= (accessed 10 November 2024).

15 Eg, see B Samantha 'The principle of non-discrimination in the UNCRC' (2005) 13 *International Journal of Children's Rights* 433-461; JG Vaghri and others *Monitoring state compliance with the UN Convention on the Rights of the Child* (2002).

16 B Abramson 'Article 2. The right of non-discrimination' in A Alen and others (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008).

17 Abramson (n 16) 5-9.

Nations Charter;[18] the Universal Declaration of Human Rights (Universal Declaration);[19] the International Covenant on Civil and Political Rights (ICCPR);[20] and the International Covenant on the Economic, Social and Cultural Rights (ICESCR).[21] It is argued that the relegated importance accorded to the African Children's Charter presents an incomplete picture concerning its normative and institutional underpinning that has led to the development of the principle of non-discrimination in Africa.[22]

In her edited volume, Olga correctly analyses the evolving nature of the rights of the child.[23] While it may not be by design, there is limited engagement of the child rights-based principles with a rather expansive evaluation of how various states, such as Greece, France, Canada, Denmark, Germany and India, have implemented the rights of the child.[24] While this approach offers an insightful narrative by states that are party to CRC, a deliberate and in-depth engagement of the principle of non-discrimination is lost.[25] It goes without saying that the research is squarely on CRC, which presents a gap and an opportunity to carry out this study.

Lansdown looks at the principle of non-discrimination under CRC,[26] and takes time to analyse each attribute of the principle in line with article 3. He looks at three attributes: first, non-discrimination in the realisation of all rights for all children within the jurisdiction;[27] second, based on status, actions, or beliefs, of parents, guardians, or family members;[28] and, third, special measures to address discrimination.[29] This approach lends credence to this research to review the various principles that underscore the understanding of the principle of non-discrimination under article 3 of the African Children's Charter. This also presents a gap with regard to the non-engagement of peculiar aspects on the principle of non-discrimination such as 'fortune' under the African Children's Charter.

18 As above; arts 1(3), 13(1)(b), 55(c) & 76(c) of the Charter of the United Nations, 892 UNTS 119.

19 Abramson (n 16) 5-9. See Universal Declaration (1948) GA Res 217A (III) (UN Doc A/810, 1948).

20 Abramson (n 16) 5-9. See art 2(1) of ICCPR 999 UNTS 171 (1966; in force 1976).

21 Abramson (n 16) 5-9. See art 2(2) of ICESCR 993 UNTS 3 (1966; in force 1976).

22 It is argued that in the era of decolonisation and decoloniality, regional instruments ought to be recognised as part of international law and looked at from how they may be a platform for the global instruments and monitoring bodies to learn from.

23 CJ Olga *The rights of the child in a changing world 25 years after the UN Convention on the Rights of the Child* (2015).

24 Olga (n 23) 1, 61, 97, 123, 151 & 167.

25 Olga (n 23) generally.

26 G Lansdown 'Article 2 the right to non-discrimination' in Z Vaghrietal and others (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child: an analysis of attributes* (2022) 11.

27 Lansdown (n 26) 15.

28 Lansdown (n 26) 16.

29 Lansdown (n 26) 17.

This contribution scrutinises the communications against Tanzania,[30] Mauritania,[31] Sudan[32] and Kenya.[33]

3 THE PRINCIPLE OF NON-DISCRIMINATION

CRC emphasises the role of the state in ensuring the application of the principle of non-discrimination.[34] A quick look at the provision is important in appreciating the context of the African Children's Charter because the African Children's Charter is complementary to CRC. The relevant provision of the CRC states:[35]

> States parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Four critical points emanate from this provision. It (i) places a mandate on the state. This means that the obligation on the state party is mandatory and the state cannot deviate from it. The state's mandate is to (ii) refrain from acts that may lead to discrimination. Furthermore, it requires that the state (iii) takes active steps to monitor the extent of discrimination; and (iv) take steps to mitigate this.[36] In contrast, the principle of non-discrimination as provided for in the African Children's Charter states that '[e]very child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status'.[37]

The foregoing article emphasises the position taken by the African Children's Charter and highlights the obligation on the state. It is from this approach that some pointers are harnessed from this provision and discussed below.

30 *Tanzanian Girls* (n 10).

31 *Mauritanian Enslaved Brothers* (n 7).

32 *Sudanese Nationality* (n 8).

33 *Children of Nubian Descent* (n 6).

34 Since the African Children's Charter complements CRC, a comparison of the two instruments is instructive in assessing the interpretation of CRC as a platform on which the African Children's Charter finds its footing through the application of art 46 in the use of persuasive jurisprudence. The issue of complementarity is not novel to the African Children's Committee. See Report on the 8th session of the CRC Committee January 1995 CRC/C/38. At 8 the CRC Committee recognises that CRC and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) have a complementary and mutually-reinforcing nature.

35 Art 2(1) CRC.

36 For a detailed normative discussion of art 2, see *Implementation handbook for the Convention on the Rights of the Child* 19-37, https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf (accessed 1 February 2024).

37 Art 3 African Children's Charter.

3.1 Agency on the child

First, article 3 requires an agency on the child to have entitlements to rights and freedoms under the African Children's Charter.[38] The Children's Charter has handed down principles to guide the normative understanding of the principle of non-discrimination. As will be shown, the African Children's Charter has used article 46 (which allows the use of inspiration from other sources of the law) to draw on inspiration from other sources to interpret article 3. This has included the use of guidance from other human rights bodies such as CRC and the CEDAW Committee, the African Commission on Human and Peoples' Rights (African Commission), the African Charter on Human and Peoples' Rights (African Charter) and the African Court on Human and Peoples' Rights (African Court).

In addition, the child is mandated to enjoy all the rights and freedoms in an environment that is provided by all stakeholders, starting with the state. It is interesting to note that the mandate is not specifically visited in the state. This potentially dangerous predicament is solved by the African Children's Charter which offers insights into the state party's obligations. The African Children's Charter mandates the state to recognise the rights, freedoms and duties enshrined in the African Children's Charter.[39] Based on the mandatory requirement, consequently, the state is mandated to undertake necessary steps within the bounds of their constitutional processes and all kinds of measures (including legislative measures) to give effect to the provisions of the African Children's Charter.[40] Furthermore, the wording may also be interpreted to mean that all stakeholders, persons or entities in the environments where a child is have an obligation to urge the state as the main duty holder to ensure that the child enjoys their rights.[41]

3.2 Obligation on the state as an active (rather than a passive) player

Second, it is argued that the active identification of the child affected by discrimination includes the engagement of proactive steps, such as the increased delivery of accessible basic services such as education, healthcare and birth registration, coupled with an increase in the

38 General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (art 1) and systems strengthening for child protection' para 9.

39 Art 1 African Children's Charter.

40 As above.

41 As such, while the state is accountable under the African Children's Charter; the various stakeholders also remain accountable in using their working methods to push for conditions that ensure that the child enjoys all the rights under the African Children's Charter without any discrimination.

allocation of funds, human resources and the required facilities.[42] As such, the state is actively involved in identifying children affected by discrimination and is expected to take deliberate steps to remedy the situation.[43] The active identification may start with the commitment by a state party to non-discrimination against women and girls, which requires it to recognise child marriage as a form of sex and gender-based discrimination, and to take appropriate measures towards its elimination.[44] To this end, critical information on children who may be suffering the brunt of discrimination has to be actively and continually identified and subsequent steps taken to ensure that children are not discriminated against. In addition, the African Children's Committee reiterates, by implication, the need for the use of equitable rather than equal treatment in the use of special measures to mitigate the effects of discrimination.[45] The African Children's Committee has in the recent past made recommendations to state parties to ensure non-discrimination as a constitutional guarantee.[46]

3.3 The status of the child is irrelevant

Third, the status of the child is irrelevant and has no bearing on the enjoyment of the rights under the African Children's Charter.[47] This gives the application of the principle of non-discrimination a broad-based contextual application. The first point of call is to have a non-exhaustive list of vulnerable children.[48] The wording of the article by

42 Concluding Observation of the African Committee of Experts on the Rights and Welfare of the Child on the Initial Report of the Republic of Angola para 11, https://www.acerwc.africa/sites/default/files/2022-06/Angola_CO_Initial_Report_7.pdf (accessed 5 February 2024).

43 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to implementation of the principle of non-discrimination. See General Comment 5 (n 38) 11.

44 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage para 11, https://www.acerwc.africa/es/key-documents/general-comments (accessed 2 February 2024).

45 General Comment 5 (n 38) para 9 states that dealing with discrimination may not require 'identical treatment' but rather 'taking special measures in order to diminish or eliminate conditions that cause discrimination'. The state retains the margin of appreciation to ensure that it uses both objective and subjective approaches to ensure that non-discrimination is applied.

46 See Concluding Observation of the African Committee of Experts on the Rights and Welfare of the Child on the initial Report of the Democratic Republic of Algeria para 14, https://www.acerwc.africa/sites/default/files/2022-06/Concluding_Observations_Algeria.pdf (accessed 5 February 2024). The Committee welcomed the constitutional guarantee for equality of everyone and non-discrimination.

47 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised such as rural children, children of imprisoned mothers, children on the move and the gendered dimension. General Comment 5 (n 38) 10.

48 This list is continually extended as the context demands. Eg, the General Comment on sexual exploitation adds to this non-conclusive list other vulnerable children such as victims of sexual violations, including children with disabilities,

design is to the end that specific contextual imperatives regarding the child are irrelevant.[49] For instance, the existence of parents or guardians, and their ethnic group, colour, sex, language, religion, political or other status are irrelevant, especially if they may stifle the child's enjoyment of the rights under the African Children's Charter.[50] The African Children's Committee gives a clarion call to state parties to ensure that birth registration is enforced regardless of the whereabouts of the child's parents or guardians, their ethnicity, group, colour, sex, language, religion, political or other opinion from a national, social origin or other status.[51] This shows how non-discrimination, while it is explicitly mentioned in article 3, is a principle that permeates through the entire African Children's Charter. This is supported by literature that looks at non-discrimination as both a substantive right and a principle.[52] In addition, there is emphasis on the fact that the principle of non-discrimination applies in all environments where a child is, whether there is armed conflict, tension, strife, refugee settings or in places of peace.[53]

3.4 The use of differential treatment

Fourth, a question that comes to the fore is the use of differential treatment or positive discrimination as an approach to non-discrimination.[54] The African Children's Committee uses the spellings 'deferential' in the *Children of Nubian Descent* and *Sudanese Nationality*, and 'differential' in *Mauritanian Enslaved Brothers* and *Tanzanian Girls*. For accuracy, the author refers to the term 'differential' – and it is acknowledged that they refer to the same thing. The cardinal rule is that a child can be justifiably treated differently from others based on their age, as long as the differentiation is proven to have a legitimate aim, that is, a necessary solution to achieve that

children in care institutions, children in conflict situations, children in street situations, and displaced and migrant children. General Comment 7 on art 27 of the African Children's Charter 'Sexual exploitation' para 40.

49 Art 3 African Children's Charter.

50 As above.

51 Art 6 African Children's Charter. See also General Comment on art 6 of the African Children's Charter 'Right to birth registration, name and nationality' para 16.

52 All the articles point to this fact. See other instructive literature such as S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712-738. See also S Karvatska & I Toronchuk 'The right to non-discrimination: interpretive practice of the ECtHR' (2020) 7 *European Journal of Law and Public Administration* 24-46.

53 General Comment 6 on art 22 of the African Charter on the Rights and Welfare of the Child on Children in Situations of Conflict paras 38-40.

54 CRC guides state parties to use legitimate forms of discrimination that have a positive dent on the rights of the child. Eg, discrimination on account of evolving capacities of the child seeks views of a child who has information on the subject at hand and with regard to their capacities, use of affirmative action or programmes that seek to special consideration to children with vulnerabilities. See *CRC handbook* (n 36) 31.

aim, and to be proportional to the achievement of the result.[55] While the African Children's Charter does not provide for differential treatment, it allows the African Children's Committee to draw inspiration from international law on human rights, and other instruments adopted by the United Nations (UN) and by African countries in the field of human rights, and from African values and traditions.[56] For instance, the African Children's Committee recognises that the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African Women's Protocol) reiterates the principles of non-discrimination and provides for the right to freedom from discrimination based on sex or gender.[57] It is argued that if the application of differential treatment is based on the child rights-based approach and the added value that the African Children's Charter provides, it may be used to increase the application of differential treatment. Although the African Children's Committee has come through strongly to reiterate other sources of law,[58] it is yet to be seen when it will apply the principle of possible differential treatment as a point of departure from a finding of a violation of the principle of non-discrimination.

4 EVALUATION OF COMMUNICATIONS

This part evaluates five communications by the African Children's Committee with regard to the way in which the principle of non-discrimination was dealt with. The five communications are engaged on account of the brief facts, the recommendations by the African Children's Committee in light of the principle of non-discrimination and a discussion. The conversation extends to the communications against Kenya, Sudan, Mauritania, Cameroon and Tanzania.

4.1 *Children of Nubian Descent*

This was the first communication which was filed in 2009, and the African Children's Committee handled its decision in 2011 with a

55 N Brando & L Lundy 'Discrimination and children's right to freedom of association and assembly' (2024) 37 *Harvard Human Rights Journal*, https://journals.law.harvard.edu/hrj/2022/12/discrimination-and-childrens-right-to-freedom-of-association-and-assembly/ (accessed 20 January 2024).

56 Art 46 African Children's Charter. A detailed discussion of this article is beyond the scope of this contribution, but a very critical provision that gives the Committee leeway to use other instruments in the promotion and protection of the rights of the child.

57 Joint General Comment (n 44) para 11.

58 See General Comment 1 (art 30 of the African Charter on the Rights and Welfare of the Child) on 'Children of incarcerated and imprisoned parents and primary caregivers' 2013 para 18. The African Children's Committee recognises the inspiration from art 2 of the United Nations Convention on the Rights of the Child (CRC) 1577 UNTS 3 (1989); the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS (1976) 171; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS (1976) 3.

finding on the violation of the principle of non-discrimination by Kenya against children of Nubian descent. It was reported that, historically, the Nubians were forcibly conscripted into the colonial British army and upon demobilisation, they were never returned to Sudan.[59] Although the British colonial authorities allocated land to Nubians, the post-colonial government of Kenya regarded them as aliens.[60] Consequently, the lack of ancestral land in the state party, and the failure to recognise their claim to land was linked to the denial of Kenyan citizenship.[61] Consequently, the children of the Nubian community did not have citizenship, and the lack of valid documentation on the part of their parents meant that they could not easily receive the benefits that children with citizenship or legal status in Kenya had.[62] This was further complicated by the fact that the children of Nubian descent had no legitimate expectation from the state and would most probably remain stateless.[63] The respondent state filed no response to the communication.

In dealing with the issue of non-discrimination, the African Children's Committee reiterated five critical principles. These principles are discussed below in light of the normative principles and the subsequent three communications on non-discrimination.

First, the African Children's Committee introduced racial and ethnic discrimination as prohibited and binding as *jus cogens* under international law.[64] While this was a point of departure from the normative underpinnings, it reiterated various principles. The Children's Committee, by implication, uses international law as the yardstick to place agency on the child as the recipient of the rights and freedoms under the African Children's Charter, and that discrimination should not be an exception.[65] In addition, the African Children's Committee by implication reiterated that the state is actively involved in identifying children affected by discrimination and is expected to take deliberate steps to remedy the situation.[66] Furthermore, the Children's Committee reiterates the principle that the state is taken to play an active rather than a passive role in how it responds other than failing to act. As such, the failure of the state to address the discrimination against the Nubian children was evidence of the state playing a passive role.[67] It was to this end that the African Children's Committee was not convinced that the state practice that has led

59 *Children of Nubian Descent* (n 6) para 2.
60 *Children of Nubian Descent* (n 6) para 3.
61 As above.
62 *Children of Nubian Descent* (n 6) para 5.
63 *Children of Nubian Descent* (n 6) para 56.
64 *Children of Nubian Descent* (n 6) para 5.
65 General Comment 5 (n 38).
66 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to the implementation of the principle of non-discrimination. General Comment 5 (n 38) para 11.
67 Joint General Comment (n 44) para 11.

children being stateless for long, coupled with the discriminatory treatment, was proportional or necessary.[68]

Second, the African Children's Committee introduced the concept of a burden to justify fair or positive discrimination. It stated that where the facts indicate a *prima facie* case of discrimination, the burden shifts to the state to justify the difference in treatment and how this may amount to fair discrimination.[69] This is amplified in the findings where the Children's Committee confirms that this burden cannot be extinguished when a state (in this case, Kenya) elects not to respond to the allegations levied against it by the complainant.[70]

Third, the African Children's Committee pronounced itself on the application of fair discrimination. It used jurisprudence from the African Commission and underscored three grounds that have to be proved by the state for discriminatory treatment to be justified, namely, 'the reasons for possible limitations must be founded in a legitimate state interest and ... limitations of rights must be strictly proportionate [*sic*] with and absolutely necessary for the advantages which are to be obtained'.

From the above, the valid reasons for discrimination are legitimacy, proportionality and absolute necessity. Interestingly, this is the first communication where the African Children's Committee refers to fair discrimination and alludes to a ground that could be used to justify it. It is argued that although the Children's Committee does not refer to the concept as 'positive discrimination' or 'differential treatment', it ought to be noted that various reasons may justify different outcomes.[71] Although positive discrimination occurs where a disadvantaged group gets preferential treatment, the state may legitimately negatively discriminate against groups as well, for instance, through the denial of voting rights to non-citizens.[72] While is it not a form of preferential treatment to the vulnerable group as non-citizens, it is a form of legitimate discrimination on the basis of citizenship. From an introspection, it would have been expected that the African Children's Committee would refer to article 46 (to draw inspiration from other sources of international human rights law and international humanitarian law) but it did not.

Fourth, the African Children's Committee reiterated the need for the state to take measures to facilitate procedures for the acquisition of nationality for children who would be stateless and not otherwise. This position upheld the principle that measures such as birth registration need to be enforced regardless of the whereabouts of the child's parents or guardians, their ethnicity, group, colour, sex, language, religion, political or other opinion from a national, social origin or other status

68 *Children of Nubian Descent* (n 6) para 56.

69 *Children of Nubian Descent* (n 6) para 57.

70 *Children of Nubian Descent* (n 6) para 5.

71 See Brando & Lundy (n 55).

72 See interesting conversation on this by JA Goldston 'Holes in the rights framework: racial discrimination, citizenship, and the rights of noncitizens' (2006) 20 *Ethics and International Affairs* 321-347.

is a given.[73] Most importantly, the Committee reiterated its broad-based contextual application of the principle that the status of the child is irrelevant and has no bearing on the enjoyment of the rights under the African Children's Charter.[74]

Fifth, the African Children's Committee enunciated a principle to the end that the violation of the principle of non-discrimination may lead to consequential violations of other provisions. It noted that the indivisibility of rights in the African Children's Charter was underscored by the consequential impact of the denial of nationality to children of Nubian descent by the state. This was evident in the finding that the state had as a consequence violated its obligations under articles 1 (to respect, protect, promote and fulfil its obligations under the African Children's Charter) and 14 (health).

It is also worth noting that the communication informed the subjective development of the jurisprudence on non-discrimination in the wording of General Comment 5 on state party obligations.[75] Some specific aspects of the normative underpinnings did not come through in this communication. Others include the application of the principle of non-discrimination in all environments such as peace, conflict and host communities,[76] and the mandate to ensure that all stakeholders (starting with the state) have an obligation to a child in the enjoyment of their rights.[77] The author hastens to add that since the facts of the communication did not involve children in spaces of conflict, humanitarian settings, as refugees or internally displaced, it is expected that a communication with such facts will build on this jurisprudence.

Regarding the violation of state obligations under article 1, the applicants never alleged a violation of the said article. The African Children's Committee only refers to the specific articles that have allegedly been violated by the Kenyan government. These include articles 6(2), (3) and (4); 3; 14(2)(b), (c) and (g); and 11(3) of the African Children's Charter.

4.2 *Mauritanian Enslaved Brothers*

This communication was received in 2011 and the decision was handed down in 2017. The brief facts are that two children were born to the Haratine sect, which automatically recognised them as slaves.[78] They served in this context to the El Hassine family and their chores involved

73 Art 6 African Children's Charter. See also General Comment on art 6 of the African Charter on the Rights and Welfare of the Child: 'Right to birth registration, name and nationality' para 16.

74 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised like rural children, children of imprisoned mothers, children on the move and the gendered dimension. See General Comment 5 (n 38) 10.

75 General Comment 5 (n 38).

76 General Comment 6 (n 53) paras 38-40.

77 As above.

78 *Mauritanian Enslaved Brothers* (n 7) para 5.

looking after the family's heads of camels, and working for the whole week without remuneration.[79] The El Hassine family subjected the two boys to corporal punishment and denied them the right to education.[80] When the matter was brought before the lower courts, judgment and a fine of $1 500 were handed down by the lower courts. Having been aggrieved by the decision, attempts to appeal were not supported by the state prosecutor.[81] After a failure to solve the case at the domestic level, the African Children's Committee found a violation of the principle of non-discrimination under article 3. Other violations that were found by the Children's Committee included the best interests of the child; the right to life, survival and development;[82] the right to education, leisure, recreation and cultural activities; and protection from economic exploitation.[83] In addition, the African Children's Committee found a violation of protection against harmful cultural and social practices and the prevention of trafficking in and abduction of children.[84]

Concerning discrimination, the complainants argued that since they were treated differently from children who were not slaves, this was a violation of the principle and right to non-discrimination. As such, the respondent's failure to prevent and investigate acts of discrimination, and ensuring the punishment of perpetrators with a view of ensuring redress to the victims, amounted to discrimination.[85] The complainants further argued that the treatment of the two children and the failure of the government to prevent such treatment and to provide an effective remedy violated their rights to education, survival and development, leisure, recreation, and cultural activities as a result of the discriminatory engagements by the state.[86] The respondent state did not specifically address its mind to the issues of discrimination.[87] Interestingly, it gave a general approach by the government in ensuring that the rights of the child were not violated, such as a legislative framework that protected children against abuse;[88] the development of a plan of action against child labour;[89] the enrolment of the children in school;[90] and the prosecution of the perpetrators.[91]

In the evaluation of the violation of the principle of non-discrimination, the African Children's Committee showcased three points in its approach in this communication. First, it reiterated that for

79 *Mauritanian Enslaved Brothers* (n 7) paras 6-7.
80 As above.
81 As above.
82 *Mauritanian Enslaved Brothers* (n 7) para 12.
83 As above.
84 As above.
85 *Mauritanian Enslaved Brothers* (n 7) para 35.
86 As above.
87 *Mauritanian Enslaved Brothers* (n 7); see the silence in the respondent's submissions on the arguments on the merits of the communication in paras 36-41.
88 *Mauritanian Enslaved Brothers* (n 7) para 36.
89 *Mauritanian Enslaved Brothers* (n 7) para 37.
90 *Mauritanian Enslaved Brothers* (n 7) para 38.
91 *Mauritanian Enslaved Brothers* (n 7) para 39.

a state to justify the use of differential treatment, three aspects should exist, namely, 'a legitimate state interest, limitations that are proportionate with, and necessary for the advantages for which they are obtained'.[92] It should be stated that this approach maintained consistency by the African Children's Committee in referring to its earlier jurisprudence on differential treatment.[93] Second, the Children's Committee relied on persuasive jurisprudence as referred to in article 46, such as communications from the African Commission and the Inter-American Commission.[94]

Third, and closely linked to the foregoing position, the African Children's Committee used the extent to which a state upholds its legal responsibilities. With an emphasis on the acts of discrimination by private individuals, the Children's Committee recalled that the state has the duty to protect children from discrimination by taking preventive measures against violations by private individuals and providing remedial actions to correct the violations.[95] The cumulative effect of the second and third pointers was the application of the due diligence principle that requires the state to take steps to prevent and investigate human rights violations, impose the appropriate punishment and ensure adequate compensation.[96] The introduction of the due diligence principle is a reiteration of the agency on the child to have entitlements to rights and freedoms under the African Children's Charter.[97] In addition, the use of the due diligence principle is a clarion call that the state has to actively identify individual children and groups of children (slaves in this communication) whose recognition and subsequent realisation of their rights require special measures.[98] By implication, it is correct to assert that the state fails to be actively involved in the engagement of the non-discrimination discourse.[99] To this end, the state is not committed to ensuring non-discrimination against the children who are slaves.[100] Closely related to the above, the failure by

92 *Mauritanian Enslaved Brothers* (n 7) para 61, notes 29 & 62, note 31.

93 See General Comment 1 (n 58) para 18; *Children of Nubian Descent* (n 6); *Sudanese Nationality* (n 8) as discussed above.

94 *Mauritanian Enslaved Brothers* (n 7) para 62; *Children of Nubian Descent* (n 6) and *Sudanese Nationality* (n 8) as discussed above. In addition, the point of departure was the application of persuasive jurisprudence that was not covered by art 46 such as textbooks and legal literature. It is reiterated that the application of art 46 is still not unpacked and qualified as to the bounds of its use. It is argued that the application of persuasive jurisprudence without reference to the interpretation of art 46 is a missed opportunity to establish the bounds of its application.

95 *Mauritanian Enslaved Brothers* (n 7) para 62, note 30.

96 As above. The due diligence principle is amplified in paras 47-58. For more on the due diligence principle, see RD Nanima 'Evaluating the role of the African Committee of Experts on the Rights and Welfare of the Child in the COVID-19 era: visualising the African child in 2050' (2021) 21 *African Human Rights Law Journal* 52-73. See also RD Nanima 'Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations' (2020) 53 *De Jure Law Journal* 307-331.

97 General Comment 5 (n 38).

98 Art 1 African Children's Charter.

99 See General Comment 5 (n 38) para 11.

100 See discussion on this principle in part 3.

the state to support the two minors by integrating them into their society is a failure to show commitment and a lack of the use of equitable treatment measures to mitigate the effects of discrimination by the state (as a duty bearer) and different stakeholders.[101]

Regarding the violation of state obligations under article 1, the applicants expressly alleged a violation of the said article in relation to other articles such as articles 3, 4, 5, 11, 12, 16 and 29. The African Children's Committee finds a violation of article 1 and other provisions of the African Children's Charter. This indicates that the African Children's Committee will find a violation of an article when it is expressly pleaded by the applicant.

4.3 *Cameroonian Child Rape*

This was the third communication to be decided concerning non-discrimination. It was received in 2015 and decided in 2018. The complainants claimed violations of articles 1, 2, 5, 7 and 17 of the African Children's Charter by the respondent state. These articles related to state party obligations; the definition of a child; the right to life, survival and development; freedom of expression; and protection against child abuse and torture.[102] The facts alleged showed that the victim had been raped by an important individual in the community on three occasions.[103] Attempts to have justice were delayed by the police and, as a result, the Court dismissed the case.[104] When the complainant's mother went to a local radio station to express her dissatisfaction with the outcome of the case, she was charged with judicial defamation.[105]

The African Children's Committee reiterated the agency on the child even in instances where the applicant's assertions in the complaint do not point to the violation. In this regard, it stated:[106]

> Article 3 of the Charter stipulates that all children are entitled to the enjoyment of the rights provided therein irrespective of all grounds including sex. This provision is clear that any form of gender based discrimination against girls is prohibited, however, it does not vividly portray that sexual violence is a form of gender based discrimination as argued by the applicants.

This position reiterates that non-discrimination should be looked at in a wider perspective which inculcates all grounds that would show discriminatory acts, and that their status is irrelevant in qualifying the existence of discrimination. In addition, any form of discrimination should not be encouraged but rather prohibited. Finally, despite the failure to articulate the form of discrimination, the African Children's

101 General Comment 5 (n 38) 9.
102 *Cameroonian Child Rape* (n 9) para 6.
103 *Cameroonian Child Rape* (n 9) para 18.
104 *Cameroonian Child Rape* (n 9) para 14.
105 As above.
106 *Cameroonian Child Rape* (n 9) para 59.

Committee would go ahead to read in the violation in light of its evaluation of the facts before it.

The African Children's Committee reiterated the active role of the state in identifying vulnerable children and taking steps to remedy their situations. To this end, it used a two-step approach by, first, applying article 46 of the African Children's Charter to draw inspiration from other sources of human rights law. This was informed by the jurisprudence of the Inter-American Commission of Human Rights,[107] the African Commission[108] and the European Court of Human Rights and Fundamental Freedoms.[109] Second, the African Children's Committee relied on the jurisprudence of the CEDAW Committee and applied the principle of due diligence,[110] with the aid of *X and Y v Georgia* from the CEDAW Committee, where it was held that there is a violation of the principle of non-discrimination where the respondent state fails to take legislative measures to protect the victim from domestic violence. The CEDAW Committee reiterated that even where the state was not directly responsible for the violation of the principle of non-discrimination, it was important that the failure to exercise due diligence to investigate and prosecute the perpetrators of the crime made it accountable under international law.[111] As such, the African Children's Committee found that the sexual abuse committed against the child disabled her from enjoying the protection under the African Children's Charter.[112] It also added that although the discriminatory act had not been perpetrated by state actors, the state has failed to deliver its obligation to protect the child as far as it failed to investigate the alleged violation.[113]

Regarding the violation of state obligations under article 1, the applicants expressly alleged a violation of the said article in addition to violations of articles 3 and 16. The African Children's Committee found the respondent state in violation of its obligations under article 1 (obligation of state parties); article 3 (non-discrimination); and article 16 (protection against child abuse and torture) of the African Children's Charter. This still points to the finding of violations with respect to provisions that have been pleaded by the applicant.

4.4 *Sudanese Nationality*

In *Sudanese Nationality*, parents who were from areas that were now gazetted to South Sudan wanted to maintain their nationality with Sudan. They were not considered nationals of Sudan and, as a consequence, the children were also denied nationality. The main issue

107 *Cameroonian Child Rape* (n 9) para 54.
108 *Cameroonian Child Rape* (n 9) para 53.
109 *Cameroonian Child Rape* (n 9) paras 49 & 50.
110 *Cameroonian Child Rape* (n 9) para 63.
111 *Cameroonian Child Rape* (n 9) para 63.
112 *Cameroonian Child Rape* (n 9) para 64.
113 *Cameroonian Child Rape* (n 9) paras 65 & 66.

was whether the violation of the principle of non-discrimination led to the violation of the right to acquire nationality.[114] The African Children's Committee held the view that the enjoyment of the right to non-discrimination was not a condition after a balancing act before it was applied.[115] Consequently, the Committee correctly stated that the right cannot be denied in disregard of the principles that govern non-discrimination as provided for in article 3 of the African Children's Charter.[116]

The African Children's Committee adopted a conceptual approach requiring that the state party should not use discriminatory regulations on different groups of a population in the grant of nationality.[117] It found that, as such, the law of the Sudan on the acquisition of nationality was discriminatory since it allowed fathers (excluding the mothers) of Sudanese children to automatically confer nationality on their children.[118] In addition, the African Children's Committee expounded on the use of reciprocity and retaliation. This was based on the fact that a similar law was applied by South Sudan to deny nationality to children from Sudan.[119] The African Children's Committee stated that the respondents' attempt to use reciprocity and retaliation was not applicable in areas of human rights, but in other areas such as trade, intellectual property and technology transfer.[120] This was an important assertion in terms of qualifying retaliation and reciprocity regarding the application of the principle of non-discrimination.[121] This meant that the status of the child was irrelevant and had no bearing on the enjoyment of the rights under the African Children's Charter.[122]

The African Children's Committee departed from the literal approach that looked at non-discrimination as a principle and not a right in *Children of Nubian Descent* and took on a conceptual approach that establishes a link between the principle of non-discrimination and the right to acquire nationality.[123] This approach creates an interesting pattern upon which the African Children's Committee builds to develop its jurisprudence. First, it refers to non-discrimination as both a principle and as a right – an inherent entity of which the state cannot deprive a child.[124] This approach adds value to the placement of a

114 *Sudanese Nationality* (n 8) para 31.
115 *Sudanese Nationality* (n 8) para 32, lines 1, 2 & 3.
116 *Sudanese Nationality* (n 8) para 32, lines 11-13.
117 *Sudanese Nationality* (n 8) paras 37-38.
118 *Sudanese Nationality* (n 8) paras 39-41.
119 *Sudanese Nationality* (n 8) para 48.
120 *Sudanese Nationality* (n 8) para 51.
121 As above.
122 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised like rural children, children of imprisoned mothers, children on the move and the gendered dimension.
123 *Sudanese Nationality* (n 8) para 31.
124 *Sudanese Nationality* (n 8) para 32, line 1.

contextual agency on the child to have entitlements to rights and freedoms under the African Children's Charter.[125]

Second, it states that the enjoyment of the right to non-discrimination is not subject to a balancing act for the principle to be applied.[126] Consequently, the African Children's Committee correctly stated that the right cannot be denied in disregard of the principles that govern non-discrimination as provided for in article 3 of the African Children's Charter.[127] This means that the state cannot use the principle of non-discrimination to violate the rights of a child.

Third, the African Children's Committee shared the view that in the context of nationality and non-discrimination, the 'link between the prohibition of discrimination and the right to nationality emanates from the very meaning and benefit of nationality'.[128] As such, it advises that the benefits that an individual has with a nation as a result of a social and legal bond ought to flow to the children without the application of arbitrary and discriminatory laws.[129] It is argued that this is in line with the principle that the status of the child is irrelevant and does not have any bearing on the enjoyment of the rights under the African Children's Charter.[130] The point of departure is that the African Children's Committee uses a conceptual approach to apply its broad-based contextual application.

Fourth, using the conceptual approach, the African Children's Committee then decided the allegation of the violation of article 3 by answering two questions: (i) whether Sudan's nationality laws have discriminatory provisions on the acquisition of nationality; and (ii) whether Sudan's nationality laws have discriminatory provisions on the deprivation of nationality. In answering question 1, the African Children's Committee uses a dual approach where it first relies on its jurisprudence in General Comment 2 and *Children of Nubian Descent* to explain the link between the principle of non-discrimination and the acquisition of nationality.[131] Second, it refers to persuasive jurisprudence from other human rights monitoring bodies on the international and national scene. For instance, there is a reference to the *Expelled Dominicans and Haitians v the Dominican Republic* of the Inter-American Commission, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Namibian High Court case of *Unity Dow*. The common denominator granulated from all these decisions is the need for mechanisms at the state level to avoid the use of discriminatory regulatory regulations or processes on

125 General Comment 5 (n 38) as discussed in part 3.

126 *Sudanese Nationality* (n 8) para 32, lines 1, 2 & 3.

127 *Sudanese Nationality* (n 8) para 32, lines 11-13.

128 *Sudanese Nationality* (n 8) para 33.

129 As above.

130 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised such as rural children, children of imprisoned mothers, children on the move and the gendered dimension. General Comment 5 (n 38) para 10.

131 *Sudanese Nationality* (n 8) para 36 refers to the African Children's Committee General Comment 2 on art 6 of the African Children's Charter.

different groups of a population in granting nationality.[132] This dual approach leads to the recommendation that the Sudanese law on the acquisition of nationality is discriminatory as far as it allows fathers of Sudanese children to automatically confer nationality on their children other than mothers.[133]

Regarding question 2, the African Children's Committee conceptualises the arbitrary deprivation of nationality as a possible violation of the principle of non-discrimination.[134] It does this in four ways: first, it qualifies the extent to which a state may use sovereignty to decide to confer, withdraw or regulate the nationality of an individual.[135] It argues that the arbitrary deprivation of nationality is a limit to the sovereignty of states. As such, state sovereignty is not a magic wand at the beckon of states to arbitrarily deny an individual of their nationality.[136] This pronouncement by the African Children's Committee creates a basis to place an agency on the child in light of the enjoyment of the various rights and freedoms under the African Children's Charter.[137]

Second, the African Children's Committee still reiterates the use of persuasive jurisprudence from other human rights monitoring mechanisms to adopt a definition of 'arbitrariness'. To this, a General Comment of the Human Rights Committee[138] and the case of *Girls Yean and Bosico v Dominican Republic*[139] are used to state that if a state uses discrimination to deprive one of his nationality, arbitrariness is rendered present.[140] This position by the African Children's Committee adds value to the positioning of the state as an active player in the engagement of the non-discrimination discourse by relating to good practices when it visits countries on field missions.[141] The pronouncement calls for the state to go beyond a commitment to actual deliberate steps in ensuring that there is no arbitrariness in handling matters of nationality.[142] It is desirable that where the African Children's Committee uses persuasive jurisprudence, article 46 is unpacked and qualified to the bounds of its use (just as it did in this communication).

Third, the African Children's Committee undertakes a value analysis of the provisions of the state's laws in comparison with the

132 *Sudanese Nationality* (n 8) paras 37-38.

133 *Sudanese Nationality* (n 8) paras 39-41.

134 *Sudanese Nationality* (n 8) paras 42-53.

135 *Sudanese Nationality* (n 8) para 42.

136 *Sudanese Nationality* (n 8) para 42.

137 This is the import of General Comment 5 as discussed in part 3.

138 General Comment on the right to respect privacy, family, home and correspondence and protection of honour and reputation art 17 para 4; in *Sudanese Nationality* (n 8) para 43.

139 Judgment of 8 September 2005 para 140; in *Sudanese Nationality* (n 8) para 45.

140 As above.

141 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to the implementation of the principle of non-discrimination. See General Comment 5 (n 38) para 11.

142 Joint General Comment (n 44) para 11.

position of the African Children's Charter. This is evident in the analysis of the laws that govern the conferment, withdrawal and regulation of nationality in Sudan.[143] This analysis fell within the bounds of violation of the principle of non-discrimination as the African Children's Committee related the non-willingness of the respondent state to confer nationality on the complainants.[144] By implication, the African Children's Committee reiterated the position that the state retains the obligation to actively identify individual children (born of South Sudanese parents) and groups of children whose recognition and subsequent realisation of their rights require special measures (such as of children of South Sudanese mothers whose fathers' nationality was revoked).[145]

Fourth, and as a consequence, the African Children's Committee addressed the question of the place of the use of reciprocity and retaliation. It noted that the respondent state reiterated its position because of a similar law that was being applied by South Sudan.[146] Using a hypothetical, the African Children's Committee stated that where state Y is violating its child rights obligations concerning children who are nationals of state X, the latter should reciprocate to the former. It correctly stated that while the principles of reciprocity and retaliation may operate in areas of the law such as trade, intellectual property and technology transfer, they do not extend to human rights obligations.[147] This was an important assertion in terms of qualifying retaliation and reciprocity regarding the application of the principle of non-discrimination.[148] It may be argued that this communication calls for legislative and administrative measures to address the challenges that children of South Sudanese parents (especially South Sudanese mothers, where the fathers do not have Sudanese nationality). This requires the need for the use of equitable rather than equal treatment in the use of special measures to mitigate the effects of discrimination.[149] The African Children's Committee takes a stance on deferential treatment as a result of the application of the Sudan Nationality Act as a position that is against the object and purpose of the principle of non-discrimination in the African Children's Charter. There is a clear reiteration that the status of the child is irrelevant and has no bearing on the enjoyment of the rights under the African Children's Charter.[150]

Regarding the violation of state obligations under article 1, the applicants never alleged a violation of the said article. It is interesting

143 *Sudanese Nationality* (n 8) paras 46-49.

144 *Sudanese Nationality* (n 8) para 49.

145 Art 1 African Children's Charter.

146 *Sudanese Nationality* (n 8) para 48.

147 *Sudanese Nationality* (n 8) para 51.

148 As above.

149 General Comment 5 (n 38) as discussed in part 2.

150 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised such as rural children, children of imprisoned mothers, children on the move and the gendered dimension. See General Comment 5 (n 38) 10.

to note that the African Children's Committee does not expressly state so as well. It rather states that it finds the respondent state in violation of its obligations under article 3 on non-discrimination, articles 6(3) and (4) on the right to nationality and prevention of statelessness, and article 11 on education. From the tenor of the African Children's Committee, it reads a violation of article 1 of the African Children's Charter.

4.5 *Tanzanian Girls*

The uncontested facts by the complainants that show discrimination indicate that, first, the primary and secondary schoolgoing girls were subjected to forced pregnancy testing and expulsion from schools.[151] Second, the statistics showed a disturbing trend in the numbers of girls that dropped out of school due to pregnancy, with over 55 000 female students between 2003 and 2011, and 2 433 girls in primary and 4 705 in secondary schools in 2012.[152] Third, the practice of forced pregnancy testing was done on girls as young as 11 years and it was not done according to the standard procedures.[153] In addition, the results of the testing were not communicated to the students but shared with the school staff – a position that led to an alleged violation of their privacy, and exacerbated the stigma.[154]

It suffices to note that the practice was neither prescribed by the Education Regulations nor included as a ground for expulsion in the Education (Expulsion and Exclusion from School) Regulation of 2002.[155] It was further contended that since the expulsion of the girls was a universal practice in public schools in Tanzania, the girls who discovered that they were pregnant dropped out of school to escape the humiliation and stigma.[156] There was no exception in the application of the expulsion and exclusion even in instances where the pregnancy was due to sexual abuse or incest.[157] Married girls are not allowed to register or to remain in school under the Education (Imposition of Penalties to Persons Who Marry or Impregnate a School Girl) Rules of 2003.[158] It was also noted that expulsion and exclusion is a permanent measure that disallows girls from readmission into public schools, not to mention the subjection of girls to unlawful detention and/or harassment by the investigating officers.[159] The respondent state did not contest the facts but argued that it retained the margin of appreciation regarding the circumstances in the provision of the right

151 *Tanzanian Girls* (n 10) para 2.
152 *Tanzanian Girls* (n 10) para 2.
153 *Tanzanian Girls* (n 10) para 3.
154 As above.
155 *Tanzanian Girls* (n 10) para 4.
156 As above.
157 As above.
158 *Tanzanian Girls* (n 10) para 5.
159 *Tanzanian Girls* (n 10) para 6.

to education and, as such, had the prerogative to limit the rights of the girls to education if it aimed to achieve a given result.[160]

The African Children's Committee laboured to contextualise differential treatment as one of the complementary elements of the right (not the principle) to non-discrimination.[161] It is necessary to differentiate because the African Children's Committee clarifies that non-discrimination may pass as a principle, as a right or as both. It identified three complementary elements to non-discrimination as differential treatment, interference and rights and freedoms in the African Children's Charter.[162] With the aid of textbooks, the African Children's Committee upheld the persuasion that these three elements inform the application of the rights under the African Children's Charter and CRC.[163] It also reiterated the grounds for differential treatment to be (i) reasonability; (ii) objectivity; and (iii) to achieve a legitimate purpose.[164] This position embraces the earlier stance in *Children of Nubian Descent* where the state bears the burden to justify the difference in treatment and how this may amount to fair discrimination.[165] Another important aspect that the African Children's Committee noted was that the right to non-discrimination was absolute and not bound by a balancing test.[166] This is a reiteration of its position in *Sudanese Nationality*.[167] Interestingly, the African Children's Committee qualified the use of necessity as a defence for the state in the application of differential treatment. It stated that a restriction on a right is necessary if there is no other alternative to achieve the intended objective.[168]

Regarding the expulsion of pregnant girls from school, the African Children's Committee stated that the act of the respondent state in the expulsion of pregnant girls from school perpetuated negative and discriminatory attitudes which, in turn, led to child marriage and teenage pregnancy.[169] It is argued that by implication the African Children's Committee states that an act of a state party that perpetuates negative and discriminatory attitudes and tendencies is a violation of its obligations under the African Children's Charter. It is to this end that the African Children's Committee found that the state's perpetuation of the expulsion of pregnant girls with no re-entry, forced pregnancy testing, detention of pregnant girls, and the affected girls' socio-economic status not only amounted to a violation of the provisions of the African Children's Charter, such as the rights to health and education, other than article 3.

160 *Tanzanian Girls* (n 10) para 27.
161 *Tanzanian Girls* (n 10) para 53.
162 *Tanzanian Girls* (n 10) para 53.
163 As above.
164 As above.
165 *Children of Nubian Descent* (n 6) para 57.
166 *Tanzanian Girls* (n 10) para 53.
167 *Sudanese Nationality* (n 8) para 32, lines 7-10.
168 *Tanzanian Girls* (n 10) para 54.
169 *Tanzanian Girls* (n 10) para 55.

Some pointers are discernible when one compares and contrasts the principles in part 3 above and this communication. First, the African Children's Committee reiterates the agency on the child to have entitlements to rights and freedoms under the African Children's Charter.[170] It calls upon the state to actively identify the individual children and groups of children, not for purposes of punishment but for their recognition and subsequent realisation that their rights require special measures.[171] It may be argued that the act of the state in perpetuating the vice of forced pregnancy testing eludes its role as an active player in the engagement of the non-discrimination discourse.[172] Other than generalising these to more general principles, it is argued that the communications offer interpretation from a jurisprudential perspective to understanding normative elements of non-discrimination. These jurisprudential developments should then be incorporated into the broader understanding of the principle of non-discrimination.

Regarding the violation of state obligations under article 1, the articles that the applicants expressly alleged violations of were the only ones that formed the finding by the Committee. The African Children's Committee found a violation of its obligations under article 1 (obligation of state parties); article 3 (non-discrimination); article 4 (best interests of the child); article 10 (protection of privacy); article 11 (education); article 14 (health and healthcare services); article 16 (protection against child abuse and torture); and article 21 (protection against harmful social and cultural practices).

5 WAY FORWARD

This article has evaluated the argument that the African Children's Committee could do more in realigning the normative underpinnings to the jurisprudential developments on the principle of non-discrimination. An evaluation of the normative framework spoke largely to 12 principles as discussed in part 3 above.[173] An evaluation of the selected five communications indicated that not all the 12 principles have been engaged by the African Children's Committee to the latter. Some specific principles that stand out include the agency of the child, the state party as an active player and the question of differential treatment. It should be noted that the African Children's Committee has had divergent approaches in the interpretation of the principles in the five selected communications. First, it has used literal engagement of the principles, on the one hand, and adopted implicit approaches on the other. This was evident in *Children of Nubian Descent*. The African Children's Committee has adopted principles that are not necessarily in

170 General Comment 5 (n 38).

171 Art 1 African Children's Charter.

172 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to implementation of the principle of non-discrimination. See General Comment 5 (n 38) 11.

173 See part 3 on the 12 principles.

tandem with the normative approach but rather act as a vehicle to ensure that non-discrimination (as a principle and a right) is upheld by state parties, as shown in *Sudanese Nationality*, *Mauritanian Enslaved Brothers* and *Tanzanian Girls*. Some of the divergent conceptual approaches by the African Children's Committee still embrace some of the 12 principles.[174] A review of the Children's Committee's approach in its Concluding Observations to state parties should be done to establish the trend concerning both its normative and jurisprudential framework.

In relation to the above, there are specific principles that, by implication, by the fact that the matters are considered by the African Children's Committee on their merits, have been applied. These include (i) that the status of the child is irrelevant and does not have any bearing on the enjoyment of the rights; (ii) the African Children's Committee is not suggestive of an exclusive list of vulnerable children; (iii) that non-discrimination applies in all environments; (iv) that the child is mandated to enjoy all the rights and freedoms in all environment, starting with the state; (v) that a finding of a violation of this principle is interlinked with a failure by the state to uphold obligations under article 1; and, finally, (vi) that all stakeholders, persons or entities should ensure that the child enjoys his or her rights.

It has been established that there is minimal literature on the principle of non-discrimination on article 3 of the African Children's Charter. Most of the wealth of the literature is on CRC. An evaluation of the normative aspects of the principle points to four major guiding principles, as discussed in part 3. A closer look at the communications has revealed with clarity that they add value to the overall conception of non-discrimination and there is intent to apply the principle in three narratives: first, as a principle in its standing as part of the child rights-based approach; second, as a right; and third, as both a principle and a right.

Without prejudice to the foregoing, the five communications reveal various points of intersection and departure concerning the rest of the principles. An appreciation of these principles is critical to informing the way forward. This part summarises the approach of the African Children's Committee and hints on a way forward.

5.1 Agency on the child

As a matter of principle, all five communications reiterate the normative foundations of attaching an agency to the child as the recipient of the rights and freedoms under the African Children's Charter, and that discrimination should not be an exception. The difference is in the departure from a literal approach in *Children of Nubian Descent* and *Cameroonian Child Rape* to a conceptual stance in *Sudanese Nationality* and *Mauritanian Enslaved Brothers*, and a contextual approach in *Tanzanian Girls*. The literal approach in

174 See the analysis in part 4.

Children of Nubian Descent is in reference to the interpretation of article 3 in light of the facts in the communication without labouring to develop jurisprudence at this stage. This is understandable as this was the first decision of the African Children's Committee. For instance, the findings on ethnic and racial discrimination as prohibitions under international law reflect this position. The conceptual stance was applied in *Sudanese Nationality* as regards the qualification of non-discrimination as both a principle and as a right. The due diligence principle was also applied in *Mauritanian Enslaved Brothers*. As a right, the qualification would be in the use of the obligation of result as the litmus test to establish the extent to which the state had upheld its obligations under the African Children's Charter. The contextual approach *Tanzanian Girls* shows the steps taken by the African Children's Committee to contextualise known elements of the principle of non-discrimination in international law. While the conceptual was greatly tilted to the factual elements of the communications, the contextual approach finds its positioning in the use of legal principles that would be used to align the understanding of the principles of non-discrimination for a legislative setting; the unpacking of the principles of the right to non-discrimination, the use of differential treatment, and the centrality of the child in answering the African child question.

5.2 Obligation on the state as an active (rather than a passive) player

In addition, the African Children's Committee reminds state parties to remain active rather than passive players in the engagement of the non-discrimination discourse. It should be noted that in all five communications, the African Children's Committee does not expressly state that states should be active players. Rather, the call is implied across the five communications. It is discernible that the African Children's Committee's wording in all five communications is suggestive of the fact that (i) the failure to take steps to correct the violations;[175] (ii) the application of a discriminatory law;[176] (iii) the failure to exercise due diligence;[177] and (iv) the perpetuation of discriminatory practices (that may lead to unfortunate lived realities for children),[178] makes the state a passive other than an active player. The African Children's Committee should impress this obligation on states and also call on other stakeholders to be accountable in their activities. For instance, civil society and national human rights institutions are critical stakeholders in ensuring that states are accountable for steps taken to ensure the implementation of the African Children's Charter.

175 *Children of Nubian Descent* (n 6) para 74.
176 *Sudanese Nationality* (n 8) para 49.
177 *Mauritanian Enslaved Brothers* (n 7) paras 47-58, 62.
178 *Tanzanian Girls* (n 10) para 55.

5.3 Differential treatment as positive discrimination

The African Children's Committee has taken strides to develop its jurisprudence on the use of differential treatment. This concept is considered in all five communications. In *Children of Nubian Descent* the African Children's Committee acknowledged that for differential treatment to be justified, the state ought to explain the use of grounds of legitimacy, proportionality and absolute necessity. In *Sudanese Nationality* it evaluates the three grounds with the state's application of the Nationality Act. In *Mauritanian Enslaved Brothers* the African Children's Committee reiterates the three grounds enunciated in *Children of Nubian Descent*.[179] In *Tanzanian Girls* the African Children's Committee contextualises three elements of differential treatment, interference, and rights as the complementary elements of the right to non-discrimination.[180]

Second, the African Children's Committee introduced the concept of a burden to justify fair or differential treatment as a preserve of the state – if differential treatment is to be used. It stated that where the facts before the African Children's Committee indicate a *prima facie* case of discrimination, the burden shifts to the state to justify the difference in treatment and how this may amount to fair discrimination.[181] This position is reiterated in *Tanzanian Girls*.[182] The placement of the burden on the state is important in ensuring that the duty bearers do not abuse the principles governing non-discrimination. Without prejudice to the foregoing, an actual engagement of the grounds for differential treatment should be deliberately subjected to facts to ensure that an informed application of the principle is used.

5.4 Use of inspiration from other sources under article 46

What is interesting to note, in all the communications, is that the African Children's Committee refers to persuasive jurisprudence. The point of departure is the reference to textbooks and commentaries as persuasive jurisprudence. A reading of article 46 of the African Children's Charter does not expressly point to the use of textbooks as persuasive jurisprudence. Rather, it refers to the use of inspiration from international human rights law as provided for specifically in (i) the African Charter; (ii) the then Charter of the OAU (now the Constitutive Act of the African Union); (iii) the Universal Declaration; and (iv) CRC. On a general front, persuasive jurisprudence may be obtained from other instruments adopted by the UN and by African countries in the

179 *Mauritanian Enslaved Brothers* (n 7) paras 61, notes 29 & 62, note 31; *Children of Nubian Descent* (n 6); *Sudanese Nationality* (n 8).

180 *Tanzanian Girls* (n 10) para 53.

181 *Children of Nubian Descent* (n 6) para 57.

182 As above.

field of human rights, and African values and traditions.[183] The author argues that any materials other than the specific and general sources in article 46 should include international human rights law or African values and customs. The African Children's Committee should prepare a guiding note or a document on the application of article 46. As of now, it is rarely placed in context, let alone mentioned in the communications. A conceptual or contextual appreciation of the application of article 46 is instructive in its application.

5.6 Non-discrimination: principle, right or both?

The African Children's Committee envisages an important approach to non-discrimination. While it refers to the same as one of the cardinal four principles that inform the child rights-based approach, it also refers to the same as a right. For instance, it should be recalled that in *Children of Nubian Descent*, non-discrimination is approached as a principle. In *Sudanese Nationality*, the African Children's Committee interchangeably refers to non-discrimination as a right and a principle. This approach introduces a triple obligation on the state to, first, ensure that the child is not deprived of their inherent entity, on the one hand,[184] and second, to use the right to non-discrimination as a basis for the enjoyment of the right to nationality; third, to uphold the place of the principle of non-discrimination as one that is not subject to a balancing act.[185] It is acknowledged that the reference to the principle as a right is not fatal in implementing the rights of the child. In domestic circles, the right to non-discrimination is often tagged with the right to equality.[186] However, there is a lack of clarity on whether the reference to non-discrimination as a right or a principle, by design, is default or chance. For the sake of jurisprudential development, this kind of application requires thinking through the approach used.

5.7 Reciprocity and retaliation as non-qualifiers to the application of the principle of non-discrimination

The African Children's Committee pronounced itself on specific principles that may apply in international law, in bilateral treaties, but not in instances where human rights are at stake. To this end, as such, while the principles of reciprocity and retaliation may operate in areas of the law such as trade, intellectual property and technology transfer, they do not extend to human rights obligations.[187] As noted earlier, this

183 Art 46 African Children's Charter.

184 *Sudanese Nationality* (n 8) para 32, line 1.

185 *Sudanese Nationality* (n 8) para 32, lines 1, 2 & 3.

186 See the Constitution of the Republic of South Africa, 1996 sec 9; Constitution of the Republic of Kenya 2010, art 27; Constitution of the Republic of Uganda 1995, art 21.

187 *Sudanese Nationality* (n 8) para 51.

stance by the African Children's Committee lays to rest the use of the foregoing principles in qualifying the application of the principle of non-discrimination.[188] There is a need for the Children's Committee to deliberately call on state parties to use its other mechanisms, such as the communications procedure and state party reporting, to ensure that there is a move for universal harmonisation of domestic laws with the provisions of the African Children's Charter.[189]

5.8 Use of due diligence

The African Children's Committee introduces the principles of due diligence in the *Mauritanian Enslaved Brothers* and *Tanzanian Girls* communications. Although the principle helps in the need for states to interpret and implement their obligations from the perspective of result, the principle points to the need for the former to use the principle to actively identify individual children and groups of children whose recognition and subsequent realisation of their rights require special measures.[190] It is also clear that the active identification of individuals and groups of children should not be for punishment but for recognition and realisation of their rights and the required special measures.[191] The African Children's Committee should not waiver in its commitment to advise state parties in the use of due diligence as far as they should evaluate their obligation based on the result of measures used to address the violations of the rights of the child.[192] In addition, the development of jurisprudence on the grant of compensation for both pecuniary and non-pecuniary loss should be developed. A tabulated annex is hereby attached at the end of the contribution.

6 CONCLUSION AND RECOMMENDATIONS

The topic of non-discrimination from a broader context is extremely relevant to human rights, largely because, while it can be a stand-alone principle, it also doubles as a right. The relevance of its application lies in the ability of the state as a duty bearer and stakeholder to benefit from its application and as both a principle, and a right, depending on the context.

Regarding the proposals on improving the application of the principle of non-discrimination, the African Children's Committee may engage in various aspects as hinted. First, the agency on the child should be informed by the deliberate centrality of the child by the Children's Committee to inform all interventions on the prevention of

188 J Doek *Harmonisation of laws on children: some practical guidance* (2007), https://app.box.com/s/ca19481c7d5dc225abff (accessed 30 January 2024).

189 As above.

190 Art 1 African Children's Charter.

191 As above.

192 *Mauritanian Enslaved Brothers* (n 7) paras 47-58; *Children of Nubian Descent* (n 6) paras 46-57.

discrimination. Second, the obligation on the state party should be a collective responsibility that is engaged by all stakeholders, such as civil society and national human rights institutions, to ensure accountability in the prevention of discrimination. Third, while differential treatment remains a critical defence by the state, the African Children's Committee can do more to deliberately evaluate the existence or lack of grounds in each communication where the matter is raised. Fourth, this is intrinsically linked to the use of persuasive jurisprudence in article 46. The preparation of a guidance note or resource document on the application of article 46 is instructive in giving clarity on the use of sources that are not used by the African Children's Committee. Fifth, the reference to non-discrimination as a principle and a right is good practice in light of the spirit of interpretation that ensures that the child benefits in all contexts that require a literal, contextual or conceptual approach. Sixth, obtaining increased harmonisation of the domestic laws is imperative in achieving a universal consensus in the application of the principle. Finally, the due of due diligence offers an introspective platform for state parties to review their approaches to the engagement of their obligations. An evaluation of the state parties' extent of the engagement of their obligations is recommended.

ANNEX

Tabulated engagement of the principle of non-discrimination

No	Principle	Nubian	Mauritania	Cameroon	Sudan	Tanzania
1	Agency on the child to have entitlements to rights and freedoms under the African Children's Charter	X	X		X	X
2(a)	Obligation on the state to actively identify individual children and groups of children whose recognition and subsequent realisation of their rights require special measures	X	X		X	X
2(b)	State as an active (committed) rather than a passive player in the engagement of the non-discrimination discourse	X	X	X	X	X
3	Use of equitable rather than equal treatment in the use of special measures to mitigate the effects of discrimination			X		
4	Use of deferential treatment or positive discrimination	X	X	X	X	X
5	Use of persuasive jurisprudence	X	X		X	X
6	The status of the child is irrelevant and does not have any bearing on the enjoyment of the rights. Broad-based contextual application	X	X		X	X
7	The African Children's Committee proffers a non-exhaustive list of vulnerable children	X	X	X	X	X

8	Ensuring that birth registration is enforced regardless of the whereabouts of the child's parents or guardians, or other status	X	X	X	X	X
9	Non-discrimination applies in all environments		X	X	X	X
10	The child is mandated to enjoy all the rights and freedoms in an environment; starting with the state.		X	X	X	X
11	The finding of a violation of this principle is interlinked with a failure by the state to uphold obligations under article 1.	X	X		X	X
12	All stakeholders, persons or entities have an obligation to ensure that the child enjoys his or her rights.		X	X	X	X

Key

X	Principle referred to by the Committee (directly and by implication)
	Principle not referred to by the Committee at all
X	Principle referred to, but not the article
	Desirable that the principle is referred to

A promise fulfilled? African human rights system and West African state mechanisms in the protection of domestic child workers

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ABSTRACT: Child domestic workers in West Africa often get a hard bargain in the labour market. From violations of their rights, to almost slavish conditions of child domestic workers in some West African states, they often find themselves in deplorable and unsafe spaces. Many child domestic workers in West Africa are abused in work environments where they hardly get protection, and cases of such human rights violations fail to get prosecuted. This study examines the influence of the African Charter on the Rights and Welfare of the Child 1999 (Children's Charter) on state mechanisms, in the protection of child domestic workers in West Africa, focusing on Nigeria, Ghana and Sierra Leone. Despite the Charter's promise to protect children's rights, many of these young workers still face the risk of human rights abuse. By examining laws, legislative efforts, policy initiatives, and real-world practices, through content analysis, this case study research uncovers the extent to which the Children's Charter has been implemented to safeguard these vulnerable children. Through case studies, and content analysis, a complex picture is revealed: while there have been significant steps forward in law and policy, enforcement remains weak, and socio-economic challenges persist. This article highlights the gap between the Charter's ideals and the everyday reality for child workers. It was concluded that state mechanisms could leverage on local laws and the Children's Charter to enhance protection of child domestic workers through capacity-building, while West African judiciaries could tackle the problem of executive inefficiency by supporting regional courts, like the ECOWAS Community Court and the African Court on Human and Peoples' Rights by ensuring that the judgments of the ECOWAS Community Court are fully implemented and respected.

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TITRE ET RÉSUMÉ EN FRANÇAIS

Une promesse tenue ? Le système africain des droits de l'homme et les mécanismes des États d'Afrique de l'Ouest dans la protection des enfants travailleurs domestiques

RÉSUMÉ: Les enfants domestiques en Afrique de l'Ouest vivent souvent dans des conditions de travail extrêmement précaires. En raison des violations systématiques de leurs droits, ils sont fréquemment soumis à des conditions proches de l'esclavage, dans des environnements de travail dangereux et peu sécurisés. Nombre d'entre eux subissent des mauvais traitements dans des contextes où leur protection reste largement insuffisante, et les violations des droits humains ne donnent que rarement lieu à des poursuites judiciaires. Cette étude analyse l'impact de la Charte africaine des droits et du bien-être de l'enfant de 1999 (Charte des droits des enfants) sur les mécanismes de protection des enfants domestiques en Afrique de l'Ouest, en se concentrant sur le Nigéria, le Ghana et la Sierra Leone. Malgré la promesse de la Charte de garantir la protection des droits des enfants, de nombreux enfants travailleurs continuent de courir un risque élevé de violations des droits humains. À travers une analyse documentaire et une étude de cas, cette recherche évalue la mise en œuvre de la Charte dans ces pays en vue de protéger ces enfants vulnérables. L'analyse révèle une situation complexe: bien que des progrès notables aient été réalisés en matière de législation et de politiques publiques, l'application de la Charte reste insuffisante, et les défis socio-économiques demeurent prégnants. Cette étude met en lumière l'écart entre les objectifs de la Charte et la réalité vécue par les enfants travailleurs domestiques. Il est conclu que les mécanismes étatiques pourraient renforcer la protection de ces enfants en s'appuyant davantage sur les législations nationales et la Charte des droits des enfants, notamment par le renforcement des capacités des autorités locales. Par ailleurs, les systèmes judiciaires ouest-africains pourraient mieux répondre à l'inefficacité de l'exécution des lois en soutenant les juridictions régionales, telles que la Cour de justice de la CEDEAO et la Cour africaine des droits de l'homme et des peuples, en veillant à ce que les décisions de la Cour de justice de la CEDEAO soient pleinement mises en œuvre et respectées.

KEY WORDS: child rights; child domestic workers; policy; labour; Africa; West Africa; ECOWAS

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1 INTRODUCTION

Child endangerment is an intractable problem in West Africa. Despite its highly deleterious effect on the physical and mental health of children, it is the fate of some children in states like Nigeria, Ghana and Sierra Leone. The most prone children are those employed in domestic work. This is because they work in the privacy of people's homes where their treatment is not monitored. These child domestic workers are formally and informally recruited, sometimes with the involvement of their parents or relatives. However, this process is typically

characterised by trickery, lack of information and empty promises. Article 1 of the United Nations Convention on the Rights of the Child provides that a child refers to any human being under the age of eighteen, unless the applicable law recognises an earlier age of majority.

Because child domestic workers are often very young, they suffer even more from vulnerability and powerlessness. Examples include being locked up at home for long periods of time without socialising with anyone else; food deprivation etc has more serious consequences on one's health because malnutrition rises exponentially while people grow older; these effects can be graver than even death itself especially when a person fails to survive due to hunger-related complications after a certain point.[1] The fact that brokers get a share from the salary of the child domestic worker and would be motivated to extend their working hours, is due to their conflicting interests, which will lead to hiding child abuse. This points out wider themes of power relationships as well as economic incentives within the child labour markets.

This article will examine the influence of the African Charter on the Rights and Welfare of the Child (Children's Charter) on domestic mechanisms in the protection of child domestic workers in West Africa, focusing on Nigeria, Ghana and Sierra Leone. Child domestic workers are a very vulnerable group of blue-collared workers. Not only are they usually female children, they also do not have the economic means to resist oppression. The people who are the legal custodians of these children also are often unable to assist these children, because it was the asymmetric power imbalance created by socio-economic incapacity that made them allow their children to be employed as domestic workers in the first place. Furthermore, domestic work in states with institutional problems can expose children to a range of human rights violations, and this is because corruption, which is often the main driver of institutional incapacity, impedes the protection of vulnerable people in West Africa. Child domestic workers are easily alienated from their families and abused in as many ways as their employers may want.

The incorporation of a legal instrument such as the Children's Charter in the African human rights system was an acknowledgment of the need to further extend the scope of human rights coverage in Africa, and the improvement of the conditions of vulnerable people, who have been suffering from oppression in societies where there are little to no protection for them. The Children's Charter provides that children should be granted protection from all types of economic exploitation, and that they should not be made to do work that will negatively impact their physical, mental, spiritual, moral, or social development.[2] Because domestic labour can be very indulging for verbal and physical abuse, it can be very damaging for their physical, mental, spiritual, moral, or social development. The African Charter on the Rights and Welfare of the Child (Children's Charter) is a human rights instrument

1 Human Rights Watch 'Child domestic workers' July 2006, https://www.hrw.org/reports/2006/wrd0706/4.htm (accessed 23 June 2024).

2 African Charter on the Rights and Welfare of the Child, art 15.

which carries as much significance as the other legal instruments that provide safeguards for human rights. In many cases, for families where there are many children and little means to cater for them, settling them into domestic work, lessens the financial burdens on their families, and allows for a complementary means to the household income. However, because they are children, and with how people of low socio-economic status often lack access to justice in West African societies, they are often very prone to exploitation and abuse, and still, the creation of mechanisms to protect child domestic workers are not meeting up with the challenges faced by these workers.

The benefit from the labour of child domestic workers prevents the support system of these children from acting totally in their best interests. This is because the adult actors, which are their employers, intermediaries and parents, are acting only in their own interests to the detriment of the children. Therefore, little attention is paid to how these children are engaged, and the conditions in which they have to work.[3] The exploitation of these children in West Africa for financial benefit is a representation of lacking concerted governmental efforts in the protection of children and systems incapable of providing functional safeguards against their exploitation. It is a largely held consensus that child domestic workers are a very vulnerable group of workers, because they are often the subjects of immense exploitation.[4] And the anti-trafficking policies that are often directed towards their welfare aspire towards 'global standards' in states like Nigeria, rather than address the local realities in which these exploitation takes place.[5] The problem with protecting child domestic workers in West Africa is tied to larger issues with social protection mechanisms and the capacity of systems to realise social justice.

In order to understand why it has been difficult to track the problems with protecting the rights of child domestic workers, and in implementing the standards in the Children's Charter, it is necessary to consider what opinions there are on child domestic labour. Maconachie and Hilson have argued that while children's work in rural Sierra Leone contributes vital income for families, it can also be their only way to afford schooling. Simply applying a prohibition of child labour without considering local contexts could have negative consequences for these children and their communities. This is because there must be viable social programs for poor households that would replace child labour, since for some households, the consolidatory income from working children is a strategy for staying above the poverty line.[6] Mere prohibiting child labour without considering specific contexts such as the existence of social security or the economic status of states

3 P Olayiwola 'On exploitation, agency and child domestic work: evidence from South-West Nigeria' (2023) 21 *Children's Geographies* 1058-1070.

4 P Olayiwola 'They just have to adopt these conventions': anti-child trafficking policies and politics in Nigeria' (2022) *Journal of Human Trafficking* 1-11.

5 Olayiwola (n 3).

6 BC Okpukpara & N Odurukwe 'Incidence and determinants of child labour in Nigeria: implications for poverty alleviation' 2006 African Economic Research Consortium.

concerned could result in some complications like an increase in child labour, since studies have shown that an outright prohibition of child labour, could inadvertently proliferate it as a result of a decrease in child wages.[7] As it would mean more hours on jobs for child workers. Furthermore, if the enforcement is weak, as it could be in states like Nigeria, Ghana and Sierra Leone where institutions are weak, it could result in more child labour and reduced school enrolment.[8]

This article will explore the issue of child domestic work and the response of state and regional mechanisms in three parts. The first part will navigate the legal and theoretical frameworks on child domestic workers in Nigeria, Ghana and Sierra Leone for the placement of the discussion in the right theoretical and legal contexts. In the third part, there is a discussion on the impact of the human rights regime on child domestic workers and it was argued that the laws protecting children in Nigeria, Ghana, and Sierra Leone align with the African Charter on the Rights and Welfare of the Child and other international legal instruments on the protection of the child, with dualism facilitating the incorporation of international norms into local contexts; however, despite these legal frameworks, child domestic workers remain highly vulnerable to exploitation due to weak enforcement, socio-economic factors, and inadequate state mechanisms. It was concluded that in states such as Nigeria, Ghana and Sierra Leone, child domestic work in private households had been a contributing factor to the conclusion that there is no line between safe and unsafe environments. The importance of equally enforcing labour laws in the selected states cannot be stressed enough and specific provisions should be enacted for such units to ensure that their labour laws are indeed enforced effectively.

2 LEGAL AND THEORETICAL FRAMEWORKS FOR THE PROTECTION OF CHILD DOMESTIC WORKER RIGHTS

The laws made for the protection of children in Nigeria, Ghana and Sierra Leone reflect the spirit and purpose of the African Charter on The Rights and Welfare of the Child 1999 (Children's Charter) and the UN Convention on the Rights of the Child. Dualism as a theory of international law, offers a critical insight into the interaction between Nigerian, Ghanaian and Sierra Leonean state laws and the African human rights legal regime in the protection of child domestic workers. Now dualism has been explained as induction of international law norms into a local context, where they become more potent and relevant as a result of their induction. This is basically in adherence to

7 P Bharadwaj, LK Lakdawala & N Li 'Perverse consequences of well-intentioned regulation: evidence from India's child labour ban'.

8 C Piza & AP Souza 'The consequences of banning child labour' https://blogs.worldbank.org/consequences-banning-child-labour (accessed 9 October 2024).

the common law tradition of incorporation.[9] As dualist states, the laws on the protection of children in Nigeria, Ghana and Sierra Leone were legislated to convey the intent of the Children's Charter, alongside policy directives, for the development, protection and promotion of children's rights. The United Nations Convention on the Rights of the Child (CRC) was adopted in 1989. The rights enunciated in the Children's Charter, which was adopted by the organisation of African Unity (OAU), now African Union (AU) in 1990, complemented or reinforced the CRC. It is important to note that the Children's Charter significantly influenced the enactment of the Child Rights Act in Nigeria.

2.1 The nature of the human rights regime on child domestic workers

In Africa, the pre-eminent legal framework on the rights and welfare of child domestic workers is the African Charter on the Rights and Welfare of the Child (Children's Charter) and at the global level are the UN Convention on the Rights of the Child, International Labour Organisation Minimum Age Convention, Worst Forms of Child Labour Convention and the Convention on Domestic Workers. The UN Convention on the Rights of the Child codifies wide-ranging rights for all people under 18. It is rooted in principles that include non-discrimination, the best interests of the child and the right to be heard on matters concerning them. States are responsible under UNCRC to enact legislation and implement policy that will protect children from all forms of violence and exploitation, which is a substantial step in pursuing the goals of the Children's Charter.

While article 1 of the Minimum Age Convention, 1973 places a legal obligation on member states to abolish child labour and that the minimum age for employment, not less than the age of completion of compulsory schooling, which is below 15 years. The Worst Forms of Child Labour Convention provides in article 3(a) to (d) the types of child labour and abuse that should be banned. These include: (a) slavery-like practices like child trafficking, debt bondage, forced labour and child recruitment for armed conflict; (b) working primarily in prostitution or involved in pornography; (c) using children for illegal activities specifically drug production and trafficking, d) any work which by its nature or the circumstances in which it is carried out harmful to the health, safety or morals of children. Article 3(a) of the Worst Forms of Child Labour Convention, specifically in the context of trafficking, debt bondage and forced labour could be related to circumstances in which some child domestic workers find themselves.

The Children's Charter defines a child in article 2 as a natural person who is under the age of 18 years. It further sets out a comprehensive set of rights for children in Africa, including the rights

9 M Ramsden 'Dualism in the basic law: the first 20 years' (2019) 49 *Hong Kong Law Journal* 239.

of child domestic workers. While article 1 of the Domestic Workers Convention, 2011, defines domestic work as the work that is done in or for a household or households. Article 15 of the Children's Charter poignantly recognises the rights of all children to be protected from economic exploitation and harmful work practices. It specifically prohibits the employment of children in work that is likely to be dangerous or interfere with their education or physical, mental, spiritual, moral, or social development.[10] Furthermore, the Charter emphasises the importance of providing child domestic workers with access to education, healthcare, and other essential services. It also calls for measures to be taken to prevent child labour and protect children from all forms of abuse. The Charter has tremendous influence on the protection and promotion of children's rights across the African continent by setting out clear guidelines and principles for governments to follow. In Nigeria, for example, the constitution protects children from all forms of exploitation.

2.2 The scope of the human rights regime of child domestic workers in context

The Child Rights Act of 2003 (Nigeria) also prohibits child labour and outlines protections for children, including those working as domestic workers. Section 28(d) specifically provides that '[n]o child should be employed as a house-help outside his or her home or family environment'. On the other hand, the Nigerian Labour Act 2004, in section 59(1)(a) prohibits children working in any capacity, except where a family member engages them in light agricultural, horticultural or domestic work. Unfortunately, many times when family members in Nigeria have had to engage children from their kin in domestic work, abuse and outright contravention of this provision has been known to occur.

These laws are in place to protect the rights and well-being of children in Nigeria and to ensure that they are not subjected to exploitative or harmful working conditions. However, enforcement of these laws is often weak, leading to widespread violations of child labour rights. There are also cultural norms and practices that condone child labour, and these further complicate efforts to protect domestic child workers in Nigeria. Furthermore, the Child's Right Act 2003 provides that every child should be protected from economic exploitation and performing work that is dangerous in nature, and that is likely to affect the child's physical, mental, spiritual, moral or social development.[11] In the light of the above, it encourages state parties to take appropriate legislative and administrative measures towards enforcement in both formal and informal employment as relates to

10 Art 15(1), African Charter on the Rights and Welfare of the Child.

11 As above.

children. Specifically on minimum wage for admission for such tasks, regulation of hours of employment and penalties for non-compliance.[12]

In Ghana, the Children's Act of 1998 prohibits child labour and provides protections for children working in various sectors, including domestic work.[13] This is reinforced by article 28 of Ghana's Constitution.[14] The Ghanaian Labour Act 2003 uses the term 'young persons' as a reference for children. Even though section 58(3) prohibits the employment of young persons from hazardous work, it does not say whether domestic work is hazardous. Ultimately, the Labour Act 2003, avoided the complexity of adequately representing the prohibition of child labour. The Children's Act establishes that the minimum age for employment is 15 years of age,[15] and goes on to prohibit children from working at night.[16] The Act criminalises exploitative labour and prescribed conditions for light work,[17] and safeguards children from torture and other forms of cruel, inhuman, or degrading treatment, including cultural practices that dehumanise or harm the physical and mental well-being of a child.[18] Moreover, the Domestic Violence Act of 2007 identifies domestic workers as part of the group of individuals in a domestic relationship, as outlined in section 2(1)(h).[19] The Domestic Violence Act prohibits all forms of violence occurring in the household environment. This includes acts of physical assault and sexual harassment.[20] It has been noted that Ghana's laws on the protection of children are in line with the Children's Charter.[21] Similarly, as stated above, the Ghanaian Child Rights Act, also prohibits the engagement of a child in exploitative labour.[22] It further clarifies that labour becomes exploitative when it deprives the child of its health, education and development.[23] Furthermore, it unequivocally prohibits any person to engage a child in nocturnal work, particularly between the hours of 8pm and 6am in the morning.[24] It further sets the minimum age for a child to be in employment to be 15 years of age.[25] While dangerous work to the age of 18 years old.[26] This is in substantial compliance with the Children's Charter.

12 African Charter on Rights and Welfare of Child art 15(2)(a), (b) & (c).
13 The Children's Act of 1998 (Act No. 560), sec 87.
14 The Constitution of the Republic of Ghana, 1992 (as amended to 1996).
15 Sec 89 Children's Act of 1998.
16 Sec 88 Children's Act of 1998.
17 Secs 87 & 90 Children's Act of 1998.
18 Sec 13 Children's Act of 1998.
19 The Domestic Violence Act (Act No. 732 of 2007).
20 The Domestic Violence Act (Act No. 732 of 2007) (n 41).
21 P Issahaku 'Raising the future leaders: an analysis of child and family welfare policy in Ghana' (2018) 13(2) *Journal of Public Child Welfare* 148-169.
22 Sec 87(1) Child Rights Act 1998.
23 Sec 87(2) Child Rights Act 1998.
24 Sec 88(1) & (2) Child Rights Act 1998.
25 Sec 89 Child Rights Act 1998.
26 Sec 91 Child Rights Act 1998.

Article 25 of the 1992 Constitution provides for educational rights and stipulates, among other things, that basic education shall be free, compulsory, and accessible to all school-going children. Section 6(2) of Children's Act 1998 outlines children's right to education. Section 8 ensures that no child is denied access to education for their development. Section 10 specifies that even a disabled child has the right to education. Also, section 47 emphasises that a child is entitled to basic education during maintenance. The Act further/ guarantees that a mother is entitled to education if she is still a minor from the family,[27] and this right extends even after she reaches 18 years old.[28] These provisions are in accordance with the Children's Charter. The law further prohibits any person from subjecting a child to torture or other cruel, inhuman or degrading treatment or punishment of any kind which dehumanises or its injurious to the physical and mental well-being of a child.[29] It makes provision for a district assembly to cater for the welfare and promotes the rights of children, and it mandates that the district and governmental agencies liaise with each other in matters concerning children. It further mandates the Social Welfare Department to investigate issues relating to Children.[30]

In Sierra Leone, the key piece of legislation is the Child Rights Act of 2007, which prohibits the employment of children under the age of 18 in hazardous or exploitative work, including domestic work. Apart from the Child Rights Act, is the Employment Act 2023, provides in section 95, that children under the age of 15 years should not work. The minimum age for light work as provided in section 96(1) of the Employment Act is 13 years. In section 96(2), light work is defined as work that is not harmful to a child's development and physical health. This makes it problematic to properly regulate child domestic work, as it could easily be termed light work, whereas determining working conditions of domestic work is difficult. Sierra Leone is a signatory to international conventions such as the UN Convention on the Rights of the Child and the International Labour Organisation's Convention on Domestic Workers, which set out specific rights and protections for child domestic workers. By way of comparison, we shall examine the provisions under the Child Rights Act 2007 in Sierra Leone and juxtapose them with the Children's Charter.

The Child's Rights Act in Sierra Leone, unequivocally states that the age of fifteen is the minimum age to take up full-time work as a child.[31] It expressly prohibits nocturnal work for children.[32] In addition, the Act clarifies that the minimum age for dangerous work to be 18 years.[33] The Child Rights Act 2007 (Sierra Leone), in compliance with article 16 of the Children's Charter, provides for the establishment of a National

27 Sec 51 Child Rights Act 1998.
28 Sec 54 Child Rights Act 1998.
29 Sec 13 Child Rights Act 1998.
30 Sec 16 Child Rights Act 1998.
31 Sec 65(1)(a) Child Rights Act 2007 (Sierra Leone).
32 Sec 65(1)(b) Child Rights Act 2007 (Sierra Leone).
33 Sec 3(1) Child Rights Act 2007 (Sierra Leone).

Commission for Children. It states that children shall have access to basic education, including the provision of good school resources, materials, and trained teachers, especially in areas that are yet to be developed.[34] The Act provides for the protection of children from exploitation.[35] It unequivocally prohibits subjecting children to torture or other cruel, inhuman, or degrading treatment. The Act also prohibits unreasonable forms of correction and states that no correction is justifiable if the child does not understand its purpose. Despite these legal protections, challenges remain in ensuring that domestic child workers are able to access their rights. Many children working in domestic settings are vulnerable to exploitation, abuse, and neglect due to their isolated working conditions and lack of oversight. Furthermore, enforcement of labour laws can be weak, particularly in rural areas where child labour is more prevalent.

The African Children's Charter offers an essential foundation for the protection of child domestic workers' rights. Yet, there are still wide gaps between the laws and the realities based on a myriad of reasons from conflicts in national legislation, socio-economic causes and cultural beliefs. The road to eliminating child domestic work in Africa lies along the path of aligning national laws with international standards, building accountability and protection enforcement mechanisms and ensuring educational opportunities for all children. This comprehensive approach is fundamental to effectively guaranteeing children's rights and dignity, allowing them to thrive without fear of exploitation.

Although social security legislation could have helped in keeping many children out of the domestic work, and securing their future, legislation such as the National Pensions Act of 2008 in Ghana provides a framework for pension benefits that indirectly impacts the children of deceased parents. One area that is very critical in the National Pensions Act has to do with the provision for survivor benefits which is found in section 101, and how those benefits impact on children when their parents are deceased. The Act specifies that when a contributor dies, children who are named as dependants, have the right to receive benefits. For this, it is important to look at how money is used to support children when their parents die. In section 101(2), the Act sees children as dependants, and therefore children become entitled to a share of the deceased parent's pension. This is an important protection for the financial interests of children at an especially vulnerable time. The law explains the distribution of benefits among dependants (which can mean children, spouses or other family members). The allocation is set up so that children receive enough support for their basic needs (such as education and healthcare). On the other hand in Nigeria, the main social security programme that covers children is the National Social Security Trust (NSST), a mandatory contributory pension scheme, which pays retirement benefits to workers in both the public and private sectors. Although NSST is essentially a retirement scheme,

34 Sec 4(1)(c) Child Rights Act 2007 (Sierra Leone).
35 Sec 4(2)(e) Child Rights Act 2007 (Sierra Leone).

it also has some provisions for children in the event of death or disability of the contributing member. In Sierra Leone, there are no specific social security programmes solely dedicated to protecting children from domestic work.

3 THE IMPACT OF THE HUMAN RIGHTS REGIME ON CHILD DOMESTIC WORKERS

It is even so deplorable that employers exploit the utter powerlessness and vulnerability of these children to their advantage. Meanwhile, social welfare institutions in Nigeria, Ghana and Sierra Leone are almost incapable of tracking a child's progress from one custodian's home to the other. Sossou and Yogtiba have found that children in some West African states, including Nigeria and Ghana, face a disturbing rise in abuse and neglect. They stated that while data may be imprecise, readily available information paints a concerning picture. This widespread violation of children's human rights, social justice, and safety demands immediate action. Sossou and Yogtiba have argued, just like many other authors, that poverty and certain cultural practices are identified as major factors of this problem.[36] There is a lack of coordination for social welfare programs for these children because of the non-existent social security that has led to a widening gap between social classes in West Africa. Furthermore, it is difficult to track the exploitation of child domestic workers because many solutions around it are built on ideals rather than acknowledgment of the realities of the context in which child domestic workers become vulnerable. Firstly, because child domestic workers are engaged within spaces that are not within the range of public scrutiny. The power dynamic between these child domestic workers and their employers does not allow them to speak about their mistreatment. They are often made to feel that due to their situation, they do not have rights, and this complicates their vulnerability.

3.1 Challenges of child domestic workers in West Africa

Stories of abuse of child domestic workers are rife in Nigeria. However, the media does not report enough of these stories to raise the awareness of an urgent intervention in the protection of child domestic workers, just as Ekeanyanwu has expressed the view in *The Cable* that cases of child abuse are largely unreported in Nigeria. He reported the case of a man who physically abuses his young cousin, as told to him by a certain Raputa, adding that, 'He beats this boy, applies pepper on his body and even his private parts. He beats him over every little mistake the boy or the abuser's children make.' Ekeanyanwu admitted that weak

36 M Sossou & JA Yogtiba 'Abuse of children in West Africa: implications for social work education and practice' (2009) 39 *The British Journal of Social Work* 1218-1234.

protection mechanisms for children in Nigeria is responsible for the high incidence of child abuse in Nigeria.[37] In Anambra, Nigeria, a lawyer, Adachukwu Okafor, was reported to have used a broken bottle, knife, and electric iron on an 11-year-old child domestic worker with her, causing severe injuries to the child.[38] Also in Abia, Nigeria, a 13-year-old child domestic worker had reportedly jumped down from a building in an attempt to escape further punishment, after being beaten severely.[39] *Premium Time*s, in appraising the situation of child domestic workers in Nigeria, reports that child domestic workers can easily be distinguished from their peers through their appearance, as they often wear their abuse like a garment. They are reported to appear dishevelled, clad in poor clothing, malnourished, and sometimes with scars from physical abuse.[40] These stories highlight the untold hardship that characterise domestic work, especially for children in Nigeria. There are many reasons why children are specifically employed as domestic workers in Nigeria, one of the chief reasons being that their employers often demand for younger workers due to their manageability and the perception that they can do more work. There is no doubt that child domestic workers in Nigeria are a highly vulnerable group of children, because, as noted, the regulatory environment is weak and does not provide for robust and coordinated interventions for vulnerable children.

Child domestic workers in Ghana face terrible ordeals with their employers. Adu-Gyamfi has opined that corpses are treated better than domestic workers in Ghana.[41] Ocran has also opined on the treatment of child domestic workers in Ghana, claiming that their dehumanisation is as complete as the one meted out to African domestic workers in the Middle East. The deficiencies in policy implementation can also be seen from the fact that there is no vocational education or training that is provided to such children, like they were promised before they were engaged. This shows that there must be legislation and other mechanisms that will protect the rights of child domestic labourers, and their employers should be held liable for any wrongdoings committed.

From Ocran's contemplation about the treatment of domestic female child labourers in Ghana, one sees the glaring issues of exploitation, gender gap and insufficient recompense in domestic jobs. It is therefore required to develop an all-encompassing approach which includes aforementioned points for issues of legal changes, safety nets and moral reasons to ensure protection of these vulnerable children at

37 O Ekeanyanwu 'Child abuse "largely unreported" in Nigeria' *The Cable* (Lagos) 11 January 2018.

38 I Obianeri 'Anambra lawyer accused of brutalising maid surrenders to police' *Punch* (Lagos) 16 February 2024

39 Guardian Nigeria '13-yr-old house help jumps down from two-storey building in Aba to evade punishment — NSCDC boss' *The Guardian* (Lagos) 20 January 2021

40 Premium Times 'Despite laws, underage home helps go through horrifying experiences in Nigeria' *Premium Times* (Lagos) 17 September 2023.

41 K Adu-Gyamfi 'Corpses have more respect than house maids' *Modern Ghana* (Accra) 25 December 2012.

risk. The challenges of child domestic workers in Ghana presents a severe human rights concern that is often not taken into consideration. This is because there is the tendency to not regard minors, especially when they come from low socio-economic backgrounds. Despite that Ghana has been rated high on democratic ideals, yet it struggles with the protection of the rights of vulnerable children. This might be due to the same institutional problems, which has also prevented Nigeria from the protection of vulnerable people, such as children working as domestic labourers.

As it is in many African states, life in Sierra Leone is difficult. Poverty levels are rising and people are desperate for jobs, while inflation has crippled the purchasing power of so many people and plunged people deeper into poverty.[42] On the other hand, institutional failure is manifested in many administrative incapacities, which includes the protection of vulnerable children. In Sierra Leone, child domestic workers are known as *men pikin,* a term used for the description of the foster care of children with relatives where they do domestic work in exchange for better opportunities. In essence, the system is mostly sustained by the trust in the relatives, with whom the children go to stay with. The phenomenon of 'men pikin' is just one part of a bigger socio-economic problem in Sierra Leone, which binds together poverty and limited access to education that forces families to hand over their children to individuals or institutions that make false promises about better lives. Most unfortunately, these kids often find themselves trapped into forced labour or sexual slavery, and are thus stripped of their rights and subjected to unbearable conditions. Inadequate legal framework, low level of awareness about the matter among officials and lack of social services have enabled trafficking to continue unabated, thus making it hard for poor children not to be exploited. A holistic approach is needed including community education, legal reforms and support.

Sierra Leone is known as a source country, transit country and destination country for trafficking in children who fall victim to both commercial sexual exploitation and forced labour. The national specific internal child trafficking practice called 'men pikin,' which translates directly as foster care in Krio language, dominates the nation state. What transpires here involves taking children from their homes by their own family members under the pretence of seeking for good educational opportunities in towns or cities within the country rather than regions where there are established schools. These assurances most times however hide behind them a brutal reality where instead of having an ideal place to study with all necessary materials provided, they suffer from exploitation and abuse.[43] There is a dearth of literature on child rights in Sierra Leone which has led to low levels of general

42 HB Momoh, FB Kamara & CB Koroma 'The 2023 elections in Sierra Leone: identifying potential conflict flashpoints and spoilers' (2022) 11 *GSC Advanced Research and Reviews* 81-93.

43 VC Cordeiro 'Children of Sierra Leone: realizing Children's Rights in Sierra Leone' 18 March 2021, https://www.humanium.org/en/sierra-leone/ (accessed 23 June 2024).

public, policy makers and stakeholders' awareness about the particular issues faced by children and what they should be protected.

A US Department of State report shows that there is evidence that child domestic work is a wide-spread phenomenon in West Africa, however, there is little known of the conditions in which these vulnerable children work. Child domestic work can vary from kinship arrangements, where children live and work in the household of their relatives to being trafficked. Despite the widespread engagement of child domestic work, it was further reported that there is a lack of comprehensive data on the conditions that these vulnerable children live in.[44] However, a new report shows that in Nigeria, there are many child domestic workers who work in slavish conditions with little time for education and social activities with 37.1 per cent working more than 30 hours weekly and 21.4 per cent who work above 42 hours weekly.[45] However, reports do not distinguish between the conditions of child domestic workers who live with kin and those who are not.

3.2 Combating child labour in West Africa

The International Labour Organisation defined child labour as work performed by a minor that is inappropriate for their age or developmental level, and hinders their physical, psychological, or social development.[46] While Minimum Age Convention, 1973 provides for the minimum age for employment being above 15 years and not less than the age of compulsory schooling in article 1 and 2(3).

Attempts have been made to stop child labour in West Africa, but they have been done without much political will. In Nigeria, poverty drives child labour, and since the rate of poverty is not reducing, many households have had to augment their livelihoods through child labour. These children either are often made to work alongside adults or made to work as domestic staff in homes of people with a higher socio-economic status. Because poverty is the leading factor for the incidence of child labour, higher levels of inequality have resulted in an exacerbation of the problem of child labour. In 2021, Aljazeera found that there were many underage girls in Nigeria who are into child domestic labour. Girls as young as 12 years old, on the cusp of adolescence, and who are usually employed through agents, leave home with promises that are often not fulfilled. These children do not often have an idea about how much they earn because their earnings are either paid to their agents or their parents. The primary factor that makes the families of these children to give up their children for

44 US Department of State 'Tackling exploitative child domestic work in West Africa' 2022, https://www.norc.org/research/projects/tackling-exploitative-child-domestic-work-in-west-africa.html (accessed 9 October 2024).

45 The Freedom Fund 'Children working in Nigerian and Liberian households are at significant risk of abusive and exploitation' 27 February 2024, https://www.freedomfund.org/behind-closed-doors-west-africa (accessed 9 October 2024).

46 International Labour Organisation 'Child labour in Nigeria – at a glance: results from the Nigeria child labour and forced labour survey 2022'.

domestic labour is poverty. Many of the families where these children come from can barely feed themselves.[47] This is resonant with other findings that poverty is the major reason of child labour.

There are two edges to the problem of child labour in Nigeria. In 2022, the government made some advance to stop the worst kinds of child labour. They passed new laws that mandated children to go to school and stay out of dangerous work environments. The government also employed more inspectors to check on working conditions and set up local groups to watch out for children. Unfortunately, many Nigerian children are still finding themselves where they have to do dangerous and strenuous work.[48] There have been attempts to resolve child labour by the Nigerian government, and one of such attempts was the formulation of the National Policy on Child Labour (Phase II) in 2022. The policy was to serve as an additional tool alongside laws, regulations and other issues that concern children at work.[49] The national policy framework in Nigeria to resolve the problem of child labour was targeted at the worst forms of child labour and was to ensure that child labour is eliminated in Nigeria. The policy relies on state mechanisms like the police, civil defence corps, immigration officials and other institutions. The problem with this, is that state mechanisms in Nigeria are lacking in capacity to engage the policy satisfactorily.

The exploitative work conditions that are associated with child domestic work include being made to work beyond reasonable hours and harsh disciplinary methods. In Ghana, child labour interferes with children's education especially in the urban areas.[50] Almost one-third of Ghanaian children between 5 and 17 are working, and for many, they work in dangerous conditions. This is especially true in farming, fishing, and forestry jobs. The same causes that have allowed the perpetuation of child labour in Nigeria continue to drive child labour in Ghana with more children being made to work in terrible conditions as a result of poverty, parental absence, and the weak response of state mechanisms in the implementation of state laws on education and child labour.[51] Poverty is a significant factor that makes children work, as many families cannot afford school or simply need the extra help to survive. Even before COVID, inequality was high, with millions of children out of school and a large number of young people struggling to find work or training.[52] And in Sierra Leone, child labour is an intractable issue with quite a large number of children under the age of

47 D Odey 'A long way from home: The child 'house helpers' of Nigeria' *Aljazeera* (Doha) 15 July 2021.

48 Bureau of International Labour Affairs 'Child labour and forced labour reports 2022'.

49 Federal Ministry of Labour and Employment, 'National policy on child labour (phase ii) 2022'.

50 O Adonteng-Kissi 'Interactions between child labour and schooling: parental perceptions in rural and urban Ghana' (2023) *Social Policy and Society* 1-15.

51 ES Hamenoo, EA Dwomoh & M Dako-Gyeke, 'Child labour in Ghana: implications for children's education and health' (2018) 93 *Children and Youth Services Review* 248-254.

52 UNICEF 'The new Ghana accelerated action plan against child labour 2023-2027 is launched'.

18 years engaged in labour. Children are even trafficked for domestic work. In Sierra Leone's Eastern Province. While there has been some progress, state mechanisms are not moving at the pace of the problem. The government of Sierra Leone have incorporated the Children's Charter and other conventions into law such as the Anti-Human Trafficking Act (2005) and the Child Rights Act (2007), the allowance of children at the age of 13 to do 'light work', undermines the efforts to check the trend of child labour in Sierra Leone.[53]

Even though the Sierra Leonean government has attempted some interventions, there are still challenges that persist. A major challenge to the government's efforts in Sierra Leone is access to education in the rural areas, particularly for young girls.[54] This problem in some other related context will be about the affordability of education for children who are forced into domestic work, or who are made to support their households through domestic work. What many studies who advocate for the prohibition of child labour do not often address, is what would take the place of child labour, where child labour is the only source of funding a child's education. There are no doubts that child labour is injurious to a child's development and can hinder a child's development. However, child domestic work does not thrive because the people who are involved in the business of child labour are mostly individuals who are after negligible profit, but poverty, poor awareness and weak state mechanisms without proper mobilisation all contribute to the problem of child domestic work in West Africa. Despite the progress made by the governments in Nigeria, Ghana and Sierra Leone, it is obvious that the efforts and interventions do not match up to the pace of the problem. The lack of political will which is often thought to encumber state mechanisms is a result of a lack of executive coordination, and the prioritisation of government interventions. This is because enforcement of state laws on child labour require dedicated commitment of governments and collaboration with NGOs, without which there would be an impediment of effective policy implementation and enforcement of state laws. Despite frameworks like the ECOWAS Regional Action Plan and state efforts, Ghana and other West African states have found it difficult to coordinate their agencies, resource mobilisation and local-level prioritisation of child welfare initiatives.[55]

53 A Balch, AM Cody, D Okech, T Callands, U Fofanah & HR Wurie 'Unveiling child trafficking: local perspectives and context in addressing sustainable development goals in Sierra Leone' (2024) 15 *Global Policy* 78-90.

54 As above.

55 Republic of Ghana 'Ghana accelerated action plan against child labour (national plan of action for elimination of child labour)'; ECOWAS Regional Action Plan for the Elimination of Child Labour Especially the Worst Forms; Ministry of Employment and Social Welfare 'Ghana child labour monitoring system (GCLMS)'.

3.3 State mechanisms and the Children's Charter

The Federal Ministry of Women Affairs and Social Development in Nigeria is the institution that has the responsibility to protect the rights of children in Nigeria as part of their mandate, which is to also promote and protect women rights. This institution is expected to balance its work on women and children, such that the rights of women and children are protected. However, its work on women outweighs its interventions on the rights of children. The Child Rights Act, 2003 (Nigeria), provides that all children that are in need of special protection measures are entitled to the level of protection which are necessary for their physical, social, economic, emotional and mental needs and in circumstances that safeguard their dignity and the promotion of stability and their active engagement in the community affairs.[56]

Child domestic workers are a group of children with a need for special protection, because of their vulnerability as individuals from low-socio-economic backgrounds and their state of being forced into labour, but they are often neglected. The Children's Charter provides that for child labour, including domestic work, there shall be no economic exploitation of children and from jobs that further endanger their lives and their physical, mental, spiritual, moral, or social development.[57] The Federal Ministry of Women Affairs and Social Development claims in its policy document, 2021 National Gender Policy, that it will reinforce the institutional procedures that will make certain that the needs of men and women, boys and girls, and vulnerable groups are met equitably.[58] Despite this policy commitment, the organisation is far from the protection of the most vulnerable group of children which are child domestic workers. Furthermore, the organisation has no short-term nor long-term plan for the protection of this group of children. The abuse of child domestic workers has been quite egregious in Nigeria and Ghana. Previous studies around governance and institutions have unraveled the problems of institutional capacity, attributing the incapacity of state institutions to many factors, such as a lack of political will, weak horizontal accountability structures and poor funding.[59] The concept of state mechanisms goes beyond mere institutions to include elements of institutional processes, like laws, regulations and policies. The situation in Nigeria, Ghana and Sierra Leone, are similar with slight variances. While Ghana is only slightly more politically stable than Nigeria and Sierra Leone, it struggles with the same problems of corruption and horizontal unaccountability.

56 Child Rights Act of 2003 (Nigeria) sec 16(1).

57 Art 15(1) African Charter on the Rights and Welfare of the Child.

58 The Federal Ministry of Women Affairs and Social Development in Nigeria '2021-2016 Federal Republic National Gender Policy-Strategic Implementation Framework/Plan'.

59 C Fombad 'The state of governance in Africa' in C Fombad, A Fiseha & N Steytler (eds) *Contemporary governance challenges in the Horn of Africa* (2023) 302.

With the same levels of incapacity of state mechanisms. While laws, regulations and policies abound, there is a very low incentive for institutions to be as effective as possible in the execution of these processes. For instance, while Nigeria has the National Agency for the Prohibition of Trafficking in Persons (NAPTIP), children still get trafficked as domestic labourers and still get physically and mentally abused in such work environments. The implementation of laws on the rights of the child is still far from desirable, with the state allowing the condition of children to be determined by whomever is in custody of these vulnerable group of children. The nonchalance of the Nigerian government in the protection of these child domestic workers is a reflection of the indifference of the Nigerian state to vulnerable groups. The International Labour Organisation Survey Report for 2022 shows that 31,756,302 children are engaged in economic activity across sectors, which means that 50.5 per cent of children are engaged in economic activity in Nigeria. It further reported that 24,673,485 children are child labourers, which is 39.2 per cent of children that are child labourers in Nigeria.[60] The ILO survey shows that children workers in the rural areas have a higher tendency to get injuries at their employment.[61] The implication of this survey, especially as regards Nigerian child workers in rural areas, is that they are vulnerable, especially because state mechanisms rarely extend to those places. In another context, child domestic workers from the rural areas who find themselves working in the cities, discover that they are without support, since they are in a strange environment, where the closest family member is some hundreds of kilometres away. An Aljazeera report on child domestic workers in Nigeria captures this aptly:

> Agents often woo the young girls with promises of education and good earnings. When their families sign up, the girls are transported from their villages to economic centres like Lagos, Abuja, Port Harcourt and surrounding cities. Often, these families are in dire financial circumstances and see their children as a vehicle for financial support. Many parents can barely afford daily meals and basic healthcare for their children, which makes the prospect of someone else taking responsibility for the child, while offering a stipend, too tempting to resist.[62]

Beyond the recruitment process is the actual abuse faced by child domestic workers in Nigeria, some get so physically abused that their lives are endangered, and yet such incidences of abuse are treated just like other crimes of aggression. Closely tied to the physical and mental abuse of child domestic workers is the likelihood of trafficking. The physical and mental abuse of these children is often hinged on their lack of support and protection by the state, and their perceived helplessness. It is this lack of protection by the Nigerian state, that inspired a group of Non-Governmental Organisations, such as the Street Project Foundation, Child Protection Network, United States Department of State the Freedom Fund, Devatop Centre for Africa Development and

60 International Labour Organisation 'Child labour in Nigeria - at a glance: Results from the Nigeria child labour and forced labour survey 2022'.

61 International Labour Organisation (n 21).

62 D Odey 'A long way from home: The child 'house helpers' of Nigeria' *Aljazeera* (Doha) 15 July 2021.

Centre for the Advancement and Protection of the Rights of Vulnerable People to advocate for the protection of child domestic workers in Nigeria with the proliferating cases of abuse against child domestic workers.[63]

In Ghana, the Ministry of Gender, Children and Social Protection is the government organisation that is empowered by law to protect children. This government organisation in Ghana has the Department of Children under it, which oversees all matters that relate to the condition of the Ghanaian child. The Children's Act, 1998 (Ghana) prohibits the subjection of a child to exploitative labour.[64] Under the Children's Act, 1998, it defines exploitative labour as labour that deprives the child of its 'health, education or development'.[65] This would mean that the use of children for domestic work is illegal, especially because of its likely negative impact on the education, health and development of the child. The Department of Children in its policy mandate works to protect children from exploitative labour, including domestic work.[66] The social welfare system in Ghana is family and relative based, and relies much on African communitarian values. This means that where an individual is in need of resources, such an individual could get assistance from family and relations. Where children have lost their parents or are in dire need of adult protection in Ghana, they are committed to extended relations and community members.[67] With the evolution of society, this system has become unsustainable with the rising economic pressure. However, many children in Ghana today without their biological parents are staying with their relatives or grandparents.[68] This has led to the prevalence of child domestic workers whose employers are actually relatives. The violence that these group of children face from their employers, results in mental health issues, impaired development, injury, negative coping mechanisms and compromised health, and this is the reality of many Ghanaian children. Ghana has been able to apprehend some of the violence against children from the time the Convention on the Rights of the Child, was ratified.[69] However it has not been able to adequately protect child domestic workers because of the nature of their employment, and a lack of political will towards the policy and legal efforts needed for their protection.

The Ministry of Gender and Children's Affairs is the government organisation that is mandated to protect child rights, amongst other things in Sierra Leone. They are also to promote child rights for social awareness. The work of this organisation has been very important especially since the civil war saw the engagement of child soldiers. Just

63 Guardian Nigeria 'NGOs advocate protection for child domestic workers' *The Guardian* (Nigeria) 2024.

64 Sec 12 Children's Act, 1998 (Ghana).

65 Sec 87(2) Children's Act, 1998 (Ghana).

66 Ministry of Gender, Children and Social Protection '2014 Child and Family Welfare Policy' November 2014.

67 UNICEF '2021 Fulfilling the commitment to child protection in Ghana'.

68 UNICEF (n 38).

69 UNICEF (n 38).

like its Nigerian equivalent, this Sierra Leonean government organisation has had to accelerate action more on gender matters than the children's right, despite the fact that child labour is still a problem and that child domestic workers are still suffering from abuse. Afrobarometer showed in its report for 2023 that 40 per cent of Sierra Leonean children were out of school, and that Sierra Leone, just like Nigeria, was one of the states with the least support systems for vulnerable children.[70] It further reported that in Sierra Leone, children are very much often abused, mistreated, or neglected 23 per cent of the time.

Sierra Leone was amongst the states that were at the bottom-run of the index for the provision of support services for children that were abused or neglected, with mental health issues and disabilities.[71] This falls short of the provision of the Child Rights Act 2022 (Sierra Leone) which demands that the Sierra Leonean Ministry of Gender and Children's Affairs in partnership with other government ministries and relevant stakeholders, shall work to promote the enjoyment of children's welfare and rights throughout the whole of Sierra Leone.[72] These statistics for vulnerable children, portend negatively for the rights of child domestic workers in Sierra Leone, who are living and suffering in the shadows.

Although laws such as the Child Rights Act have been formulated to protect children in Sierra Leone, enforcement is weak. The government has taken steps to address these and similar challenges, through the lifting of bans on pregnant girls attending school.[73] In some communities, on the other hand, societal issues are still a problem. While women likely would benefit from economic empowerment policies, the focus of those policy interventions may fail to address that child protection is indeed paramount. The dynamics in Sierra Leone are part of a larger pattern, where women's proximate gains, such as initiatives against child marriage, and the advocacy for their economic participation, come at the expense of children's rights and childhood. Empowering women is important for societal advancement, but not at the cost of children's education and well-being. To achieve sustainable development, Sierra Leone needs a two-pronged approach that accounts for child rights alongside those of women. Making sure policies take these long-term considerations into account will create a more just society for all.

70 A Chingwete & R Houessou 'Africans see room to improve well-being of vulnerable children' 11 November 2023 Afrobarometer Dispatch No 731.

71 A Chingwete & R Houessou (n 70).

72 Child Rights Act 2022 (Sierra Leone) sec 43(1).

73 E Calimoutou 'Sierra Leone took a major first step towards keeping girls in school and inclusive education' 17 September 2020 https://blogs.worldbank.org/en/nasikiliza/sierra-leone-took-major-first-step-towards-keeping-girls-school-and-inclusive-education (accessed 10 October 2024).

3.4 Enhancing safeguards via state mechanisms

There are many ways state mechanisms can address the gap between their capacities and the promise of protection that is replete in the Children's Charter. Between the potentials that the Children's Charter represents, and the failed promises of state mechanisms in Nigeria, Ghana and Sierra Leone, in meeting up to the protection needs of child domestic workers there are opportunities for redemption. These opportunities of redemption are strategies that can be executed for the effectiveness of state mechanisms in these West African states. One way to examine the failure of these state mechanisms, is to consider what is missing in their agenda-setting. It appears that in Nigeria and Sierra Leone, the government ministries concerned with the protection of children, are more concerned with programs driven towards women emancipation. With the laws on the protection of children in these three states, child domestic workers have continued to suffer human rights violations, this is because resources are not enough to go after violators, and corruption in government circles impedes justice for these child domestic workers. Furthermore, since child domestic work is accepted culturally, changing perceptions would be driven by both sensitisation on child protection laws and a stronger commitment by these states to disrupt child trafficking.

3.5 Regional mechanisms and the Children's Charter

Since the use of children for domestic work is driven by poverty, it is essential that governments in West Africa begin to work towards social security programs for their citizens through wealth tax. West African governments taxing held assets in their states might help bridge the gap on widening inequality. Furthermore, the attribution of credible commitment to horizontal accountability mechanisms like the ECOWAS Community Court of Justice and the African Court on Human and Peoples' Rights, through a consolidated approach of judicial support from local judiciaries within the West African region, will not only help check executive excesses that frustrate human rights protection, but also enhance means through which civil society aspire for social change. One of the most limiting factors for legislative and policy efforts on child protection is the lack of credible data. In Nigeria, Ghana and Sierra Leone, governments struggle with effective data systems, and this can frustrate legislative and policy efforts on the protection of children. Therefore, governments can collaborate with the private sector to achieve competent data collection and utility of these data. Since human rights abuses of child domestic workers are particularly notorious in states like Nigeria and Ghana, the African Commission can give technical assistance to build capacity members of the civil society in these states, to be able to track violations of the rights of child domestic workers, who are often very difficult to help because of the discreet nature of their work environment, and learn new strategies to engage the changing nature of child labour.

4 CONCLUSION

In West Africa, child domestic workers suffer inhumane treatment from their employers, especially in Nigeria and Ghana. These categories of child workers are often overlooked, because their work environment is in private homes, where violations of their rights are well-concealed. Protecting child domestic workers is challenging because of the hidden nature of domestic work inside private homes, because children often work for relatives, and because domestic work may be socially and culturally accepted as appropriate work for children. It is often difficult to gather evidence of when domestic work is benign and when it is harmful. However, given the informal and largely undocumented nature of domestic work relations, and the fact that the domestic workplace is not public, labour law provisions cannot be enforced unless special provisions are put in place to enforce them. State mechanisms have not also been able to meet up with their mandate of protecting vulnerable children, because of corruption and lack of capacity. Poverty, which is the main factor for the proliferation of child domestic workers still persists. However, state mechanisms could leverage on local laws and the Children's Charter to enhance protection of child domestic workers through capacity-building, while West African judiciaries could tackle the problem of executive inefficiency by supporting regional courts, like the ECOWAS Community Court and the African Court on Human and Peoples' Rights by ensuring that the judgments of the ECOWAS Community Court are fully implemented and respected. These West African judiciaries could also demonstrate their commitment to the rule of law and regional integration by upholding the independence of the regional court and refrain from interfering with its proceedings or decisions.

Women's right to sexual and reproductive health information: The Gambia's fix for female genital mutilation

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ABSTRACT: This article argues that the African Union's theme for 2024, 'Educate an African fit for the 21st century', provides an avenue to galvanise support for the protection of women's right to sexual and reproductive health information (women's right to SRHI) considering the power of knowledge and information to foster socio-cultural transformation and sustainable development. The right protects women's sexuality, reproductive health and well-being and is a precondition for substantive equality between men and women. The provision of comprehensive information and education in schools and in public on women's rights to sexual and reproductive autonomy can drive the transformation of harmful cultural practices and historical discriminations against African women in reproductive healthcare. In Africa, as elsewhere, despite legislation and policies against gender-based violence and discrimination, the prevalence of female genital mutilation (FGM) disempowers women from attaining their sexual and reproductive health. The rise in FGM during the COVID-19 pandemic and recent attempts to overturn its ban in The Gambia portray the danger of possible reversal of the previous gains of FGM ban. This article therefore makes the case for the express recognition of women's right to SRHI. In doing this, it draws from empirical, legal and health literature and policy documents to re-conceptualise women's right to SRHI based on substantive equality, and examines the merits of the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) and related instruments to safeguard women's access to comprehensive information and education on sexual and reproductive health and rights. The article reveals gaps between policy and women's lived experiences regarding access to SRHI and concludes by encouraging the African Union and development partners to support The Gambia and other African states to prioritise access to culturally sensitive sexuality information and education.

TITRE ET RÉSUMÉ EN FRANÇAIS

Le droit des femmes à l'information sur la santé sexuelle et reproductive : l'approche de la Gambie face aux mutilations génitales féminines

RÉSUMÉ: Cet article soutient que le thème de l'Union africaine pour 2024, intitulé «Éduquer une Afrique adaptée au XXIe siècle», offre une opportunité cruciale pour promouvoir le droit des femmes à l'information sur la santé sexuelle et reproductive. Ce droit, indispensable à la protection de la sexualité, de la santé reproductive et du bien-être des femmes, constitue une pierre angulaire pour parvenir à l'égalité réelle entre les hommes et les femmes. L'accès à une information complète et à une éducation publique sur les droits des femmes à l'autonomie sexuelle et reproductive est essentiel pour transformer les pratiques culturelles néfastes et les discriminations

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historiques. En Afrique, malgré l'existence de législations et de politiques visant à lutter contre la violence et la discrimination fondées sur le genre, la prévalence des mutilations génitales féminines (MGF) continue de compromettre gravement le droit des femmes à la santé sexuelle et reproductive. L'augmentation des cas de MGF pendant la pandémie de COVID-19 et la tentative récente de révoquer leur interdiction en Gambie illustrent les risques de recul dans la lutte contre ces pratiques. L'article plaide pour une reconnaissance explicite du droit des femmes à la santé sexuelle et reproductive, en s'appuyant sur des analyses empiriques, juridiques et politiques. Il reconceptualise ce droit à travers le prisme de l'égalité réelle et évalue le rôle des instruments juridiques régionaux, notamment le Protocole de Maputo, dans la protection et la promotion de l'accès des femmes à une information et une éducation complètes en matière de santé sexuelle et reproductive. En révélant les écarts persistants entre les politiques adoptées et les expériences vécues par les femmes, l'article souligne l'urgence pour l'Union africaine et ses partenaires de développement de soutenir des États comme la Gambie dans leurs efforts pour prioriser l'accès à une éducation sexuelle adaptée, respectueuse des cultures et intégrée aux politiques de santé publique. L'article conclut en appelant à un engagement renouvelé pour garantir que ces droits fondamentaux soient au cœur du développement durable et des transformations socioculturelles en Afrique.

KEY WORDS: Maputo Protocol; sexual and reproductive health and rights; women's right to sexual and reproductive health information and education; sexuality education; FGM

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1 INTRODUCTION

Women's (including girls') right to sexual and reproductive health information (women's right to SRHI) is vital to the realisation of sexual and reproductive health and rights (SRHR) such as the right to health, right to life, non-discrimination, freedom from torture, right to education, and is an essential pre-condition for substantive equality between men and women.[1] This means that states have an overarching obligation to provide appropriate information and educational measures to address all discriminatory norms that hinder women's enjoyment of SRHR on equal basis with men. This would require 'saving' women's right to SRHI from its current fragmentation under international human rights law or, as it were, 'from the shadows': a task of re-conceptualisation. Also, women's right to SRHI suffers from

1 RJ Cook & MF Fathalla 'Advancing reproductive rights beyond Cairo and Beijing' (1996) 22 *Comment* 119.

multiple conceptualisations which tends to unnecessarily confuse its normative content and ultimate realisation whereby a conceptual overload could 'imply that access to information plays a subordinate role to the right that it is facilitating'.[2] Most importantly, any attempt to anchor a human right from multiple sources implies a rudimentary perception of the right considering that governments are required to respect, protect, promote and fulfil every human right.[3] Conversely, religious and traditional misconceptions and misinformation underlie female genital mutilation (FGM), which is the partial or total removal of the external female genitalia or other injury to the female organs for non-medical reasons, making it a violation of women's SRHR.[4] Though it is not ordinarily done with the intention of inflicting harm, but driven and reinforced by patriarchy, FGM seriously affects women of reproductive age (between 15-49 years) and has an insidious connection with early/child marriage.[5] Furthermore, FGM deprives women and girls of making choices and decisional autonomy over their reproductive health and well-being free of coercion and violence. The procedure is usually performed by traditional practitioners actively supported by parents, elderly women, and religious leaders whereby it constitutes girls' rite of passage, indicative virginity, and marriageability.[6] FGM results in death, infant mortality and life-long mental and physical health challenges.[7] An estimated 230 million plus women and girls are FGM victims globally over 144 million of whom are in Africa and where FGM is concentrated across not less than 27 countries.[8] Nigeria has the world's third largest number of FGM victims while countries in North Africa and the horn of Africa have about 95 and 98 per cent of the women as victims respectively.[9] Whilst not less than 24 African countries had prohibited FGM as of 2020 and ratified the Protocol to the African Charter on Human and Peoples' Rights on

2 CA Bishop 'Internationalizing the right to know: conceptualizations of access to information in human rights law' PhD dissertation, University of North Carolina, 2009 37.

3 Vienna Conference on Human Rights 1993.

4 Department of Women's Health, Family and Community Health, World Health Organization 'a systematic review of the health complications of female genital mutilation including sequelae in childbirth WHO/FCH/WMH/00.2' (2000) 11.

5 UNICEF 'Understanding the relationship between child marriage and female genital mutilation: a statistical overview of their co-occurrence and risk factors' (2021) 7-42, http://data.unicef.org/resources/understanding-the-relationship-between-child-marriage-and-fgm/ (accessed 20 October 2024); World Vision UK 'Exploring the links: female genital mutilation/cutting and early marriage' (2014) 7-13, http://Exploring_the_links_FGM_cutting_and_early_marriage.pdf (accessed 20 October 2024).

6 UNICEF 'Female genital mutilation/cutting: a global concern' (2016) 2, ttps://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/ (assessed 15 August 2024); A Kaplan and others 'Health consequences of female genital mutilation/cutting in The Gambia, evidence in action' (20011) 8 *Reproductive Health* 1; K Nakamura and others (eds) *Female genital mutilation/cutting: global zero tolerance policy and diverse responses from African and Asian Local Communities* (2023) 5.

7 As above.

8 UNICEF Data 'Female genital mutilation (FGM)', https://data.unicef.org/topic/child-protection/female-genital-mutilation/#_edn1 (assessed 15 August 2024).

9 As above.

the Rights of Women in Africa (African Women's Protocol or Maputo Protocol) 2003, secretive practices of FGM persist. Significant reductions only occurred in states that carried out public awareness and comprehensive sanctions.[10] Even where there is enforcement of legal sanctions, some religious hardliners still display open resistance to FGM eradication as happened recently in The Gambia.

In The Gambia, there is a heightened concern over the health risks that the prevalence of FGM poses to women who constitute 50.6 per cent of the 2.3 million population.[11] While 75 per cent of women and girls between the ages of 15 and 19 have undergone various forms of FGM,[12] three in four girls and women of reproductive age have undergone the procedure.[13] Moreover, infants as young as 5 months old are not spared from the FGM violence.[14] FGM not only constitutes gender-based discrimination and violence under the international human rights obligations undertaken by The Gambia,[15] it also violates Gambian laws and policies established to eradicate gender discrimination.[16] Violence against women was prohibited[17] and FGM criminalised including failure to report preparatory, contemporaneous or past acts thereof since 2015,[18] but victims of FGM or their families hardly ever lodge official complaints and so prosecutions are not

10 United Nation's Office of the Human Commissioner for Human Rights (OHCHR) 'Women's Rights in Africa 37.

11 *Countrymeters*, 'Gambia population' https://countrymeters.info/en/Gambia (accessed 12 January 2020); T Manuh & A Biney 'Exploring intersections between gender-based violence and adolescent sexual and reproductive health and rights in West Africa: A review of the literature produced in the sub-region' (2021) 25 *African Journal of Reproductive Health* 126.

12 United Nations Population Fund 'Female Genital Mutilation Dashboard (FGM) - Gambia', https://www.unfpa.org.data.fgm (assessed 20 October 2024); United Nations International Children Emergency Fund, 'Gambia: Statistical Profile on Female Genital Mutilation' (2019) 2.

13 B Mboge and others 'Female genital cutting in The Gambia: can education of women bring change?' (2019) 43(2) *Journal of Public Health* 398.

14 UNFPA (12).

15 The Gambia must respect and protect women's right to SRHI in terms of human rights treaties it has signed, ratified and/or acceded. These include the Convention on the Elimination of all forms of Discrimination against Women 1979, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

16 See Gender and Women's Empowerment Policy 2010-2020 revised in 2017; National Action Plan on the Implementation of the United Nations Security Council Resolution (UNSCR 1325); National Population Policy (geared towards the empowerment of women and girls, fundamental rights protection and access to sexual and reproductive health information); National Child Protection Strategy 2016-2020; National Social Protection Policy (NSPP) 2015-2025; National Health Policy 2015-2025; National Reproductive Maternal, New born, Child and Adolescents Health Policy 2017-2026; National Action Plan on FGM/C 2013-2018. See The Gambia National Report on the Five-Year Review of the Implementation of the Addis Ababa Declaration on Population and Development Beyond 2014, The Gambia & UNFPA (2018) 9-10.

17 See Domestic Violence Act 2013.

18 Women's (Amendment) Act 2015, sec 32B (a culpable defendant is liable on conviction to three years' imprisonment or to a fine of Fifty Thousand Dalasis or both).

common.[19] In fact, the first criminal indictment and convictions for FGM involving three women only took place in 2023.[20] The health and human rights-related complications of FGM are also well documented,[21] but the majority Muslim population, many Christians, elderly women and even educated Gambians see nothing wrong with it based on traditional and religious prejudices since it is believed to prevent promiscuity in women.[22] Hence, state-sponsored manipulation of health-related information,[23] discriminatory cultural norms and patriarchal attitudes that engender the stereotyping of women and girls persist. Moreover, the Constitution of The Republic of The Gambia 1977 (CRG 1977) (as amended) has no provision on the right to health. Rather, it protects several rights including cultural rights[24] while section 28 thereof protects women's 'equal dignity of the person with men' under which women's right to SRHI could be implicitly derived.

Based on the foregoing, this paper argues that the realisation of women's right to SRHI makes it imperative to end FGM,[25] and makes the case for The Gambia and other African countries to re-invigorate sexuality and reproductive health education in school curricula to protect and promote women's right to SRHI. In doing so, part 1 of the paper introduces the subject. Part 2 re-conceptualises women's right to SRHI while part 3 appraises the international human rights standards, the African Women's Protocol and related consensus documents on women's right to SRHI. Part 4 undertakes a case study of how the practice of FGM violates women's right to SRHI in The Gambia. Part 5 concludes and makes suggestions for the way forward.

19 See S Mutambasere, A Budoo-Scholtz & D Murden (eds) *The impact of the Maputo Protocol in selected African states* (2023) 118.

20 F Baldeh & S Birchinger 'Keeping up the ban against FGM/C: a strong signal for reproductive health and rights from The Gambia to the World *PRIF Blog*, https://blog.prif.org/2024/08/08/keeping-up-the-ban-against-fgm-c-a-strong-signal-for-reproductive-health-and-rights-from-the-gambia-to-the-world/ (accessed 20 October 2024).

21 Such as infections, urinary incontinence, infertility, emotional trauma, maternal deaths, childbirth complications and other health, see PD Mitchum 'Slapping the hand of cultural relativism: female genital mutilation, male dominance, and health as a human rights framework' (2013) 19 *William & Mary Journal of Race, gender and Social Justice* 585, 591-592; Kaplan and others (n 6) 1-6.

22 AK Marcusán and others 'Female genital mutilation/cutting: changes and trends in knowledge, attitudes, and practices among health care professionals in The Gambia' (2016) 8 *International Journal of Women's Health* 103-117; Kaplan and others (n 6).

23 SI Bosha and Others 'The impact of the presidential alternative treatment program on people living with HIV and The Gambian HIV response' (2019) 21 *Health and Human Rights Journal* 239, 240 (former President Jammeh's fraudulent scheme to cure HIV and AIDS).

24 CRG 1997, sec 32.

25 See Sustainable Development Goals Goal 5 which aims to end FGM by 2030.

2 RE-CONCEPTUALISING WOMEN'S RIGHT TO SRHI

Women and girls have specific healthcare needs which must be met to enable them to live meaningful and dignified lives as autonomous human beings. In many societies, gender-based assumptions, stereotypes and women's subordination to men fuel violations of SRHR. While states might have adopted legal and policy measures to eliminate discrimination against women in healthcare, such have been patronising while systematically excluding vulnerable and voiceless adolescent girls, rural women, women living with aids, etc., to whom the state is accountable. Women's right to SRHI obligates states to provide access to comprehensive and appropriate goods, information and services including public awareness campaigns for a participatory approach to the advancement of women's SRHR including fertility control, contraception, family planning, etc. This part re-conceptualises women's right to SRHI as a substantive right related to multiple rights that underscore the significance of comprehensive information and education required for women and girls to attain substantive equality within the context of sexual and reproductive self-determination.

2.1 Substantive equality and women's right to SRHI

As against formal equality which treats people alike irrespective of their differences, substantive equality aims to achieve a just and egalitarian society by making adjustments and accommodations to eliminate or reverse historical and structural disadvantages among different segments of society.[26] Accordingly, human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Maputo Protocol protect women and girls from discrimination to reclaim human dignity based on the notion of substantive equality. These human rights treaties mandate states to implement remedial and right-based legal, policy, administrative measures, support women and create public awareness to address these disadvantages.[27] The consensus documents such as the International Conference on Population and Development (ICPD) and the Fourth World Conference on Women (FWCW) which created the normative background for states' obligation on the right to information and education towards sexual and reproductive well-being of women and

26 E Durojaye & Y Owoeye "'Equally unequal or unequally equal": adopting a substantive equality approach to gender discrimination in Nigeria' (2017) 17(2) *International Journal of Discrimination and the Law* 4-5.

27 As above.

girls are also grounded in substantive equality.[28] Moreover, the power of education to transform lives, impart information and instil ideas to create inclusive societies and 'a just and peaceful world' and as a source of empowerment for individuals and groups cannot be overemphasised.[29] This is integral to the Africa Union 2024 theme which aims at building resilient education systems to reverse the negative impact of discrimination and the non-fulfilment of the sexual reproductive and health needs of young people on the enjoyment of the right to education in Africa.[30] Accordingly, women's right to SRHI including sexuality education is an essential precondition for the enjoyment of SRHR guaranteed internationally, in regional treaties, and domestic laws, towards gender equality and to enable women and girls to protect their health and plan their families.[31] However, the realisation of women's right to SRHI towards the enjoyment of other SRHR and the eradication of harmful cultural and religious practices like FGM can be challenging, particularly in Africa, where sexual and reproductive rights matters are viewed with suspicion due mainly to socio-cultural and religious reservations.[32] As a result, women and girls are beholden to the horrors of FGM which is prevalent in 35 countries in African, Middle Eastern and Asian communities and among immigrant communities in the Western world.[33] This makes the link between comprehensive sexuality education (CSE) and women's right to SRHI crucial by providing adolescent girls with the necessary knowledge and skills to make informed decisions about their bodies, relationships, and reproductive choices, empowering them to exercise their SRHR through access to accurate healthcare-related information regarding their sexuality and reproduction. Essentially, CSE is a key tool of substantive equality to enable women address religious and cultural hindrances such as FGM that prevent the full realisation of their SRHR.

28 E Durojaye 'Realizing access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 162-170; E Durojaye 'Substantive equality and maternal mortality in Nigeria' (2012) 44 *The Journal of Legal Pluralism and Unofficial Law* 117-118.

29 UNESCO 'UNESCO welcomes ambitious African Union education goals', ttps://www.unesco.org/en/articles/unesco-welcomes-ambitious-african-union-education-goals (accessed 20 October 2024).

30 African Union & African Committee of Experts on the Rights and Welfare of the Child 'Concept Note for the Day of the African Child 2024: 'Education for all children in Africa: the time is now' (2024) 5, https://www.acerwc.africa/sites/default/files/2024-03/Concept-Note_Day-of-the-African-Child_2024_ENG.pdf (assessed 20 October 2024).

31 R Brown and others 'A sexual and reproductive health and rights journey: from Cairo to the present' (2019) 27 *Sexual and Reproductive Health Matters* 326; Centre for Reproductive Rights 'The human right to information on sexual and reproductive health government duties to ensure comprehensive sexuality education' (2008) 2.

32 V Balogun & E Durojaiye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11(2) *African Human Rights Law Journal* 387.

33 Marcusán (n 22).

Incidentally, statistical evidence has shown the correlation between high exposure to FGM in sub-Saharan Africa and women and girls in poorest households, the less educated, those with lower access to media, etc.[34] Relatedly, to transform and revitalise education to achieve gender equality in Africa demands that women's access to SRHI be included as part of school curricula of health education considering that major international and regional consensus documents all speak of women empowerment through education.[35] Moreover, women's right to comprehensive SRHI and education is a development of an iterative process by human rights bodies on the right to health including on SRHR protected in various formulations in human rights treaties, health Declarations, and international and regional consensus documents and policies. These include the Universal Declaration of Human Rights (Universal Declaration),[36] World Health Organisation Constitution,[37] CEDAW,[38] the International Covenant on Civil and Political Rights 1966 (ICCPR),[39] the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR),[40] the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, and the Convention on the Rights of the Child (CRC) 1989.[41] This is elaborated upon in paragraph 3.1 below with regards to access to information and functional sexuality education from the Concluding Observations, General Comments, and case decisions made

34 UNICEF Data 'Understanding the relationship between child marriage and female genital mutilation' https://data.unicef.org/resources/understanding-the-relationship-between-child-marriage-and-fgm/ (accessed 11 June 2024): BO Ahinkorah and others 'Socio-economic and demographic determinants of female genital mutilation in sub-Saharan Africa: analysis of data from demographic and health surveys' (2020) 17 *Reproductive Health* 162.

35 See Sustainable Development Goal (SDG) 2030 goal 5's target to eliminate all harmful practices including FGM by year 2030 and UN Agenda 2030 African Union (2023) Linking Agenda 2063 and the SDGs, https://www.au.int/agenda2063/sdgs (accessed 31st July 2024); African Union 'Agenda 2063: the Africa we want' https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (assessed 20 October 2024); Continental Education Strategy for Africa (CESA 2016-2025), https://www.au-continental-strategy-on-education-for-health-and-well--being-of-young-people-in-africa.pdf (assessed 11 August 2024).

36 Adopted 10 December 1948, UNGA Res 217 A (III), art 25(1) (the right to a standard of living adequate for health and well-being including food, clothing, housing and medical care), art 25(2) (motherhood and childhood are entitled to special care and assistance).

37 Adopted 7 April 1948, 14 UNTS 185 Preamble.

38 Adopted 18 December 1979 entered into force 3 September 1981) GA Res 54/180 UN GAOR 34th session Supp 46, UN Doc A/34/46 (1980) art 10(1)(h) (access to health-specific educational information and on family planning) art 12 (the right to the highest standard attainable of physical and mental health without discrimination and ensure gender equality in access to healthcare), art 14(2)(b) (states' obligation to provide access to family planning information and education) and art 16(1)(e) (right to reproduction choice information).

39 General Assembly Resolution 2200A (XXI) (adopted 16 December 1966 entered into force 3 January 1976).

40 General Assembly Resolution 2200A (XXI) (adopted 16 December 1966 entered into force 3 January 1976) art 12(1) & (2)(a) (states' obligation to take steps to reduce stillbirth and infant mortality).

41 Adopted 1989, entered into force 2 September 1990, UN Doc A/44/49.

at various times by their respective monitoring bodies and special mechanisms.

2.2 Women's right to SRHI as a substantive right

Several rationales that intertwine with the right to access to information, freedom of expression, right to health, the right to privacy, etc.,[42] could be advanced for women's right to SRHI. In the same vein, the Centre for Reproductive Rights asserts that the right, 'like all reproductive rights, is firmly rooted in the most basic international human rights standards, including protections of the rights to life, health, education, and non-discrimination'.[43] Consequently, the task of re-orientating women's right to SRHI begins with a brief analysis of the extant 'conceptualisation literature'. The first one will be referred to as 'the purist freedom of expression and access to information conceptualisation'. According to Mendel, freedom of expression and access to information are intricately linked in that[44]

> freedom to receive information prevents public authorities from interrupting the flow of information to individuals and ... freedom to impart information applies to communications by individuals. It would then make sense to interpret the inclusion of freedom to seek information, particularly in conjunction with the right to receive it, as placing an obligation on government to provide access to information it holds.

The foregoing exposition of the provisions of the ICCPR, article 19 tallies with all international human rights provisions and soft law developed under the auspices of the United Nations and regional authorities that guarantee the freedom 'to seek, receive and impart information'[45] though the extent of information covered may not be conclusively determinable. This conceptualisation would, by implication, impose a negative duty on government in a democratic society of non-interference with information required for effective public participation in addition to a positive obligation to make health governance-related legal, policy level and other information held by public (and some private) bodies feely available to all citizens subject to legitimate exemptions. This is particularly more so because

42 Inter-American Commission on Human Rights 'Access to information on reproductive health from a human rights perspective' OEA/Ser.L/VII. Doc.61 (22 November 2011) 1.

43 Centre for Reproductive Rights (n 31) 3.

44 T Mendel 'Freedom of information: an internationally protected human right' (2003) 39 *Comparative Media Law Journal* 95, 40; A Roberts 'Structural pluralism and the right to information' (2001) 513 *University of Toronto Law Journal* 243, 260.

45 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (Universal Declaration), art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19(1); American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, 1, OAE/Ser. L./V/II.23 doc. Rev. 2, entered into force 18 July 1978 (ACHR) art 13; Declaration of Principles on Freedom of Expression in Africa 2002, African Commission Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res. 62 (XXXII) 2002 (African Declaration 2002) sec 4.

information 'gathered by public officials at public expense is owned by the public'.[46] Like Mendel, Weeramantry views the right to freedom of expression and information as underpinning the right to health because, as it is with every human right, its enjoyment requires an 'ancillary' right necessary for its exercise.[47] The only drawback which stems from Weeramantry's conceptualisation is his subordination of access to information to other rights. Second, Coliver, likewise many legal experts conceptualise women's right to SRHI from a cluster of rights such as freedom of expression and information, equality and non-discrimination, right to life, right to health, right to dignity and the right to private and family life. These latter rights impose both negative and positive obligations on the government to provide 'information necessary for reproductive health and choice'.[48] She argues forcefully that the obligation necessary for the protection and promotion of reproductive health and choice includes:[49]

> [t]he affirmative obligation to provide information necessary for the protection and promotion of a minimum standard of reproductive health (including information about effective methods of contraception), where women, particularly those at high risk, such as rural women and adolescents, do not otherwise have access to such information.

A third understanding of women's right to SRHI stems from the right to personal information such as medical or clinical records. This one has been invoked from a combination of the right to privacy and freedom of expression.[50] This is an extension of the right to control information or data about oneself held by public and private entities and to effect corrections thereto or update such information subject to such countervailing interests permissible in a democratic society.[51] However, even when the rationales for access to SRHI exist in all these conceptualisations, their combined effect is to render the contours of the right more uncertain and at best an instrumental right. Moreover, that all the rationales reference human dignity as their baseline makes the argument for re-conceptualising women's right to SRHI such as this paper aims to be more compelling and helps to denote the right's status in international law.[52] The concept of substantive equality thus provides the leverage for the understanding of access to information as an enabler of the substantive enjoyment of other rights, especially the

46 J Stiglitz 'On liberty, the right to know, and public disclosure: the role of transparency in public life' (1999), http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_On_Liberty_the_Right_to_Know_and_Public.pdf (accessed 23 January 2020).

47 CG Weeranmanty 'Access to information: a new human right, the right to know' (1994) *4 Asian Yearbook of International Law* 99, 102.

48 S Coliver 'The right to information necessary for reproductive health and choice under international law' (1995) 44 *The American University Law Review* 1292.

49 Coliver (n 48) 1280.

50 Bishop (n 2) 106-107; Inter-American Commission on Human Rights (n 42).

51 Inter-American Commission on Human Rights (n 42) 29-33.

52 Weeranmanty (n 47) 99, 111.

realisation of socio-economic rights.[53] Flowing from the foregoing is that the right of access to information in the socio-economic field can serve to equalise the power relations in a polity.[54] Obviously then, information is both empowering, reassuring and creates awareness, especially government information required to upturn disadvantages in society.[55] By extrapolation, this resonates for women's right to SRHI of women and girls whose reproductive rights are in jeopardy from the observance of discriminatory cultural norms. Timely access to healthcare information and services can prevent, alleviate and even obviate the unnecessary reproductive health complications and burdens that adolescents and women in disadvantaged settings bear. In addition, 'education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any ... prohibited grounds'[56] to inure in an egalitarian society, and be flexible enough to 'adapt to the needs of changing societies and communities'.[57] Moreover, UN human rights bodies, intergovernmental institutions, and policy think-tank have played an activist role in etching out the normative frontiers of sexual and reproductive health and rights (SRHR) pertaining to all individuals, but more so for women.[58] Since then, gradual progress has been made to seek a more comprehensive approach of reproductive health and rights presumed on the lifecycle from adolescence, reproductive age, midlife to older adulthood with access to education and information required for informed decision-making. This has pushed the recognition of health rights and development at the centre of policies, programmes and implementation plans which emphasise the strategic roles of information, education, community mobilisation and gender equality in the provision and access to quality healthcare.

A comprehensive reproductive health approach not limited to concerns for women of reproductive age but extended to include the lifetime concerns for men and women from birth to old age beginning with the Cairo International Conference on Population and Development (ICPD) in 1994[59] and the Beijing Fourth World Conference on Women (FWCW) in 1995.[60] These rights began to

53 S Jagwanth 'The right to information as a leverage right' in R Calland & A Tilley (eds) *The right to know, the right to live: access to information and socio-economic justice* (2002) 3.

54 As above.

55 Bishop (n 2) 73; RA Wildeman 'Access to information can fundamentally alter society's power relations' (2009) 3.

56 Bishop (n 2) 86.

57 Bishop (n 2) 87.

58 O Gbadamosi *Reproductive health and rights: African perspectives and legal issues in Nigeria* (2007) 20-21.

59 Report of the International Conference on Population and Development (ICPD) 7, UN Doc A/CONF.171/13 (1994); Balogun & Durojaye (n 32) 374-376.

60 Fourth World Conference on Women Beijing (FWCW) held on 15 September 1995, A/CONF.177/20.

receive a lot of attention in contemporary times,[61] particularly paragraph 7(2) of ICPD and as paragraph 94 of FWCW state thus:[62]

> Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system ... Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice ... and the right of access to appropriate health-care services ... It also includes sexual health [for] ... the enhancement of life and personal relations ...

The 1994 ICPD Programme of Action describes reproductive health as that which

> [c]oncerns the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour.

The foregoing conferences and meanings ascribed to sexual and reproductive health are integral to the subsequent emergence of reproductive rights in international human rights instruments[63] though asymmetrically slanted towards the reproductive than sexual essence.[64] Subsequently, sexual health was defined as 'a state of physical, emotional, mental and social well-being in relation to sexuality.'[65] SRH encompasses child-bearing or reproductive health-care services, sexuality, sexual education, bodily integrity, consensual sexual relations and marriage, etc.,[66] requiring the mastery of the complex nature of human physiology and related healthcare facilities, goods, services and conditions. Women's right to SRHI would therefore involve mandatory access to or the right to seek, receive and impart all information relevant to the cyclical enhancement of human life, social well-being and personal development. In addition, it would entail the training and equipping of health practitioners with technical capacity and knowledge to facilitate the dissemination of relevant information. Relatedly, the New York Law School has determined that health information has four dimensions, viz; information related to treatment of diseases in formal settings (professional healthcare information); information for disease prevention and availability of health services (health education); information emanating from treatment of diseases in familial or informal settings (lay healthcare information); and information required for participatory healthcare decision-making

61 Gbadamosi (n 58) 16-22.

62 FWCW (n 60).

63 Gbadamosi (n 58).

64 Balogun & Durojaye (n 32) 376.

65 CESCR General Comment 22.

66 World Health Organisation 'Defining sexual health, Report of a technical consultation on sexual health' (2006) 5.

(health policy information).[67] Dytz has also described health information as 'one of the rights of the user of the public health care system'.[68] Reproductive healthcare would then involve having access to a range of good-quality information and services: family-planning counselling, information, education, including access to safe and effective contraceptive methods; education for prenatal care, safe delivery and post-natal care, infant and women's healthcare. It would also signify: the prevention of unsafe abortion, reproductive tract infections, sexually transmitted diseases (STDs) and other reproductive health conditions; prevention of harmful practices such as FGM/C; and information, education and counselling on human sexuality, reproductive health and responsible parenthood.[69] However, considering Africa as the world's most youthful continent, the necessity for age-appropriate CSE for adolescents cannot be overemphasised.[70]

Adolescents often engage in risky behaviours but must make decisions vital to their sexual wellbeing with high quality, comprehensive reproductive and sexual health education offering information on reproduction, contraception, STDs, etc. This would help them to understand the importance of their sexuality and the value of equality in gender relations. Incidentally, sexuality education is relatively new and just beginning to take root in Africa.[71] Since 2013, 21 countries in Eastern and Southern Africa agreed to increase access to sexuality education for the youths in a structured manner[72] while several West African countries have joined the bandwagon with donor funding.[73] The basic challenge with extant CSE programmes is their HIV-tilted nature reflecting donor biases.[74] The Gambia, for instance, has plans for 'age appropriate' comprehensive sexual and reproductive health and rights (SRHR) education and family planning and contraceptive use.[75] The UNESCO's International Technical Guidance on Sexuality Education proposes the subjects' curricula on key youth-related developmental issues such as interpersonal relationships, life skills, sexual behaviour, culture, etc. While such themes are considered best practices by researchers, the emphasis on gender norms

67 New York Law School 'Access to health information under international human rights law' (2012), http://www.hifa2015.org/hifa2015-and-human-rights/ (accessed 14 January 2020).

68 JLG Dytz 'Right of access to health information' (2004) 57 *Revista Brasilera Enfermagen* 139, 139.

69 United Nations, Reproductive Health Policies (2017) 1-2.

70 R Engelman 'Sexuality education begins to take root in Africa' *NewSecurityBeat*, https://www.newsecuritybeat.org/2020/03/sexuality-education-begins-root-africa/ (accessed 15 August 2024).

71 As above.

72 As above.

73 As above.

74 F Murunga and others 'Comprehensive sexuality education in Sub-Saharan Africa' (2019) 8.

75 See The Gambia 'Combined report on the African Charter on Human and Peoples' Rights for the period 1994 and 2018 and initial report under the Protocol to the African Charter on the Rights of Women in Africa' (2018) 153, https://www.rightofassembly.info/assets/downloadsReport_of_Gambia_to_the_ACHPR_(2018).pdf (accessed 20 October 2024).

particularly for gay and lesbian young people will surely prove problematic for African states. Though discussion of topics regarded as 'no-go areas' in African societies are now being opened-up by African scholars, the dearth of teachers, sex taboos, and the fear of initiation of adolescents into early sex life and relationships considered immoral or 'unAfrican' will likely hinder CSE implementation without broad-based education across societal strata.[76] By analogy, the European Court on Human Rights, for instance, showed sensitivity to parents' religious and philosophical convictions though it upheld a compulsory sex education course 'conveyed in an objective, critical and pluralistic manner' and does not aim at indoctrination.[77] Human rights education stakeholders in African states must assist to find that middle ground in schools' educational curricula that balances educational needs and societal norms. An analysis of international human rights treaties and interpretations as regards women's right to SRHI is further required in this regard.

3 WOMEN'S RIGHT TO SRHI: INTERNATIONAL AND REGIONAL STANDARDS AND CONSENSUS DOCUMENTS

Women's right to SRHI obligates states to prevent and remedy the denial of human dignity occasioned through the evisceration of women's sexual and reproductive health needs and choices.[78] Women's right to SRHI also implicates issues of timely access to accurate sexual and reproductive health information which states have international human rights obligations to provide to empower vulnerable girls and disadvantaged women to make informed decisions as regards their sexuality, bodily integrity, and private and family lives. The emergence of women's right to SRHI reflects the significance of the international human rights' normative framework on human dignity, which particularly underwrites the advancement of rights pertaining to vulnerable women and girls. Hence, this part clarifies the content, scope, and status of women's right to SRHI developed under the auspices of the United Nations, the African Union, comparative

76 CK Wangamati 'Comprehensive sexuality education in sub-Saharan Africa: adaptation and implementation challenges in universal access for children and adolescents' (2020) 28 *Sexual and Reproductive Health Matter*s 56-61; MA Adesina & II Olufadewa 'Comprehensive sexuality education (CSE) curriculum in 10 East and Southern African countries and HIV Prevalence among the youth' (2020) 4 *European Journal of Environment and Public Health* 5-6; FM Wekesah and Others 'Comprehensive sexuality education in Sub-Saharan Africa' (2019) 8-10; *Open Door Counselling and Dublin Well Women Centre v Ireland* (1992) 15 EHRR 244.

77 *Kjeldsen v Denmark* (1976) 1 EHRR 711 para 53.

78 Coliver (n 48) 1297.

regional bodies, and their monitoring mechanisms, reporting and interpretive frameworks.[79]

3.1 International and regional treaties and consensus documents

Women's right to SRHI has emerged from the basic understanding of the principle of substantive equality in treaties and consensus documents and their elaborations by international human rights agencies. These include the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 2006 (CRPD),[80] the Convention of the Rights of the Child (CRC),[81] ICESCR,[82] CAT, ICCPR, and CEDAW.[83] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol or Maputo Protocol) 2003,[84] and comparative regional human rights authorities[85] and national constitutions[86] are also noteworthy. Whether conceived from a narrow position of right to reproductive self-determination and family planning choices-related information[87] or a wider 'right to' information required to enjoy all human rights,[88] women's right to SRHI is firmly rooted in the principle of substantive equality.[89] This principle underlies the pronouncements of UN treaty-based bodies in various reports, Concluding Observations, General Comments and other

79 As above.

80 Art 23(1)(b) (right to age-appropriate reproductive health information).

81 Art 24(3).

82 Art 12.

83 Art 12 (the right to the highest standard attainable of physical and mental health without discrimination and ensure gender equality in access to healthcare).

84 Adopted 2003 entered into force 25 November 2005, OAU Doc CAB/LEG/66.6) art 2 (states to take positive action to address inequalities between women and men), arts 2(2) & 5(a) (states to provide public information on strategies to eliminate harmful traditions), art 4(1)(h) (prohibition of medical experiment on women without informed consent), art 14(1)(e) (right to information on health status), art 14(2)(a) (rural women's right to reproductive health information).

85 Eg, the European Court of Human Rights held that the right to life guaranteed under article 2 of the European Charter may be violated if a state fails to prevent unintentional loss of life during pregnancy or childbirth (*Tavares v France* App 16593/90). The principle of extraterritoriality is found in various European legislations pertaining to harmful African practices, such as FGM. The most promising example in this regard is Spain, which under its Constitutional Act 3/2005, provides that FGM committed abroad is a crime.

86 The Constitution of the Republic of South Africa 1996 Act 106 1996 (as amended) art 9(2).

87 Coliver (n 48) 1285.

88 See, for instance: freedom of expression – ICCPR, art 19; right to health: Universal Declaration, UN General Assembly Resolution 217 A (III), 10 December 1948 (Universal Declaration) art 25; ICESCR, art 12; CEDAW, arts 12(1)(2)(b) & 14(2); CRC, art 24(1) & (2); right to personal integrity – ICCPR, arts 7& 9(1); right to be free of sexual and gender violence – CEDAW, arts 5 and 6; right to equality and non-discrimination in the area of reproductive health – ICCPR, art 2(1).

89 See JGD Trimiño 'Reproductive rights, international regulation' (2012) 1-2.

documents affirming women's right to SRHI. Article 10(h) of CEDAW requires that women have 'specific educational information to help to ensure the health and well-being of families, including information and advice on family planning'. The CEDAW Committee has issued General Recommendation 24 on Women and Health,[90] which *inter alia* compels states to ensure the right to sexual health information and education for all women particularly of adolescents and girls on family planning methods.[91] Also, Recommendation 24 reaffirm women's right to access healthcare services, information, and education based on equality with men under article 12 of CEDAW.[92] The Committee has emphasised systematic sexuality education programmes as priority for states including specific contents like reproductive rights information, responsible sexual behaviour and parenthood, and sexual and reproductive health (SRH), particularly for boys and girls, while stressing the correlation between STI and teenage pregnancy prevention and family planning.[93]

Similarly, CESCR has encouraged sexual and reproductive health education in school curricula and called for public awareness on these through sexuality education in schools and awareness campaigns to combat maternal and child mortality, while advocating comprehensive sexuality education programmes to eliminate the practice of FGM.[94] It aims to equip children and young people with knowledge, skills, attitudes and values that empower them to realise their health, well-being and dignity. In General Comment 14,[95] CESCR, cognisant of the underlying social determinants of health such as freedom to make responsible decisions and choices, freedom from violence, and discrimination concerning one's body and health, interpreted article 12(1)[96] and (2)(a)[97] of ICESCR as not just about being healthy. Rather, it conceived the right to health as an inclusive right and an entitlement to accessible and quality health education and information, including on sexual and reproductive health.[98] Furthermore, CESCR affirmed that the 'realisation of women's right to health requires the removal of

90 Women and Health, 11th Session, February 1994, UN Doc HRI/GEN/1/Rev. 1 (29 July 1994).

91 OA Savage-Oyekunle & A Nienaber 'Adolescents' access to emergency contraception in Africa: an empty promise?' (2017) 17 *African Human Rights Law Journal* 476, 523.

92 Centre for Reproductive Rights (n 31) 3.

93 Centre for Reproductive Rights (n 31) 3-4.

94 Centre for Reproductive Rights (n 31) 8.

95 The Right to the Highest Attainable Standard of Health, Twenty-second session of the CESCR E/C.12/2000/4 (11 August 2000), http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf (accessed 28 February 2020).

96 The right to the enjoyment of the highest attainable standard of physical and mental health.

97 Obligation of states parties to take steps necessary for the reduction of stillbirth and infant mortality and healthy development of the child.

98 See also CESCR, General Comment 22 (The right to sexual and reproductive health) (2016) UN Doc E/C.12/GC/22, https://www.escrnet.org/resources/general-comment-no-22-2016-right-sexual-andreproductive health (accessed 28 February 2020).

all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health'.[99]

Allied to the foregoing, the Committee further asserted that the right to seek, receive and impart information on health issues is a component of the general right to health and reproductive health services, especially recommending adolescent or 'youth-friendly' healthcare including information and counselling. The CAT once recommended that a state party must take 'necessary steps to eradicate the practice of female genital mutilation, including through nationwide awareness-raising campaigns'.[100] Relatedly, HRC in its General Comment 28: 'Equality of Rights Between Men and Women' interpreted the right to equality before the law protected by article 26, as requiring states parties to eliminate discrimination against women in public and private life, including education and service provision while it has requested a state party which removed sexuality education from the school curriculum to reintroduce it in public schools.[101] Moreover, international human rights law obliges states to respect, protect and fulfil all rights, the right to health not excepted.[102] The obligation to respect demands that states refrain from censoring, withholding or intentionally misrepresenting health-related information.[103] Obligations to protect include, *inter alia* measure to ensure that third parties do not limit people's access to health-related information and services.[104] The obligation to fulfil relates to the dissemination of appropriate information relating to healthy lifestyles, harmful traditional practices and which helps to make informed health choices.[105] Consequently, states' duty regarding SRHI in CESCR's view presupposes not just a negative freedom of non-interference with information necessary for women's expression of sexuality or bodily autonomy;[106] it includes a positive obligation to provide information on medical facilities, goods and services related thereto.[107] Interestingly, regional bodies have followed the example and sometimes performed creditably better than UN bodies on matters pertaining to women's right to SRHI as the African system exemplifies.

99 General Comment 14 para 21.

100 Centre for Reproductive Rights (n 31).

101 Concluding Observations: The Human Rights Committee, see Centre for Reproductive Rights (n 31) 6.

102 CESCR General Comment 14 paras 34-7.

103 CESCR General Comment 14 para 34.

104 CESCR General Comment 14 para 35.

105 CESCR General Comment 12: The right to adequate food (art 11 of the Covenant) UN Committee on Economic, Social and Cultural Rights (CESCR) para 37, https://www.refworld.org/docid/4538838c11.html (accessed 25 February 2020).

106 General Comment 14 paras 4 & 11.

107 General Comment 14 paras 12(a), (b)(i), (ii), (iii), (iv), 12(c) & 12(d).

3.2 African regional treaty bodies and jurisprudence

The African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) are designated to monitor the implementation of the African Charter on Human and Peoples' Rights (African Charter)[108] and interpret other human rights treaties like the Maputo Protocol to which African states are signatory. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) monitors the African Convention on the Rights and Welfare of the Child (African Children's Charter).[109] The foregoing African regional instruments have received encouraging elaborations and jurisprudential expositions[110] in terms of international law through their designated treaty bodies and special mechanisms. Article 16 of the African Charter guarantees 'the right to enjoy the best attainable state of physical and mental health'. The African Commission's Resolutions and General Comments on the content of the right cut across maternal mortality, access to medicines and reproductive health services and information as human rights. The Maputo Protocol was the first comparative human rights treaty to expressly obligate states to ensure respect for the right of women to sexual and reproductive health.[111] This right includes the rights such as to family choices,[112] choice of contraceptive,[113] self-protection against sexually-transmitted infections,[114] to be informed of one's health status and a partner's, particularly if affected with STDs,[115] and family planning education.[116] Furthermore, article 5 of the Protocol enjoins state parties to take legislative and other measures to prohibit FGM in all its ramifications while article 12(1)(c) enjoins state parties to protect women, especially the girl-child from all forms of abuse.[117] Corroborating Stefiszyn,[118]

108 Adopted 27 June 1981, entered into force 21 October 1986, (1982) 21 ILM 58.

109 OAU Doc CAB/LEG/24.0/49 (1990) (entered into force 29 November 1999).

110 *Purohit and other v The Gambia* (2003) AHRLR 96 (ACHPR 2003); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Government of Namibia v LM and others* (forcible sterilisation without informed consent); *Ahamefule v Imperial Hospital and other* (testing for HIV without consent); *Kingaipe and Another v the Attorney General* (forcible testing for HIV of military personnel in Zambia); E Durojaye *Litigating the right to health in Africa* (2015).

111 Art 14.

112 Art 14(b).

113 Art 14(c).

114 Art 14(d).

115 Art 14(e).

116 Art 14(g).

117 AO Ayanleye 'Women and reproductive health rights in Nigeria' 6 (2013) *OIDA International Journal of Sustainable Development* 9, 13.

118 K Stefiszyn 'Adolescent girls, HIV, and state obligations under the African Women's Protocol' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 163.

Mkwananz,[119] and Assefa,[120] the African Commission and the African Children's Committee recently affirmed the tenure of article 5 on the need for 'public awareness in all sectors of society regarding harmful practices through information, formal and informal education' and FGM-related content in formal education towards its eradication.[121] The African Commission adopted General Comment 1 on article 14(1)(d) (the right to self-protection and the right to be protected from HIV and sexually transmitted infections) and 14(e) (the right to be informed on one's health status and the health status of one's partner).[122] The African Commission reckons that the right protected in article 14(1)(d):[123]

> [I]ncludes women's rights to access information, education and sexual and reproductive health services … are also intrinsically linked to other women's rights including the right to equality and non-discrimination … [the violations of which] will impact on women's ability to claim and realise … [her] right to self-protection.

In addition, the African Commission 'recognises that an enabling legal and policy framework [for implementing access to sexual and reproductive health information protected under article 14(1)(d) and (e)] is intrinsically linked to women's right to equality, non-discrimination and self-protection'.[124] The Commission has issued resolutions relating to topical issues affecting the sexual and reproductive lives of Africans.[125] The African Commission's also adopted General Comment 2 on the Maputo Protocol which recognises the right to informed consent and states' obligation to provide women and girls with accessible information on abortion, family planning, and maternal health.[126] Article 14(2)(a) of the Maputo Protocol provides that state parties shall take all appropriate measures to 'provide adequate, affordable and accessible health services, including information, education and communication programmes to women,

119 S Mkwananz 'It takes two to tango!: The relevance and dilemma of involving men in the realization of sexual and reproductive health and rights in Africa' in Durojaye, Mirugi-Mukundi & Ngwena (n 118) 80.

120 AG Assefa 'Monitoring implementation of the sexual and reproductive health and rights of adolescents children: The role of the African Committee of Experts on the Rights and welfare of the Child' in Durojaye, Mirugi-Mukundi & Ngwena (n 118) 231.

121 The African Children's Committee and African Commission 'Joint General Comment on Female Genital Mutilation' (2023) 13, 21.

122 General Comment 1 on article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 6 November 2006), achpr_instr_general_comments_art_14_rights_women_2012_eng.pdf (accessed 27 February 2020).

123 General Comment 2 para 11.

124 General Comment 2 para 33.

125 Balogun & Durojaye (n 32) 378.

126 General Comment 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 28 November 2014) On Article 14(1)(a)(b)(c) and (f), achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf; https://www.achpr.org/legalinstruments/detail?id=13 (accessed 24 February 2020); Maputo Plan of Action for the implementation of the Continental Guiding Framework and the Abuja Declaration.

especially those in rural areas' on which General Comment 2 also elaborates upon. Commenting on a related instrument, CESCR remarked thus:[127]

> The enjoyment of rights is non-discriminatory and grants gender equality when women are well informed of products, procedures and health services that are specific to them and when they actually have access to the latter ...

By the foregoing, women's right to SRHI has thus received a boost within the African regional human rights system. Furthermore, whilst most African countries might not have explicitly recognised women's right to SHRI as a justiciable right in their constitutional frameworks, the right is embedded within the right to health guaranteed in the numerous human rights treaties and instruments they have ratified.[128] For instance, in *Purohit and Another v The Gambia*,[129] the African Commission relied on the ESCR Committee's General Comment 14[130] to affirm the state's obligation under article 16 of the African Charter to take concrete and targeted steps within available resources to ensure full realisation of the right to health. The African Commission explicitly explained the nature of the right to health in the African Charter as embracing health facilities, goods and services to be guaranteed to all without discrimination of any kind.[131] The African Commission has interpreted article 14(1)(e) and (2)(a) of the Maputo Protocol which enjoins states to 'take all appropriate measures' to provide adequate and accessible health services, including information and education to women.[132] The African Commission reasoned that '[t]he right to be informed on one's health status includes the rights of women to access adequate, reliable, non-discriminatory and comprehensive information about their health'.[133] Hitherto, there was little legal challenge to non-access to sexual and reproductive health services (SRHS) and violence against women despite 'the fact that African women continue to bear the greatest burden of sexual and reproductive ill-health in the world'.[134] Nowadays, activists and civil society have become more assertive on women's rights before African regional and national judicial bodies. Incidentally, African treaty-monitoring bodies[135] and special mechanisms are also well-positioned to provide authoritative meaning and interpretive gloss on several aspects of women's SRH.[136]

127 General Comment 2 para 31.

128 See Balogun & Durojaye (n 32) 370, 375-377.

129 (2003) AHRLR 96.

130 'The right to the highest attainable standard of health', UN Committee on Economic, Social and Cultural Rights, UN Doc E/C/12/2000/4 para 12.

131 Balogun & Durojaiye (n 32) 389.

132 General Comment 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

133 General Comment on art 14(1)(d) and (e) of the Protocol to the African Charter on the rights of women (2014) para 13.

134 Balogun & Durojaiye (n 32) 386.

135 African Commission on Human and Peoples Rights' (African Commission); African Committee of Experts on the Rights and Welfare of the Child (ACERWE).

136 Balogun & Durojaye (n 32) 394.

A 2022 African Children's Committee decision proves invaluable in this regard. In *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* (*Tanzanian girls' case*),[137] the complainants alleged that the Respondent's failure to uphold its obligation to respect, protect, and fulfil the rights of Tanzanian girls to health information and services the deprivation of which results in unwanted pregnancy. It was also alleged that forcing girls to undergo pregnancy testing under similar conditions violated the rights to equality, and non-discrimination, education, RHS, etc., in the African Children's Charter.[138] The respondent argued that it has the responsibility to promote African morality and that it considered sexual relations among children to be immoral and against African values which must be punished.[139] Among the issues for determination was whether the alleged absence of access to appropriate information and youth-friendly CSE and SRHS violated the African Children's Charter.[140] The African Children's Committee found:[141]

> Children – when in situations where their health and well-being are implicated – should be provided with adequate and appropriate information to understand the situation and all the relevant aspects concerning their interests, and be allowed, when possible, to give their consent in an informed manner.

Following its Joint General Comment with the African Commission on Ending Child Marriage,[142] and Africa Commission's General Comment 2, African Children's Committee, boldly asserted: 'The fulfilment of the right to health includes the facilitation of access to information and services'.[143] The decision serves as a wake-up call for African governments to begin an introspection into African values on sexuality. Incidentally, the Centre for Reproductive Rights in New York had cause to research into the problem of criminalising consensual adolescent sexual intimacy as addressed by national courts in Africa.[144] The organisation had cause to counsel governments that resort to such punitive measures to rather enhance sexuality education and reproductive health services in ways that conform to the rights of the

137 Communication No 0012/Com/001/2019, Decision No 002/2022.

138 *Tanzanian girls'* case paras 2, 18, 25-26.

139 *Tanzanian girls'* case para 27.

140 *Tanzanian girls'* case para 76.

141 *Tanzanian girls'* case para 71.

142 Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWE) on Ending Child Marriage (2017).

143 *Tanzanian girls' case* paras 78-90, 83. See also ECW/CCJ/JUD/37/19 *Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (On Behalf of Pregnant Adolescent School Girls in Sierra Leone) v Sierra Leone*, para 33 (ECOWAS Court decision on the integration of SRR rights into school curricula).

144 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZAGPPHC 1, Case No 73300/10 (South Africa, High Court); *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* CCT 12/1, [2013] ZACC 35 (South Africa, Constitutional Court).

child.[145] This counsel is applicable to The Gambia, a country caught in the throes of FGM.

4 FGM AND WOMEN'S RIGHT TO SRHI IN THE GAMBIA

The constitutional review underway in The Gambia provides the leeway to redress gender-based discrimination since women in The Gambia are disadvantaged by a patriarchal stranglehold which robs them of decision-making power regarding their sexuality and reproductive health.[146] This part explores how the constitutional moment can be leveraged to address the near relapse of the extant FGM ban.

4.1 Constitutional and socio-cultural background to FGM prevalence in The Gambia

The Constitution of the Republic of The Gambia 1997 (as amended) (CRG 1977) embodies a bill of rights.[147] It guarantees the rights of every person irrespective of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, subject to respect for the rights and freedoms of others and the public interest. The fundamental rights enshrined shall be respected and upheld by all organs of state, all natural and legal persons, and enforceable by the courts under the Constitution.[148] However, section 7 of the Constitution preserves customary law applicable to local communities and integrates the application of Sharia law among Muslims as regards matters of marriage, divorce and inheritance into Gambian law. The integration of Sharia precepts into Gambian law of itself is not inherently problematic, but it's rather the societal accretion of traditional practices thereto that perpetuates violence and reinforces discrimination to women and girls such as FGM. FGM is highly prevalent among the Serahuleh, Mandinka, Fula and Jola tribes in the rural hinterland who regard it as a rite of passage from girlhood to womanhood and test of female chastity among the populace under the unifying force of Islam.[149] Though the combined threat of imprisonment issued by former President Jammeh and the enlightenment crusades led by civil society and women rights activists seriously lowered the practice, FGM has increased since the advent of democracy. The Gambia is a dualist country like all Anglo-phone commonwealth nations whereby international treaties must be

145 Centre for Reproductive Rights & Pretoria University Law Press 'Legal grounds reproductive and sexual rights in sub-Saharan African Courts Volume III' (2017) 45, 49, 53.

146 Kaplan and others (n 6) 4.

147 CRG 1997 (as amended) Chapter IV.

148 CRG 1977, sec 17(1).

149 Kaplan and others (n 6) 5.

domesticated to become binding law.[150] In Gambian jurisprudence, the Supreme Court's approach to domestic application of international human rights treaties tends to be relativist. Since inception in 2017, keen watchers of political events in The Gambia have not failed to observe that the Government of President Adama Barrow has been 'undertaking key constitutional and legal reforms to bring our laws in harmony with our international obligations'.[151]

4.2 The gap in the legal protection of women's rights in The Gambia

The Constitution of The Gambia 1977 guarantees several rights protective of women such as the right to life, the right to equal treatment with men, including equal opportunities in political, economic and social activities and prohibition of gender discrimination.[152] The National Women's Council (NWC) under the NWC Act 1980 is saddled with the mandate to seek the integration and implementation of gender and women's rights initiatives in government activities. The NWC as a representative body is composed of women in all the country's districts to foster women's participatory decision-making. The Child Rights (Amendment) Act 2016 prohibits marriage of any person less than eighteen years old and criminalises child marriage and betrothals. The Women's Act 2010 (amended by Women's (Amendment) Act 2016)[153] which was passed to advance the rights and welfare of women recognises the right to dignity,[154] access to justice and equal protection of the law,[155] prohibition of discrimination,[156] right to marry,[157] right to health,[158] and rights of rural women.[159] In addition to constitutional provisions, policy initiatives like the National Policy for the Advancement of Gambian Women 2010-2020 aims at gender parity and the optimisation of affirmative action to redress past injustices and discriminatory attitudes against women.[160] That the sufferings of women and girls subjected to FGM and other forms of gender violence remains unabated

150 CRG 1997, sec 79(1)(c); OO Shyllon 'Monism/dualism or self executory: the application of human rights treaties by domestic courts in Africa' (2009) 6-12.

151 IDEA 'From dictatorship to a new Constitution in The Gambia: issues and concerns', http://constitutionnet.org/news/dictatorship-new-constitution-gambia-issues-and-concerns (accessed 22 January 2020).

152 See CRG 1977 (as amended) secs 28-33.

153 Criminalisation of female circumcision under Women's Act 2010 which domesticated The Gambia's ratification of CEDAW and the Maputo Protocol. See S Nabaneh 'The Gambia's political transition to democracy is abortion reform possible?' (2019) 21 *Health and Human Rights* 169-179.

154 Women's (Amendment) Act 2016, sec 4.

155 Women's (Amendment) Act 2016, sec 7.

156 Women's (Amendment) Act 2016, sec 10.

157 Women's (Amendment) Act 2016, sec 24.

158 Women's (Amendment) Act 2016, secs 29-30.

159 Women's (Amendment) Act 2016, sec 33.

160 The Gambia (n 75) 121.

despite these litany of statutory rights makes the constitutional protection of the right to SRHI imperative in seriously attenuating their plight. Since CRG 1997 does not contain any definitive pronouncement on the right, the ongoing constitutional review process provides a rare opportunity to canvass for its entrenchment.

4.3 Women's right to SRHI and ongoing constitutional review in The Gambia

The recent botched attempt at overturning the FGM ban in The Gambia is a wake-up call to protect women's right to SRHI. Interestingly, The Gambia's Draft Constitution of 2020 provides for socio-economic rights including the right to health and portrays efforts towards a reasoned harmonisation of the customary and Islamic orientations of the people with human rights ethos. According to Maria Dacoster, the Interim President of the National Federation of Gambian Women, though the CRG 1997 accorded significant liberties to women it recognised some discriminatory personal laws which eroded women's rights relating to inheritance, divorce, marriage, etc.[161] This dilemma resonates for rural and urban women, a matter raised in the 'Issues Document'[162] of the Constitutional Review Committee (CRC) set up to outline areas for reform of CRG 1977 thus: 'Should specific provision be made in the new Constitution outlining the right to health care service … in a similar manner as the current Constitution – provides in relation to education?'[163]

The ongoing constitutional review thus provides a historic opportunity to redress as practicably as possible and ensure more voice for women in reproductive health decision-making. The Draft Constitution of the Republic of The Gambia 2019 consists of 20 chapters and some 315 clauses.[164] The Draft reflects some basic principles of human rights and the rule of law, religious secularism and participatory democracy.[165] Some interesting features of the Draft Constitution include judicial recourse to human rights treaties to which The Gambia is signatory as interpretive aids with respect to any constitutional right[166] and flexible 'standing' rules to aid public interest

161 N Sowe 'Women's ministry wants more stake in new draft constitution' *Foroyaa Newspaper* 24 December 2019 https://foroyaa.gm/womens-ministry-wants-more-stake-in-new-draft-constitution/ (accessed 29 February 2020).

162 Constitutional Review Commission, The Gambia, Constitutional Review Commission of The Republic of The Gambia: possible areas for constitutional reform (Issues Document) (2018) 1-45.

163 Constitutional Review Commission (n 162) 5.

164 *The Voice* 'Gambia publishes first draft constitution' https://www.voicegambia.com/2019/11/16/gambia-publishes-first-draft-constitution/ (accessed 17 February 2020).

165 *Africanews* 'Gambia close to getting first post-Jammeh constitution', https://www.africanews.com/2019/11/17/gambia-close-to-getting-first-post-jammeh-constitution// (accessed 26 February 2020).

166 Draft 2019 Constitution, sec 9(3).

litigation to enforce fundamental rights.[167] The Draft affirmed the state's positive obligation to respect constitutional rights,[168] to respect, protect, promote and fulfil fundamental rights, particularly of vulnerable groups including women,[169] and non-derogation from the protection from cruel and inhuman treatment.[170] A host of new rights including right of access to information,[171] women's rights to equal dignity and treatment with men,[172] right of children against abuse and violence,[173] and the justiciability of socio-economic rights (formerly directive principles in the 1997 Constitution) have also emerged.[174] With this array of rights alone, the recognition of women's right to SRHI will be complementary, but it could be made a subsection of the right to health in the Draft section 60(1)(a). Women must be sufficiently empowered, protected and accorded equality to exercise and enjoy their full rights as citizens. Imprecise or inadequate fundamental rights provisions to protect women's dignity like CRG 1997, section 32, require reform.

5 CONCLUSION

There is no gainsaying that women's right to SRHI is among the corpus of the ever-growing international human rights framework based on a major preoccupation among human rights bodies for substantive and gender equality which has led to the introduction of CSE in several African states. However, despite the benefits of CSE: freedom from discrimination, FGM eradication, and respect for equality, human dignity, and overall, of women's sexual and reproductive health well-being, the reality in Africa is that sexuality education is still shrouded in opaque cultural concerns. African governments must therefore ensure to involve adolescents in the development, implementation, monitoring and evaluation of the content of sexuality education and is culturally sensitive. They must also involve religious and community leaders in development of sexuality curricular and decision-making. Since The Gambia is one of the countries with the highest prevalence of FGM and other discriminatory practices that pose negative impacts to women's overall social well-being, it is hereby advocated that a well-structured provision of the women's right to SRHI be entrenched in the Final Constitution which is the expected outcome of the constitutional

167 Constitutional Review Committee, 'Explanatory memorandum to the proposed Draft Constitution' (2019) 2; Draft 2019 Constitution, sec 33(2)(c).

168 Constitutional Review Committee, 'Explanatory memorandum to the proposed Draft Constitution' (2019) 3; Draft 2019 Constitution, sec 32.

169 Draft 2019 Constitution, sec 32(1) & (3).

170 Draft 2019 Constitution, sec 69(3)(b).

171 Constitutional Review Committee, 'Explanatory memorandum to the proposed Draft Constitution' (2019) 3; Draft Constitution, sec 46.

172 Draft 2019 Constitution, sec 53(1) & (2).

173 Draft 2019 Constitution, sec 54(c).

174 Constitutional Review Committee 'Explanatory memorandum to the proposed Draft Constitution' (2019) 3-4; Draft Constitution, chapter VI, Part II (secs 60-66).

review process. The AU and its development partners must support African governments, civil society organisations and other stakeholders to advocate for the constitutional entrenchment of women's right to SRHI in other African countries while African states must eliminate barriers to access to sexuality education. This will add to the quality, resilience, inclusive and culturally compliant outlook of Africa's educational system.

Strengthening democratic governance in Africa through state reporting under the African Charter on Democracy, Elections and Governance: assessing the prospects, challenges and pathways to improved compliance

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ABSTRACT: This article addresses the role of the African Charter on Democracy, Elections and Governance (African Democracy Charter) in strengthening democratic governance in Africa by focusing on the aspect of state reporting as a pathway to improving compliance by state parties. It outlines the existing framework for state reporting under the African Democracy Charter and interrogates how this framework has been operationalised and monitored with a view to identifying existing gaps and challenges. It also locates state reporting of the African Democracy Charter within the wider constellation of state reporting on human rights instruments and explores ways in which improved coherence and coordination can be achieved as states respond to these various obligations. It then explores the role to be played by civil society in enhancing aspects of state compliance with African Democracy Charter principles. It concludes with key lessons learnt from twelve years of the instrument being in force and makes proposals for a strengthened framework on state reporting as an aide to improved implementation at the national level. The article reveals that considerable work remains to be done in the areas of universal ratification, state compliance on reporting, improved coordination of stakeholders at various levels and in enhancing the involvement of civil society to enhance public ownership and engagement. It is based on extensive desk-review and research of the African Democracy Charter, its related policy and programme documents and existing academic literature. It is also informed by deliberations, reports and releases issued by various stakeholders who have engaged in development of the African Democracy Charter as well as in advocacy related to its successful implementation at the continental, regional and national levels.

TITRE ET RÉSUMÉ EN FRANÇAIS

Renforcer la gouvernance démocratique en afrique par l'établissement de rapports par les états en vertu de la charte africaine de la démocratie, des élections et de la gouvernance : évaluer les perspectives, les défis et les voies d'une meilleure conformité

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RÉSUMÉ: Cet article aborde le rôle de la Charte africaine de la démocratie, des élections et de la gouvernance (Charte africaine de la démocratie) dans le renforcement de la gouvernance démocratique en Afrique en se concentrant sur l'aspect des rapports étatiques comme moyen d'améliorer le respect par les États parties. Il décrit le cadre existant pour les rapports étatiques dans le cadre de la Charte africaine de la démocratie et s'interroge sur la manière dont ce cadre a été opérationnalisé et suivi en vue d'identifier les lacunes et les défis existants. Il situe également les rapports des États sur la Charte africaine de la démocratie dans la constellation plus large des rapports des États sur les instruments relatifs aux droits de l'homme et explore les moyens par lesquels une cohérence et une coordination améliorées peuvent être obtenues à mesure que les États répondent à ces diverses obligations. Il explore ensuite le rôle que doit jouer la société civile dans le renforcement du respect par l'État des principes de la Charte africaine de la démocratie. Il se termine par les principaux enseignements tirés des douze années d'application de l'instrument et formule des propositions pour un cadre renforcé sur les rapports étatiques afin de contribuer à une meilleure mise en œuvre au niveau national. L'article révèle qu'un travail considérable reste à faire dans les domaines de la ratification universelle, du respect par l'État des rapports, d'une meilleure coordination des parties prenantes à différents niveaux et du renforcement de l'implication de la société civile pour renforcer l'appropriation et l'engagement du public. Il est basé sur une étude documentaire et des recherches approfondies sur la Charte africaine de la démocratie, ses documents de politique et de programme connexes et la littérature universitaire existante. Il s'appuie également sur les délibérations, rapports et communiqués publiés par diverses parties prenantes qui se sont engagées dans l'élaboration de la Charte africaine de la démocratie ainsi que dans le plaidoyer lié à sa mise en œuvre réussie aux niveaux continental, régional et national.

KEY WORDS: African Charter on Democracy; Elections and Governance; democratic governance; state reporting; compliance

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1 INTRODUCTION

1.1 The importance of state reporting in fostering compliance with treaty obligations

State reporting is considered 'one of the oldest monitoring instruments in international law'.[1] It is the process through which a state party to a treaty is required to report to an oversight mechanism periodically, in order to highlight the steps it has taken to comply with its treaty obligations. State reporting promises three major benefits. First, the report development process is a critical self-assessment by a state which reveals the challenges that it is facing in the fulfilment of its treaty obligations and this enables the adoption of policies to improve compliance. Second, state reporting requires a participatory and consultative approach that can foster improved coordination within government while also facilitating public input and partnership with key stakeholders such as civil society. This in turn generates public awareness of the state's treaty obligations and potentially secures support for state measures aimed at compliance. Third, the state reporting process enables constructive engagement between the state and the oversight mechanism on how to overcome challenges to compliance. It also equips the state with recommendations and opportunities for assistance that can enable it to improve its compliance in future.[2] Therefore, the general objective of state reporting is to facilitate scrutiny of relevant government policies in order to enable informed and principled policy making towards compliance with treaty obligations.

It is on this basis that the African Charter on Democracy, Elections and Governance (African Democracy Charter) requires state parties at two-year intervals, to submit periodic reports that should enable the African Union (AU) to establish the progress being made towards realising democratic governance as a continentally shared value. The remainder of the introduction section of this article locates democratic governance as a constitutive element of African shared values. The second part of the article provides an overview of the state reporting mechanism under the African Democracy Charter. The third part reflects on the relationship between the African Democracy Charter and other related state reporting obligations under the AU system; in order to draw lessons and explore the prospects for improved coordination between reporting frameworks. The fourth part reflects on the role that Regional Economic Communities can play in improving state compliance with the African Democracy Charter and also reflects on the role to be played by civil society. The article concludes with a

1 http://opiniojuris.org/2020/11/27/a-little-less-conversation-a-little-more-action-please-state-reporting-and-the-treaty-body-review-2020/ (accessed 12 June 2024).

2 OHCHR *Reporting to the United Nations Human Rights Treaty Bodies Training Guide: Part I- Manual* (2017) 27.

series of recommendations aimed at improving state compliance with the reporting requirements under the African Democracy Charter.

1.2 Democratic governance as a constitutive element of African shared values

The African Union (AU) through its Constitutive Act in article 4(m) recognises respect for democratic principles, human rights, the rule of law and good governance as foundational principles for its functions as a union. This is echoed as an aspiration within Agenda 2063, the AU's visionary blueprint for Africa's transformation to a peaceful, secure, stable and well-integrated continent.[3] Democratic governance is further embedded in the tapestry of the AU as part of the African Shared Values which are defined as follows:[4]

> those norms, principles and practices that have been developed or acquired, which provide the basis for collective actions and solutions in addressing the political, economic and social challenges that impede Africa's integration and development.

An integral step to make these values tangible is the African Democracy Charter. The African Democracy Charter is recognised as the normative instrument that encapsulates these shared values on democratic governance as well as those of human rights, rule of law, peace and security.

Indeed, the African Democracy Charter consolidates the experiences and values extracted from Africa's third wave of democratisation which started in the late 1980s and saw the autocratic regimes that took hold in the continent after independence give way to a fresh democratic wave on the continent.[5] Illustratively, some of the African Democracy Charter provisions drew their inspiration from and complemented preceding instruments such as the OAU Declaration on Principles Governing Democratic Elections, the New Partnership for Africa's Development (NEPAD) Declaration, the Declaration on Democracy, Political, Economic and Corporate Governance and the African Peer Review Mechanism (APRM) Base Document.[6]

Beyond providing key definitions and an operational framework for its implementation, the African Democracy Charter elaborates on democratic governance values through a series of provisions covering topical issues such as: the objectives and principles of the African Democracy Charter; democracy, rule of law and human rights; the culture of democracy and peace; democratic institutions; democratic

3 https://au.int/agenda2063/goals (accessed 12 June 2024).

4 Africa Governance Institute as cited in FA Agwu 'Shared values in Africa's integration and unity' (2011) 3(1) *Africa Review* at 4.

5 K Matlosa 'The African Charter on Democracy, Elections and Governance: origin and odyssey' (2018) 5(3) *African Journal of Democracy and Governance* 31.

6 AM Mangu 'African civil society and the promotion of the African Charter on Democracy, Elections and Governance' (2012) 12(2) *African Human Rights Law Journal* 351-352.

elections; sanctions in cases of unconstitutional changes of government; and political, economic and social governance. It is on this basis that it has been viewed as an accountability framework. It provides a benchmark to assess state parties' commitment to democratic governance values while also enabling comparative analysis between states and an analysis of governance trends on the continent.[7] This value proposition of the African Democracy Charter calls attention to the status of its acceptance by AU member states and whether its existence has indeed shaped the governance trends on the continent.

February 2022 marked 10 years since the African Democracy Charter came into force and while some gains have been made in the arena of democratic governance, this decade has been described as one of 'governance progress threatened by worsening security, democratic backsliding, and COVID-19'.[8] With regard to progress, it is notable that as at July 2024, 39 out of the AU's 55 member states had ratified the African Democracy Charter while a further seven member states have submitted their signature to the instrument as an integral step towards ratification.[9] This means that approximately 71 per cent of Africa's governments are bound by the provisions of the African Democracy Charter as state parties to this instrument while 84 per cent of Africa's governments by way of signature have at least indicated a willingness to abide by these principles.

This majority embrace of the African Democracy Charter by member states has run in tandem with the progressive deepening of various democratic benchmarks on the continent. Regular and multiparty elections, peaceful transitions of power and the establishment of independent institutions have materialised in high frequency against the backdrop of the African Democracy Charter coming into force. As will be discussed in later sections of this article, the African Democracy Charter has also enabled the strengthening of the AU's institutional capacity in responding to democratic governance priorities such as election observation, citizen engagement and participation. Furthermore, the African Court on Human and Peoples' Rights (African Court) has declared the African Democracy Charter to be a human rights instruments and thus made democratic governance principles justiciable by making it 'incumbent on state parties to ensure that they respect the rule of law, democratic governance and the right to equality before the law'.[10] This was established in the case of *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* when the Court held that the African Democracy Charter is a human rights instrument since its provisions requiring states to establish independent and impartial electoral bodies was in furtherance of the

7 https://ecdpm.org/work/guide-african-charter-democracy-elections-and-governance (accessed12 June 2024)

8 Mo Ibrahim Foundation *2022 Ibrahim Index of African Governance: Index Report* (January 2023) 14.

9 https://au.int/en/treaties/african-charter-democracy-elections-and-governance (accessed 12 June 2024).

10 B Kioko 'The African Charter on Democracy, Elections and Governance as a justiciable instrument' (2019) 63 *Journal of African Law* 61.

rights enshrined in article 13 of the African Charter on Human and Peoples' Rights.[11] That said, this decade of the African Democracy Charter being in force has also witnessed significant setbacks.

While elections have become a frequent occurrence, questions of transparency and credibility have persisted and, in some cases, caused political violence. A 2021 study indicated that in the over 100 elections undertaken in 44 African countries for the period of 2011-2017, some form of electoral violence at some point of the electoral cycle was experienced.[12] While peaceful transitions of power in Africa have become the norm rather than the exception, episodes of Unconstitutional Changes of Government (UCG) continue to occur. Illustratively, the 2023 Africa Governance Report (AGR) noted that the continent had experienced 18 instances of UCG in the period of 2003-2022; with six of those instances happening between 2019 and 2022.[13]

Beyond the familiar dimension of military coups, the UCGs also entail unconstitutional constitutional amendments;[14] which are driven by nefarious aims such as subverting the public will and seeking to either eliminate or resist term-limits or see incumbents skew electoral laws in their favour. Indeed, a 2023 study on military coups and the need for democratic renewal in Africa identified constitutional manipulation as a proximate factor leading to UCGs since it causes the deterioration of civic trust in government performance as well as in the very notion of democracy.[15] Additionally, more than half of African states within the last decade have also registered deterioration in the critical aspects of security and rule of law and on participation, rights and inclusion.[16]

In light of the above catalogue of progress and setbacks, this article focuses on the African Democracy Charter state reporting framework as a way to effectively assess the level of commitment and compliance by member states to this instrument as a manifestation of the African shared values on democratic governance. As Matlosa importantly highlights, 'it is rather the domestication and implementation' of the provisions of the African Democracy Charter that 'speaks volumes'.[17]

11 MJ Ayissi *'Actions Pour La Protection Des Droits de l'Homme (APDH) v Republic of Côte d'Ivoire* (Afr. Ct. H.P.R.)' (2017) 56(3) *International Legal Materials* 584.

12 KJ Kewir & N Gabriel *Causes of election violence in Africa* 4.

13 African Peer Review Mechanism (APRM) and African Governance Architecture (AGA) 'The Africa Governance Report 2023: Unconstitutional Changes of Government in Africa' (2023) 5.

14 Y Roznai 'Unconstitutional constitutional amendments – the migration and success of a constitutional idea' (2013) 61(3) *The American Journal of Comparative Law* 657–719; https://www.peaceau.org/en/article/declaration-on-unconstitutional-changes-of-government-in-africa (accessed 12 June 2024).

15 United Nations Development Programme *Soldiers and citizens: military coups and the need for democratic renewal in Africa* (2023) 16.

16 Mo Ibrahim Foundation (n 8) 16.

17 K Matlosa 'Governance in Africa: AU achievements, challenges and prospects' in W Okumu & A Atta-Asamoah (eds) *The African Union at 20: African perspectives on progress, challenges and prospects* (Institute for Security Studies 2023) 161.

2 AN OVERVIEW OF THE STATE REPORTING MECHANISM UNDER THE AFRICAN DEMOCRACY CHARTER

The state reporting, evaluation and monitoring process in the Africa Democracy Charter is designed to foster compliance through cooperation that is based on consultation, analysis and persuasion as opposed to punitive or coercive measures.[18] In its essence and methodological approach, the state reporting process is established and intended to be a constructive and open dialogue between the state party and the African Governance Platform (AGP) as well as national stakeholders in order to ascertain the status of implementation, existing best practices, the challenges encountered and possible solutions. The intent is to facilitate the progressive realisation of democratic governance principles by African states. This section will first outline the legal and institutional framework for state party reporting under the African Democracy Charter and then proceed to assess its efficacy thus far in order to identify the emerging challenges and enable an inquiry into the roles that various stakeholders can play in resolving these challenges.

2.1 The African Democracy Charter's legal and institutional framework for reporting

Operationalising the African Democracy Charter is premised on the commitment of state parties to give effect to its provisions through political will and initiating appropriate legislative, policy and administrative measures at the national level. The African Union Commission (AUC) on its part is required to develop the requisite benchmarks against which the actions of state parties can be evaluated while also offering the states both technical and financial assistance towards a progressively improved rate of compliance.[19] It is on this basis that a state reporting and monitoring mechanism for the African Democracy Charter arises.

Article 49(1) requires state parties to the Charter to submit reports every two years from the date the Charter came into force. The report is to be submitted to the AUC, which is tasked with coordinating the evaluation process with key organs of the AU that possess mandates around the African Democracy Charter themes as well as with Regional Economic Communities (RECs) and appropriate national-level structures.[20] The AUC discharges its evaluation role through the African Governance Architecture (AGA) and its institutional

18 M Wiebusch and others 'The African Charter on Democracy, Elections and Governance: past, present and future' (2019) 63(S1) *Journal of African Law* 9 at 27.

19 African Democracy Charter art 44(2)(A)(a).

20 African Democracy Charter art 45(c).

framework, the African Governance Platform (AGP). The AGA is a platform for dialogue that brings together various stakeholders 'who are mandated to promote good governance and strengthen democracy in Africa, in addition to translating the objectives of the legal and policy pronouncements in the AU Shared Values'.[21]

As the institutional framework, the AGP operates in two concentric circles: the first circle brings together AU organs, institutions and RECs which hold a formal mandate on matters of democracy, governance and human rights.[22] The second circle brings in continental stakeholders from civil society, the diaspora, the private sector and development partners. It is the first circle of AGP stakeholders that is entrusted with the evaluation of state reports submitted under the African Democracy Charter.[23] The AGP ultimately evaluates state reports through the coordination function of its African Governance Architecture Secretariat (AGA Secretariat) which is tasked to coordinate the feedback envisioned under article 49(2) of the African Democracy Charter. To achieve the objectives of state reporting, state parties are encouraged to establish a multi-stakeholder national institutional framework to serve as the focal point for the coordination of the monitoring and reporting activities related to this instrument. This should encompass the relevant state and government ministries, departments and agencies as well as non-state actors so as to ensure diversity, effective participation and inclusion.[24]

States are required to prepare either an initial report or a periodic report. The initial report is the first report that the state party is required to submit after ratification of the Charter. The initial report is limited to 80 pages and serves as the baseline for the subsequent periodic reports to be submitted by the state. In terms of structure, the initial report is recommended to be divided into two broad sections which are a section on background information and a section on implementation measures. The background information required includes: information on whether the African Democracy Charter has been domesticated and whether it is justiciable before national courts; an outline of the state institutions relevant to the Charter's implementation and information on their budgetary allocations; the

21 https://au.int/en/aga/about (accessed 12 June 2024).

22 The members include the Peace and Security Council (AU-PSC), the AUC's Department for Political Affairs, Peace and Security (AUC – PAPS), the African Commission on Human and Peoples' Rights (Commission), the African Court on Human and Peoples' Rights (Court), the Pan-African Parliament (PAP), the African Peer Review Mechanism (APRM), the African Union Advisory Board Against Corruption (AUABC), the Economic, Social and Cultural Council (AU-ECOSOCC), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the African Union Commission on International Law (AUCIL), the African Union Development Agency-NEPAD (AUDA-NEPAD)- and all the 8 AU recognised RECs (COMESA, ECCAS, ECOWAS, SADC, EAC, IGAD, UMA, CEN-SAD).

23 Rules of Procedure of the African Governance Platform (adopted by the Twenty-Eighth Ordinary Session of the Executive Council held in Addis Ababa, Ethiopia on 28 January 2016): Annex – Guidelines for State Parties' Reports Under the African Charter on Democracy, Elections and Governance Sec II.

24 Rules of Procedure of the African Governance Platform (n 23) Sec III art 9.

status of civic space and related regulatory frameworks; the constitutional, legislative and other related instruments relevant to the implementation of the African Democracy Charter; information on the relevant regional, continental and international instruments ratified by the state party; the consultation process (which should be multi stakeholder based) for the development of the initial report; and the steps undertaken to ensure the content of the African Democracy Charter is widely disseminated.[25]

With regard to implementation measures, the initial report requires the following information: the legislative as well as administrative measures undertaken to make the state party compliant with the African Democracy Charter; the institutional mechanisms that have either been established or strengthened to enable compliance with the Charter; disaggregated data, statistics and results that can demonstrate implementation of the Charter's provisions; the challenges encountered by the state party in implementation of the Charter and the measures undertaken to overcome them; the gaps and opportunities that exist as well as lessons that other state parties can learn from; and areas on which the state party may require technical support to enable implementation of the African Democracy Charter.[26]

The periodic reports are restricted to a 40-page limit and should be submitted every two years to provide status updates on the progress made towards the implementation of concluding observations and recommendations received by the state party. Notable information to be provided in the periodic report includes: measures undertaken to implement previous recommendations and disseminate them widely; progress made in the implementation of the African Democracy Charter since the previous report; the challenges encountered and how they were overcome; updates on relevant constitutional, legislative and administrative measures since the previous report; the consultations undertaken in the development of the report; gaps, opportunities and lessons; and areas requiring technical support.[27]

Upon receiving a state report, the AGA Secretariat solicits input from AGP members as well as other relevant stakeholders, engages the state party in a dialogue and culminates in the issuance of concluding observations and recommendations. Based on an official request from a state party, the AGA Secretariat can provide training and experience sharing on the state obligations with regard to reporting on the African Democracy Charter. Under article 49(3) of the African Democracy Charter, the AUC is also mandated to prepare a synthesised report on the continental landscape as far as the implementation of the Charter is concerned, with recommendations that the AU Assembly of heads of state and government will be required to act on. The monitoring and implementation framework also envisages coordination and collaboration among the AGP members (including RECs), the national

25 Rules of Procedure of the African Governance Platform (n 23) Sec V art 13.
26 Rules of Procedure of the African Governance Platform (n 23) Sec V art 14.
27 Rules of Procedure of the African Governance Platform (n 23) Sec VI art 16.

focal points within the state parties and the participation of civil society.[28]

2.2 Emerging challenges in state reporting under the African Democracy Charter

Despite the elaborate framework outlined in the prior section, an examination of the practice reveals challenges that undermine the objectives of state party reporting under the African Democracy Charter. The challenges addressed in section include a low level of political will for compliance on state reporting, capacity constraints, limited publicity on the reporting process, multiple and overlapping reporting obligations and insufficient harnessing of the potential presented by effective coordination within the AGP.

At the time of writing, the AUC had received only two state reports on the African Democracy Charter; from the Republic of Togo (submitted in 2017) and Republic of Rwanda (submitted in 2019). This is in stark contrast to the number of state parties to the instrument which stands at 39. This low level of state reporting is attributable to several factors. The first is that the lack of reporting points to the absence of or, at best, ambivalent political will towards the implementation of the African Democracy Charter. Where the ratification of the instrument introduces a presumption of political will to adhere to democratic governance principles, the conduct of state parties has frequently pointed to the contrary.

Research has evidenced that state parties ratify the African Democracy Charter as a result of 'concerns about their legitimacy, reputation or esteem', as opposed to actually internalising or institutionalising the norm.[29] Illustratively, while all states from the Economic Community of West African States (ECOWAS) have ratified the African Democracy Charter, 11 out of 15 UCG incidents recorded on the continent from 2008 (a year into the adoption of the African Democracy Charter) up to 2022 took place in that region.[30] Furthermore, as already highlighted, more than 50 per cent of African states in the last decade registered a downward trajectory on the critical indicators of participation, rights and inclusion.[31] This was also echoed in a 2023 study which concluded that the proclamation of democracy in some African states was in fact a façade as the models of governance utilised were exclusionary in nature.[32]

28 Rules of Procedure of the African Governance Platform (n 23) Sec XI art 37.

29 U Engel 'The 2007 African Charter on Democracy, Elections and Governance: trying to make sense of the late ratification of the African Charter and non-implementation of its compliance mechanism' (2019) 54(2) *Africa Spectrum* 136.

30 African Peer Review Mechanism (APRM) and African Governance Architecture (AGA) (n 14) 5.

31 Mo Ibrahim Foundation (n 8) 16.

32 United Nations Development Programme (n 15) 21.

Capacity constraints have impacted the AUC and their ability to effectively preside over the state reporting process. Ideally, for an effective state reporting and monitoring process to work, sufficient investments on human and financial capacity need to be made. Practically however, insufficient resources have proven detrimental to the sustainability of the AGA's critical functions such as presiding over the African Democracy Charter state report evaluation process. Indeed, a 2017 study did indicate that sustainable financing was a challenge for AGA and this had undermined the effective implementation of its mandate which includes the African Democracy Charter reporting process.[33] This is further evidenced by the fact that despite only two states being compliant, Togo and Rwanda only received the concluding observations to their respective state reports in August 2024.[34] This challenge is situated in the larger context of resource allocation within the AU, where the view has been expressed that the AU tends to emphasise spending on peace and security interventions and neglected committing resources towards preventive democratic governance efforts.[35]

The AGP framework anticipates these challenges and prescribes resolving some of them through the establishment of the African Governance Facility (AGF). The AGF is a resource mobilization mechanism aimed at supporting initiatives that are geared towards promoting good governance and consolidating democracy in Africa. These initiatives include: institutional capacity strengthening and building; dialogues to facilitate citizen engagement in democratic governance processes; and technical support to member states towards the ratification, domestication, implementation and reporting on AU Shared Values instruments.[36] The AGF is meant to be jointly owned and resourced by AGP members, AU member states and other stakeholders.

However, the AGF is not operationalised. The AGF would be integral to enabling campaigns on ratification and dissemination of the African Democracy Charter as well as its reporting guidelines to a variety of stakeholders. It would also support state parties to establish national mechanisms for reporting and implementation and strengthen the AGP's coordination towards effective review of reports and monitoring the implementation of concluding observations. Illustratively, the reports by Togo and Rwanda should be amplified by the AUC to harness impetus for compliance by other states and can

33 F Aggad & P Apiko 'Understanding the African Union and its Governance Agenda: African Governance Architecture and the Charter for Democracy Elections and Good Governance' (2017) 7.

34 https://www.peaceau.org:443/en/article/togo-and-rwanda-honored-for-commitment-in-reporting-on-democracy-and-governance (accessed 10 October 2024).

35 MK Nikodimos 'The Role of the African Governance Architecture (AGA) in the Promotion of Democratic Governance in Africa: The Cases of Egypt-2013 and Burundi-2015' unpublished Master's thesis, Linnaeus University, 2020 at 26 (on file with the author).

36 https://web.archive.org/web/20160719032912/http://aga-platform.org/index.php/aga-platform/2015-10-20-06-26-7/2015-10-12-11-41-45 (accessed 12 June 2024).

serve as instructive case studies for other states on how they can undertake their own state reporting. Evidently, this work has begun in the form of workshops aimed at member states within the African Union Permanent Representatives Subcommittee on Human Rights, Democracy and Governance (HRDG) in 2022 and 2023.[37] However, much more outreach to all state parties is required if the potential for peer learning is to be fully exploited.

Closely related to resource constraints is the insufficient publicity and dissemination of information on the state reporting process. In fact, unlike other treaty reporting processes such as those of the African Charter and the United Nations human rights system, the African Democracy Charter reporting process does not have a public portal where state reports and other material relevant to their evaluation can be accessed. This limits the possibility for public debates on the recommendations issued to these states as well as extracting best practices to be adopted by the various stakeholders involved in the process. This contrasts with international best practice where it has been established that state compliance with international legal obligations does to some extent rely on public access to information from treaty processes such as state reports and the recommendations issued as a result.[38] Such access strengthens public participation, transparency and accountability.

Another challenge to state reporting under the African Democracy Charter is the assertion of reporting fatigue by states due to the multiple reporting obligations that run alongside the African Democracy Charter, arising from multiple instruments at the continental and international levels.[39] Indeed, at the continental level, the major ones along the democratic governance and human rights spectrum in addition to the African Democracy Charter are the African Charter on Human and Peoples' Rights (African Charter); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); the African Charter on the Rights and Welfare of the Child; and the African Union Convention on Preventing and Combating Corruption. There is also the voluntary country review process provided for under the Statute of the African Peer Review Mechanism (APRM). This is further compounded by reporting obligations and related engagements within the United Nations system as well as at the level of RECs.

37 https://www.peaceau.org:443/en/article/togo-and-rwanda-honored-for-commitment-in-reporting-on-democracy-and-governance (accessed 15 October 2024).

38 CD Creamer & BA Simmons 'The proof is in the process: self-reporting under international human rights treaties' (2020) 114(1) *American Journal of International Law* 36.

39 Stakeholders' seminar on the African Charter on Democracy Elections and Governance: 26-27 July 2022, Addis Ababa, Ethiopia (notes on file with the authors).

An analysis of the continued proliferation of reporting mechanisms in the African system concluded that the various mechanisms risked not being impactful due to the unfocused deployment of resources and efforts within the system.[40] It is on this basis that in 2023, the AGP commenced internal deliberations and also with member states on harmonising state reporting mechanisms in the areas of human rights, democracy and governance. Essentially, this is meant to explore the viability of consolidating the reporting processes of various mechanisms in order to ease the burden of state parties and enhance the prospects of implementation at the national level.[41] While this remains an evolving discussion in its early stages, an element that can already be capitalised on in the interim is the potential of synergies that can be established among the AGP members who undertake state reviews in line with their respective mandates, a matter that is explored in the next section.

3 IMPROVING AFRICAN DEMOCRACY CHARTER REPORTING BY BUILDING SYNERGIES WITH OTHER RELATED REPORTING OBLIGATIONS UNDER THE AFRICAN UNION SYSTEM

The African Democracy Charter implementation and monitoring framework expects the AGP members to work in a coordinated manner to ensure that state parties are effectively evaluated as far as their compliance with and implementation of the instrument's provisions are concerned.[42] Beyond direct participation in the African Democracy Charter state reporting process, the AGP's coordination aspect opens the door to further linkages between this process and other state reporting obligations that are derived from the mandates of some of the AGP members. This section explores the linkages with reporting under the African Charter and under the APRM. This is essential because the African Commission and APRM processes have higher state compliance rates than the African Democracy Charter reporting process, while also venturing into the similar areas of inquiry and thus can help bridge the gap on democratic governance reporting in the interim. Additionally, the African Commission and APRM processes provide lessons on procedure that would be useful in enlivening the African Democracy Charter reporting process and increasing the prospects for compliance.

40 C Heyns 'The African regional human rights system: the African Charter' (2004) 108(3) *Dickinson Law Review* 679, 702.

41 https://au.int/en/pressreleases/20231201/harmonizing-state-reporting-mechanisms-human-rights-democracy-and-governance (accessed 15 October 2024).

42 Rules of Procedure of the African Governance Platform (n 23) Sec II, art 5.

3.1 Reporting under the African Charter on Human and Peoples' Rights

Article 62 of the African Charter and article 26 of the Maputo Protocol require state parties to submit state reports to the African Commission every two years to demonstrate how they have upheld the rights and freedoms guaranteed in those respective instruments. The rights to freedom of association, freedom of assembly, to freely participate in the governance affairs of one's country and to have equal rights to and access to public services which are all covered under the African Charter, means that the African Commission ventures into African Democracy Charter-related obligations when reviewing state reports submitted under the African Charter. Therefore, the Concluding Observations emerging from the African Commission's review should help strengthen state compliance with the African Democracy Charter.

Illustratively, the African Commission's Concluding Observations in relation to Kenya's eighth to eleventh periodic report, commended Kenya for its jurisprudence which safeguarded the right of prisoners to vote and for reforms to its electoral law to enhance the political participation of persons with disabilities (PWDs).[43] The African Commission also raised concerns regarding the low representation of women at decision making levels;[44] and the lack of formal representation and political participation for indigenous groups such as the Ogiek, Ilchamus and Elmolo.[45] In the case of the second and third combined report of Malawi, the African Commission called on the government to challenge societal beliefs and attitudes that inhibited women's appointment in political and public positions as well as implement the affirmative action measures that were required by their law on gender parity.[46]

Beyond the Concluding Observations issued by the African Commission, there is also much to be derived from the provisions for public engagement within their reporting framework. Under the African Commission rules of procedure, the state reports on African Charter compliance are published on the African Commission website

43 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya: Adopted by the African Commission on Human and Peoples' Rights at its 19th Extraordinary Session held from 16 to 25 February 2016 in Banjul, The Gambia 4.

44 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya (n 43) 11.

45 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya (n 43) 14.

46 Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi on the implementation of the African Charter on Human and Peoples' Rights (2015–2019) and Initial Report on the Protocol to the African Charter on Human and People's Rights on the Rights of Women (2005-2013): Adopted by the African Commission on Human and Peoples' Rights at the 70th Ordinary Session held from 23 February to 9 March 2022 23.

when received in order to make them available for public scrutiny.[47] This in contrast to the prevailing situation under the African Democracy Charter where the state reports submitted thus far have not been made publicly available. As already highlighted, such publicity is instrumental for public participation, transparency and accountability.

In addition to the publication of state reports, the African Commission allows for the submission of shadow reports from civil society. Shadow reports refer to the independent and credible information compiled by civil society organisations with the purpose of providing parallel or supplementary information to that of state reports, with regard to the situation of human rights in the country under review. Practically, the shadow reports are limited to 15 pages with a maximum of 10 annexes and should be submitted 30 days prior to a state being reviewed.[48] As with the state reports, the African Commission also publishes the shadow reports on its website alongside information from other stakeholders. While the African Democracy Charter reporting process anticipates input from stakeholders, there is no elaborate guidance on how such input should be provided. In this regard, the African Democracy Charter process should similarly develop clear guidelines and invite the submission of shadow reports from civil society organisations.

The examination of state reports at the African Commission is done through an open session, where the state party under consideration participates in an interactive dialogue with the commissioners in the presence of other state party representatives, civil society and national human rights institutions. The concluding observations from the examination are then made public by the African Commission and published on their website. This enables various stakeholders to participate in the efforts to monitor and follow up on the state's implementation of the recommendations issued to them. This contrasts with the experience under the African Democracy Charter thus far, where the examination of state reports has been done in closed sessions and the concluding observations not published on a publicly accessible platform.

3.2 Reporting under the African Peer Review Mechanism

Under the APRM state parties voluntarily undergo a review process to establish progress made on democratic and political governance, economic governance and management, socio-economic governance

47 Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020: Adopted by the African Commission on Human and Peoples' Rights during its 27th Extra-Ordinary Session held in Banjul (The Gambia) from 19 February to 4 March 2020 Rule 79(2).

48 https://www.chr.up.ac.za/news-archive/2022/3157-guidelines-on-shadow-reports-of-the-african-commission-on-human-and-peoples-rights (accessed 12 June 2024).

and corporate governance.[49] The governance structure of the APRM consists of continental and national structures. The continental structure is headed by the APR Forum which brings together the Heads of State and Government from the AU member states that have accepted to undergo the APRM process. The APR Forum adopts the country review reports that emerge from the process and takes ownership of their implementation. There is also an APR Panel of Eminent Persons that is mandated to provide oversight to the review of a participating member state so as to underwrite the independence, professionalism and credibility of the process. The process is supported technically and coordinated administratively by the APRM Secretariat.

The APRM national structure for the member state undergoing the review should consist of a national focal point (at ministerial level), a national commission to provide strategic policy direction, a national APR secretariat for technical and administrative support, technical research institutions to execute the APRM questionnaire and a budgetary framework for the process. The review process is undertaken through a five step process as follows:[50] (1) The state under review develops a Country Self-Assessment Report (CSAR) together with a National Plan of Action (NPoA) on the basis of multi-stakeholder participation (2) A country assessment is undertaken by a country review team which is led by a member of the APR panel and consults local stakeholders (3) the government of the state under review receives a Country Review Report (CRR) and proceeds to provide its feedback to the report while also amending its NPoA accordingly (4) the Head of State or Government from the state under review then proceeds to engage in a peer dialogue within the APR Forum that sees the CRR and NPoA discussed (5) the state under review then commits to address the issues arising from the review and to report annually on the progress made while also doing the same at other appropriate platforms such as the PAP or REC.

Based on the shared subject matter of governance as well as a review structure that envisages an interactive dialogue with the state, there is a strong argument for deliberate synergies to be established between the Africa Democracy Charter and APRM state review processes. A first step towards such synergies would be a joint campaign for the universal ratification of the African Democracy Charter and accession to the APRM process in order to ensure that the frameworks become applicable to all AU member states. Where states have ascribed to both processes, the AGA Secretariat and the APRM Secretariat could explore a synchronization of the review calendars for both processes. This would ease the reporting burden for the state under review and consolidate the AU resources that can be dedicated towards evaluating state reports and monitoring implementation of concluding observations. The APRM national structure can also be adopted to cater to both the African Democracy Charter and APRM

49 https://aprm.au.int/en/focus (accessed 12 June 2024).

50 F Aggad & N Tissi 'The road ahead for the African Governance Architecture: an overview of current challenges and possible solutions' SAIIA Occasional Paper (South African Institute of International Affairs (SAIIA) (2014) 13.

reporting processes and thereby assuage the issues of reporting fatigue and capacity constraints.

Such synergies are possible as seen in the development of the African Governance Report (AGR) which is an AGP initiative led by the APRM in collaboration with its fellow AGP members. The AGR serves as a key barometer on the status of various governance themes requiring attention by the AU Assembly of Heads of State and Government; an implementation component required in article 49(3) of the African Democracy Charter. The AGR development process can serve as a foundational template for exploring the integration and synchronization of governance related state reporting obligations in order to achieve improved compliance by AU member states as well as improved coherence in the concluding observations, recommendations and monitoring mechanisms that AGP members put in place.

4 STRENGTHENING COMPLIANCE THROUGH REGIONAL ECONOMIC COMMUNITIES AND CIVIL SOCIETY

4.1 The role of regional economic communities

The 1991 Treaty Establishing the African Economic Community (Abuja Treaty) recognises RECs as essential pillars for Africa's integration and the AU has recognised eight RECs on the continent.[51] RECs are valued for the in-depth knowledge they possess with regard to the socio-cultural and political dynamics of their respective regions.[52] Therefore, RECs can play a foremost role in entrenching at state level, the core tenets of the African Democracy Charter which consist of democracy, good governance, human and peoples' rights, constitutionalism and the rule of law. This is why article 44(2) of the African Democracy Charter requires a framework for cooperation with RECs aimed at enhancing state ratifications of the instrument as well as the designation of focal points to strengthen monitoring and evaluation of state obligations and ensuring effective public participation in implementation initiatives.

In practice, RECs have had varying degrees of success in entrenching the African Democracy Charter's implementation. With regard to norm development, only ECOWAS stands out with the adoption of its 2001 Supplementary Protocol on Democracy and Good Governance which outlines the role of ECOWAS in undertaking

51 They are the Arab Maghreb Union (AMU), Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).

52 Africa Peer Review Mechanism (APRM) and African Governance Architecture (AGA) 'The Africa Governance Report 2019: Promoting African Union Shared Values | African Union' (2019) 82.

election monitoring as well as imposing sanctions on a member states for the occurrence of UCGs or massive human rights violations. The East African Community (EAC) has developed a draft protocol on good governance but it has not yet been adopted by its member states.[53] Outside these two developments, the development of REC level instruments on good governance has not gained much traction.

It is in the arenas of election monitoring and conflict resolution that governance interventions by RECs have featured prominently. RECs such as ECOWAS, EAC, IGAD, SADC and COMESA have frequently deployed election observer missions within their spheres of influence in order to bolster free, fair and credible elections. Such missions have augmented those deployed by the AUC and expanded the platforms for accountability in relation to electoral processes. The election observer reports generated by RECs should greatly inform the evaluation of African Democracy Charter state reports on the aspect of electoral governance and steer concluding observations on electoral reforms where necessary. There are also examples that point to robust interventions by RECs to affirm democratic governance principles, especially when UCGs are likely to or have taken place. ECOWAS has had to intervene severally on this issue, such as in the case of Niger; where the regional body spoke against a July 2023 military coup and resolved to restore constitutional order by all means including through the use of force.[54]

In the recent past, ECOWAS has also intervened in the cases of Burkina Faso, Guinea and Mali, where military coups in these countries have been met with sanctions that include suspension of their membership to the regional body and travel bans on government officials and senior leaders within these regimes.[55] In Eastern Africa, the EAC has deployed troops to stabilise the Eastern DRC region and restore peace in that country;[56] while IGAD is spearheading a mediation effort to restore peace in Sudan which descended into its current cycle of conflict in April 2023.[57] These sanctions and peacekeeping intervention capacities should be viewed as potential instruments of enforcement and implementation of African Democracy Charter related recommendations where relevant.

Such interventions by RECs and the AU on sensitive matters like addressing conflict are guided by adherence to the principles of

53 A Songa & M Ronceray 'EAC democracy agenda: channels, lessons and digital technologies for civil society engagement' ECDPM Discussion paper no 354 (2023) 3.

54 https://ecowas.int/final-communique-fifty-first-extraordinary-summit-of-the-ecowas-authority-of-heads-of-state-and-government-on-the-political-situation-in-niger/ (accessed 12 June 2024).

55 https://www.facebook.com/FRANCE24.English and https://www.france24.com/en/live-news/20230219-west-african-bloc-maintains-sanctions-on-junta-regimes (accessed 12 June 2024).

56 https://www.eac.int/statements/2733-status-of-deployment-of-eac-troops-and-verification-mechanisms-in-eastern-drc (accessed 12 June 2024).

57 https://igad.int/communique-of-the-1st-meeting-of-the-igad-quartet-group-of-countries-for-the-resolution-of-the-situation-in-the-republic-of-sudan/ (accessed 12 June 2024).

subsidiarity, complementarity and comparative advantage so as to strengthen their effective coordination and collaboration.[58] Therefore, on this understanding, while RECs have exercised leadership in some interventions, they have also been led by the AU on a series of interventions aimed at improving democratic governance situations in the midst of conflict. Illustratively, while ECOWAS led the intervention to ensure the peaceful transition of power in the Gambia in 2016;[59] it was the AU through the African Union Technical Support Team to The Gambia (AUTSTG) that led the post-crisis initiatives to help the Gambia undertake constitutional and security sector reforms.[60] In the case of the post-election violence of Zimbabwe in 2008, the AU deferred to the mediation leadership of SADC to resolve the crisis.[61] Despite these examples, there are legal loopholes that need to be addressed in the arenas of distribution of competencies between the AU and RECs and in clarifying the nature and scope of subsidiarity and complementarity.[62] Indeed, some instructive cases such as the intervention of ECCAS in Chad and the EAC in Burundi have demonstrated that in the absence of an adequately defined legal framework the actions of RECs could run counter to those of the AU and ultimately undermine the shared values that they should collectively uphold.[63]

Some RECs have also provided pathways to citizen engagement on governance matters. The EAC has established a Consultative Dialogue Framework (CDF). The CDF facilitates dialogue between the EAC and key stakeholders such as civil society and the private sector with a view to ensuring that 'the integration process proceeds with the involvement of the citizens of EAC Partner States through multi-stakeholder partnerships'.[64] ECOWAS has established relationships with thematic and strategic civil society networks to advance interactions on governance and notable networks include: the West Africa Civil Society Forum (WACSOF), West Africa Network for Peace building (WANEP), the West Africa Democracy Solidarity Network (WADEMOS) and the West Africa Civil Society Institute (WACSI). Such multi-stakeholder frameworks expand spaces for deliberation of pertinent governance issues and with deliberate collaboration, can be deployed as part of the

58 Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordination Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa article IV(iv).

59 C Hartmann 'ECOWAS and the restoration of democracy in the Gambia' (2017) 52 *Africa Spectrum* 85-99.

60 https://issafrica.org/pscreport/psc-insights/lessons-from-the-gambia-about-africas-evolving-post-conflict-realities (accessed 12 June 2024).

61 B Kahombo 'Constitutional crises and the jurisdiction of the African Union' (2022) 25(1) *Recht in Afrika | Law in Africa | Droit en Afrique* 12 at 28.

62 T Makunya 'The nexus between constitutionalism, peace and security in the law and practice of the African Union' (December 15, 2022) 25(1) *RiA Recht in Afrika | Law in Africa | Droit en Afrique* at 82.

63 T Makunya (n 62) 82.

64 https://www.eac.int/gender/civil-society/consultative-dialogue-framework (accessed 12 June 2024).

monitoring and evaluation framework for concluding observations that state parties receive under the African Democracy Charter evaluations.

While the potential value addition of RECs is well established, more needs to be done to actualise this potential. Relevantly, the 2019 AGR highlighted the following aspects of the AU-RECs relationship as areas for improvement: (1) ensuring that the RECs are sufficiently aligned with the AU Constitutive Act and Shared Values; (2) a clarified definition and shared understanding of the principle of subsidiarity between the AU and RECs so as to enable an efficient and effective division of labour on matters of democratic governance; and (3) establish a systematic framework for each REC to effectively monitor the implementation of AU Shared Values instruments such as the African Democracy Charter.[65] The AUC has dedicated an annual engagement with RECs during its mid-year coordination meetings to resolve the above issues and realise synergies. This can be considered an integral step towards meeting the requirements of article 44(2) under the African Democracy Charter but should be followed up with concrete measures of designating focal points within the RECs as well as establishing monitoring and evaluation frameworks in relation to the African Democracy Charter at that level to encourage and strengthen state compliance.

4.2 The role of civil society

Civil society is an essential fulcrum to realising the African Democracy Charter article 3(7) principles of effective citizen participation in democratic and development processes as well as governance of public affairs. Furthermore, the state reporting process requires states to involve non-state actors in the development of their reports in order to ensure that the outcome meets the necessary thresholds of diversity, effective participation and inclusivity.[66] Relatedly, the AGA Secretariat is developing a comprehensive citizen engagement strategy that could be instrumental in deepening the public's understanding of the African Democracy Charter and their potential role in furthering state compliance.[67]

In light of the foregoing, what roles should civil society play in the implementation of the African Democracy Charter and its reporting process? First, because of their ubiquitous and diverse nature, Civil Society Organisations (CSOs) are valuable partners in the awareness raising component of the reporting process and implementation more broadly. CSOs have frequently invested in simplifying provisions of the African Democracy Charter and disseminating it to make the

65 Africa Peer Review Mechanism (APRM) and African Governance Architecture (AGA) (n 48) 84.

66 Rules of Procedure of the African Governance Platform (n 24 Section III Article 9.

67 https://au.int/en/pressreleases/20220825/citizens-engagement-strategy-will-mainstream-engagement-african-citizens (accessed 12 June 2024).

instrument more accessible and understood by the public.[68] CSOs are also credited for capacity enhancement initiatives through convening dialogue forums and creating learning platforms for persons interested in understanding how the African Democracy Charter can be applicable in their daily lives.[69] An improved public understanding of the African Democracy Charter will increase the demand for state compliance and harness the impetus to advocate for state reporting.

Based on their competencies and evidence-based research, some think-tanks and CSOs have been able to provide technical assistance to the AU and state parties in the implementation of the AU Shared Values instruments. A recent example is the African Union Network of Think Tanks for Peace (NeTT4Peace) which is aimed at enhancing the 'relevance and value of the contribution of African knowledge communities' towards providing evidence-based research that informs AU's policy making on peace, security and governance matters.[70] There is also the Pan-African Civil Society Network on Political Affairs, Peace and Security (PANPAPS) which is aimed at strengthening collaboration between civil society and the AU on advancing democratic governance, peace, security and stability on the Continent.[71] Such technical assistance can also be envisaged in the arena of state reporting, especially in broadening citizen engagement.

With regard to reviewing state compliance to democratic governance principles, some non-state actors have provided strategic technical assistance to strengthen AU organs. The APRM entered into a partnership with the Mo Ibrahim Foundation to collaborate in the areas of knowledge and data sharing; harmonisation of the Ibrahim Index of African Governance (IIAG) with APRM processes, including the representation of APRM on the Advisory Council; capacity support to the continental Secretariat; support of the Mo Ibrahim Foundation to the continental drive for universal accession to the APRM; and participation of the Mo Ibrahim Foundation in APRM Country Review Missions.[72] The APRM also entered into a partnership with the Open Governance Partnership (OGP) so as to facilitate the implementation of APRM recommendations at state level and foster collaboration between APRM National Structures and OGP National Multi-stakeholder Forums.[73] These form of partnerships with non-state actors should be explored and harnessed in the context of the multi-

68 See for example https://ecdpm.org/work/guide-african-charter-democracy-elections-and-governance (accessed 12 June 2024).

69 See for example https://mooc.africtivistes.org/en_GB/ (accessed 12 June 2024).

70 https://www.peaceau.org:443/en/article/au-launches-the-african-network-of-think-tanks-for-peace-nett4peace (accessed 12 June 2024).

71 https://reliefweb.int/report/world/communique-1161st-meeting-peace-and-security-council-held-6-july-2023-2nd-annual-consultative-meeting-between-peace-and-security-council-economic-social-cultural-council-and-representatives-civil-society-organizations (accessed 12 June 2024).

72 https://mo.ibrahim.foundation/news/2017/aprm-mif-strengthen-partnership (accessed 12 June 2024).

73 https://www.opengovpartnership.org/documents/framework-of-collaboration-between-the-african-peer-review-mechanism-and-ogp/ (accessed 12 June 2024).

stakeholder national institutional framework envisioned within the African Democracy Charter state reporting process.

CSOs can also provide accountability to the African Democracy Charter reporting process by preparing shadow reports to those submitted by state parties. As previously highlighted, shadow reporting already takes place in the context of African Commission reviews where CSOs with observer status submit shadow reports and disseminate the concluding observations that emerge from the process.[74] The African Democracy Charter reporting process does anticipate contributions by CSOs who have accreditation from the Economic, Social and Cultural Council (AU-ECOSOCC). Such CSOs are invited to a Pre-Session convened by the AGP where they are expected to provide insights that inform the subsequent dialogue with the state party under review. However, not much is defined in terms of the format for the Pre-Session and whether CSOs can furnish the AGP with written submissions or a shadow report. In light of this, the AGP should elaborate on this provision by inviting CSOs to submit shadow reports modelled along the format adopted by the African Commission for African Charter reporting and also structure the African Democracy Charter's Pre-Session along similar lines to the NGO Forum that accompanies the ordinary sessions of the African Commission.[75]

CSOs could also introduce innovation to the state reporting process. A potential area for innovation is the use of civic technology. Civic technology refers to those initiatives that utilise technology to strengthen democratic processes and promote inclusive decision making by enhancing the capacities of citizens to actively participate and possess the tools that empower them to pursue transparency and accountability on matters of governance.[76] The civic tech initiatives deployed by CSOs in this case could be open governance and public participation tools that demystify governance processes such as law making or state reviews.[77] Civic technology can build a continental constituency for citizen engagement on matters of democratic governance and enrich the evaluation of state compliance with the African Democracy Charter. The AU should tap into the potential of collaborating with CSOs on civic technology through existing initiatives such as the AU Civic Tech Fund and the AGA Democracy and Governance in Africa- Youth Innovation Challenge.[78]

Realising these dividends from CSOs requires overcoming various challenges that inhibit their effective engagement. A key challenge is the shrinking civic space on the continent. The 2022 Ibrahim Index of African Governance notes that over a third of Africa's population

74 https://achpr.au.int/en/network/ngos (accessed 12 June 2024).

75 https://www.acdhrs.org/ngo-forum/ (accessed 12 June 2024).

76 https://ecdpm.org/work/civic-tech-service-democracy-good-governance-africa (accessed 12 June 2024).

77 https://europeandemocracyhub.epd.eu/assessing-civic-tech-that-works-to-build-theafricawewant-citizen-led-tech-for-impact-that-can-help-african-governments-deliver-better-services/ (accessed 12 June 2024).

78 https://au.int/en/pressreleases/20201202/innovation-accelerator-stimulate-growth-youth-promoting-democracy-and (accessed 12 June 2024).

resides in a country where participation, rights and inclusion has declined at an accelerating pace since 2017.[79] AU member states should be encouraged to preserve civic space as part of fostering public participation and citizen centred policies.

With regard to CSO accreditation, the eligibility requirement for CSOs to obtain AU-ECOSOC accreditation is currently prohibitive. Article 6(5) of the Statutes of AU-ECOSOCC, requires applying CSOs to demonstrate that 50 per cent of their financial resources are derived from their membership. This is a requirement that numerous CSOs have been unable to fulfil. Consequently, the lack of accreditation impedes the participation of CSOs in the African Democracy Charter reporting process. There are prospects for reform as the AU-ECOSOCC on the basis of a decision by the AU Executive Council is currently working to reform its structure in two ways: the establishment of AU-ECOSOCC national chapters within AU member states as a way of realising the goal of a people-centred union; and the development of a harmonised and clarified criteria for granting CSOs consultative and observer status with the AU.[80]

Key objectives of the harmonised accreditation mechanism are providing a simple, accessible, fair, transparent, inclusive and efficient process for CSOs wishing to engage AU organs and enhancing the ability of AU organs to receive expert information or advice.[81] Notably, the AU-ECOSOCC proposal on the harmonised accreditation mechanism recommends a two-tiered criteria for CSOs, namely, 'consultative status' and 'observer status'. The proposed consultative status category would not include the stringent funding requirement but would enable CSOs who obtain this status to engage AU member states, attend the public sessions of AU organs, make oral and written statements and be included in a consolidated database of CSOs to be used by AU organs for consultations.[82] Such a reform measure aimed at broadening CSO inclusion would be welcome in the context of CSO participation in the African Democracy Charter reporting process.

Beyond granting accreditation, the AU-ECOSOCC has also been instrumental in popularizing the African Democracy Charter across the Continent by undertaking various citizen engagements and dialogue forums such as its flagship event, the Citizens Forum. The 2022 edition of the Citizens Forum focused on democracy and UCGs in Africa and saw CSOs provide input to an outcome document of recommendations for onward submission to the AU Assembly. The AU-ECOSOCC has also used the platforms of its General Assembly and Thematic Clusters to enumerate the role of CSOs in the ratification, domestication and implementation of the African Democracy Charter. Notably, the Citizens Forum and Thematic Clusters are not hinged on accreditation

79 Mo Ibrahim Foundation (n 8) 48.

80 https://au.int/sites/default/files/decisions/31762-ex_cl_dec_873_-_898_xxvii_e.pdf (accessed 12 June 2024).

81 AU-ECOSOCC stakeholder consultation 8 December 2022 (notes on file with the authors).

82 AU-ECOSOCC stakeholder consultation 8 December 2022 (notes on file with the authors).

and therefore a broad range of civil society organisations are able to engage with AU-ECOSOCC and by extension, the AGP. Therefore, these two platforms should be linked to the efforts of broad sensitisation and dissemination in as far as the public component of African Democracy Charter reporting is concerned.

5 CONCLUSION

This article has located the African Democracy Charter as an AU Shared Values instrument, expressing the collective commitment by AU member states to uphold the principles of democratic governance. However, this commitment has demonstrably wavered. With only 39 out of 55 possible ratifications, the ACDEG is still some distance from being universally applicable. Furthermore, the current decade is witnessing considerable setbacks in the arena of democratic governance, with the resurgence of UCGs as well as highly fractious electoral contests and full-blown conflicts. These situations have called attention to the implementation frameworks and this article has focused on the reporting framework. While an elaborate framework for state reporting and review is in place, it remains plagued by significant challenges that hinder its true potential. A top priority should be embarking on a campaign that encourages improved state reporting compliance among the state parties to the African Democracy Charter. The outreach targeting the HRDG sub-committee is a welcome start, but it should be escalated to engage all 39 state parties. A campaign for universal ratification of the African Democracy Charter should also be undertaken in order to ensure that the compliance mechanism for the shared value of democratic governance is truly applicable to all AU member states.

The capacity constraints at all levels must be addressed in order to bolster the review aspect of the African Democracy Charter reporting process. A key plank of this would be to operationalise the AGF which would enable the AGP to provide the envisioned technical assistance to state parties as well as activate a robust citizen engagement strategy and follow up mechanism for concluding observations. There is also a need for a deliberate policy dialogue at the AGP level aimed at fostering greater coherence and cohesion with regard to the various state reporting obligations and institutional mechanisms that exist. This will ease the reporting burden on the part of AU member states and the task of evaluation on the part of AU organs. Such coordination will also expand the much-required multi-stakeholder aspect of these processes. It will also serve to ensure that AGP members leverage on each other's strengths, mitigate their respective weaknesses and enhance the accountability of AU member states by streamlining the follow up to concluding observations. This article has identified viable synergies with reporting under the African Democracy Charter, the African Charter and the APRM. It has also suggested lessons and avenues that can be exploited at REC level.

Interventions to address conflict as well as UCGs and the development of the AGR suggests that improved coordination among

AGP members (including the RECs) is indeed possible. Finally, the CSO engagement pillar and identified aspects of reform centred on enhancing access and facilitating effective participation should be fully actualised. In this regard, the African Democracy Charter reporting process should embrace technology and establish a public portal which demystifies the process and makes relevant documents available. It should also leverage on existing infrastructure such as the African Commission's NGO Forum, the APRM national mechanisms and the emerging ECOSOCC national chapters; as a way of tapping into viable CSO constituencies and establishing best practices which can enrich the Pre-Sessions anticipated in the African Democracy Charter reporting framework. Importantly, the reporting framework should adopt the African Commission's transparent approach of publishing state and shadow reports as well as concluding observations in order to enable all stakeholders to monitor and support implementation efforts. AU member states should also be compelled to preserve civic space and welcome CSO input to governance matters. Such an integrated, consultative and multi-stakeholder framework would enliven the currently sub-optimal reporting compliance levels, raise the prospects for improved compliance with the African Democracy Charter and contribute to the AU goal of a stable, peaceful and sustainably developing continent.

Implementing provisions of the African Women's Protocol through the Law on Public Financing of Political Parties in the Democratic Republic of the Congo: a case against femocracy

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ABSTRACT: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa obliges states to promote, protect and fulfil women's equal participation in politics. The Democratic Republic of Congo (DRC) ratified the Protocol in 2008, aligning with its 2006 Constitution's commitment to women's rights. However, Law 8/005 on Public Financing of Political Parties undermines this commitment, at least in two key ways. First, articles 5 and 9 of the Law allocate annual subsidies for political parties at 0.5 to 1 per cent of the national budget and set electoral campaign funding at 2 per cent of the budget, tied to the national budget law after each election. The lack of implementation of these provisions disproportionately disadvantages women, who often lack the financial resources to sustain party operations or campaigns. Second, its article 7 limits public funding to parties with representation in key government institutions. This marginalises women seeking to lead or establish political parties because their parties will not have had representation in such institutions. Using the Union for Democracy and Social Progress (UDPS) and the Union for the Congolese Nation (UNC) as case studies, this study demonstrates how the failures to revise and implement Law 8/005 violate the Protocol. It argues that this perpetuates femocracy in the two leading political parties. As defined by Amina Mama femocracy is a political system in which elite women, with the backing of powerful men, occupy positions of power and influence but primarily advance their personal or male interests rather than addressing systemic issues affecting ordinary women. This study used key informants to examine the dynamics within the UDPS and UNC. These interviews revealed key challenges faced by women in political leadership.

TITRE ET RÉSUMÉ EN FRANÇAIS

L'application du Protocole de Maputo à travers la loi portant financement public des partis politiques en RDC : analyse contre la «féminocratie»

RÉSUMÉ: Le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique oblige les États parties à garantir une participation égale des femmes à la vie politique, à travers des mesures effectives de promotion et de protection de leurs droits. Ratifié par la République démocratique du Congo (RDC) en 2008, ce Protocole s'inscrit dans la continuité de l'engagement constitutionnel de 2006 en faveur des droits des femmes. Toutefois, la loi n° 8/005 portant financement public des partis politiques compromet ces objectifs sur deux plans majeurs. Premièrement, les articles 5 et 9 de cette loi prévoient des subventions annuelles aux partis politiques à hauteur de 0,5 % à 1 % du budget national, ainsi qu'un financement

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des campagnes électorales équivalent à 2 % du budget national. Cependant, l'absence de mise en œuvre effective de ces dispositions pénalise disproportionnellement les femmes, qui, en raison d'inégalités économiques structurelles, peinent à mobiliser les ressources nécessaires pour soutenir les activités et campagnes des partis. Deuxièmement, l'article 7 limite l'accès au financement public aux partis représentés dans les principales institutions étatiques. Cette disposition marginalise les femmes qui aspirent à créer ou à diriger de nouveaux partis, souvent exclus de ces instances de pouvoir. À travers les exemples de l'Union pour la Démocratie et le Progrès Social (UDPS) et de l'Union pour la Nation Congolaise (UNC), cette étude démontre que les lacunes dans la révision et la mise en oeuvres de la loi n° 8/005 constituent une violation manifeste des engagements de la RDC au titre du Protocole. L'analyse s'appuie sur la notion de «féminocratie», définie par Amina Mama comme un système où des femmes élites, soutenues par des hommes influents, occupent des positions de pouvoir tout en perpétuant des intérêts masculins ou personnels, sans traiter les problèmes structurels affectant les femmes ordinaires. En s'appuyant sur des entretiens avec des informateurs clés, cette étude met en lumière les défis structurels auxquels sont confrontées les femmes dans les sphères politiques en RDC et appelle à une révision substantielle de la loi pour garantir une mise en œuvre cohérente et respectueuse du Protocole de Maputo.

KEY WORDS: the Law on Public Financing of Political Parties; femocracy; African Women's Protocol; Democratic Republic of Congo

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1 INTRODUCTION

Discrimination against women in political affairs in the Democratic Republic of Congo (DRC) is not novel. The colonial establishment considered it unwise to have Africans in political positions, fearing that they would turn into agitators demanding the end of colonialism.[1] In Belgium-Congo, all political decisions did not involve its 'Congolese' subjects, let alone women.[2] At the time of independence from the Belgians in 1960, women's participation in political decision making was still non-existent.[3] This state of affairs continued with Mobutu Sese Seko's dictatorship, from 1965 to 1997, under which women were still excluded from political participation in decision making because

1 M Ndulo 'Legal education in an era of globalisation and challenge of development' (2014) *Cornell Law School Publications* Paper 957.

2 United Nations Economic and Social Council 'Economic and Social Affairs Conference' 22 December 2023 99, http://www.esaconf.un.org (accessed 22 December 2023).

3 A Matundu Mbambi & M-C Faray-Kele 'Gender equality and social institutions in the DRC' (2010) *Peace Women* 3.

political power was concentrated in one man.[4] The country went into civil wars from 1993 to 2003, and a transitional government was established from 2003 to 2006. During this period, political power went from being concentrated in the hands of another male dictator (Laurent Desiré Kabila) to being shared among the heads of rebel groups, all of whom were male and had no consideration for women's participation in political decision making.[5]

It is against this historical backdrop that the Congolese people, in adopting the 2006 Constitution (as revised in 2011), did not hesitate to provide for gender equality.[6] The aim was to allow Congolese women to participate, among other things, in political life, in the same way as men do. Article 5 of the 2006 Constitution states that without prejudice to other provisions of the Constitution, all Congolese citizens of both sexes, who are at least 18 years of age and enjoy their civil and political rights, are voters and eligible for public office.[7] Additionally, article 13 complements it by stating that a law or any act of the executive should not discriminate on any ground, including sex, against a Congolese person in matters of accessing public functions.[8] Furthermore, article 14 guarantees women equitable representation in national, provincial and local institutions, and requires the state to ensure that there is no discrimination in these institutions.[9] Indeed, articles 5, 13 and 14 place women on equal footing with men. This means that Congolese women are entitled, just as Congolese men are, to run for any 'political decision-making positions' in the government. These articles form the foundation of gender equality in the Congolese legal system. They have contributed to transforming the country from a colonial, dictatorial and civil war-torn culture, which was fundamentally patriarchal and did not allow women to have a say in political decision making. While Articles 5, 13, and 14 of the 2006 Constitution establish the foundation for gender equality in the DRC, this ideal is far from being achieved. Articles 13 and 14 of the Constitution mandate 50/50 political representation between men and women in all government institutions.[10] However, the 2023 UN Women Africa report shows that Congolese women's political representation has only slightly increased, from 8.4% in 2006 to 10% in 2018 at the national level, 6.8% to 10.2% at the provincial level, and 4.6% to 19% at the senatorial level – falling short of the 50/50 goal.[11] Additionally, while article 13 of the 2022 Electoral Law incentivises female representation by exempting party lists with 50 per cent women from deposit fees, this has instead made

4 F Janyszeck 'The politics of legitimation under Mobutu' (21 January 2019), http://www.innovativeresearchmethods.org/the-politics-of-legitimation-under-mobutu/ (accessed 13 January 2024).

5 F Reyntjens 'Briefing: Democratic Republic of the Congo political transition and beyond' (2007) 106 *African Affairs* 310.

6 Matundu Mbambi & Faray-Kele (n 3) 3.

7 Art 5 Constitution of the Democratic Republic of Congo 2006 (as revised in 2011).

8 Art 13 Constitution of the Democratic Republic of Congo 2006 (n 7).

9 Art 14 Constitution of the Democratic Republic of Congo 2006 (n 7).

10 Art 13, 14 Constitution of the Democratic Republic of Congo 2006 (n 7).

11 UN Women Africa *DRC: The electoral reform and women's political participation* (2023) 2.

women more vulnerable due to economic disparity. Male-dominated parties add women for financial gain, not empowerment.

To promote substantive equality in political participation, the 2006 Constitution mandates that political parties may receive public funds from the state to finance their electoral campaigns or activities.[12] This led to the enactment of Law 8/005 of 10 June 2008, on public financing of political parties. Article 5 of this law states that the subsidy allocated each year to finance the functioning of political parties cannot be less than 0,5 per cent or more than 1 per cent of the DRC's national budget.[13] Additionally, article 9 specifies that the state's contribution to the financing of electoral campaigns should be included in the national budget law of the year following the organisation of each electoral consultation, which is set at 2 per cent.[14] Sadly, women, particularly those starting new political parties, would not benefit from Law 8/005 as much as men. Article 7 of the law requires that a party must be represented in at least one of several governing bodies to receive public financing,[15] which inherently discriminates against women, as few women and women-led parties are represented in these positions due to their historical exclusion from political affairs in the DRC. Despite its enactment, Law 8/005 has never been revised and implemented or reflected in national budgets. This article will shortly come back to this.

The article examines whether the DRC government's failure to revise and implement Law 8/005 on Public Financing of Political Parties violates articles 9(1) and (2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). Article 9(1) of the Women's Protocol states that states must ensure equal women's participation in politics and governance.[16] Article 9(2) goes on to state that the states shall ensure increased and effective representation of women in decision-making roles.[17] This article argues that one consequence of this violation is the promotion of 'femocracy' rather than 'democracy' when one considers the place of Congolese women in political parties and electoral processes.

In part 2, the article examines Congolese women's experiences in two leading political parties, namely, the Union for Democracy and Social Progress (UDPS) and the Union for the Congolese Nation (UNC). It also analyses the extent to which Law 8/005 aligns with articles 9(1) and 9(2) of the African Women's Protocol. Part 3 explores how the non-revision and non-implementation of Law 8/005 violate articles 9(1) and 9(2) of the African Women's Protocol, and how it promotes femocracy. It is important to note at this stage that Mama teaches us

12 Art 6 Constitution of the Democratic Republic of Congo 2006 (n 7).

13 Art 5 Financing of Political Parties Act (Law 8/005 on Public of 2008), Law 8/005 of 10 June 2008 on the Public Financing of Parties Policies (leganet.cd) (accessed 13 January 2024).

14 Art 9 Financing of Political Parties Act (n 13).

15 Art 7 Financing of Political Parties Act (n 13).

16 Art 9(1) African Women's Protocol.

17 Art 9(2) African Women's Protocol.

that femocracy is a system where a small group of elite women, backed by powerful men, claim to support women's causes but are driven by their self-interest. Their power is firmly influenced and supported by powerful men who hold higher political offices and do not care about the causes of ordinary women. Consequently, ordinary women's causes are never meaningfully addressed by femocratic women.[18] In part 4 the article considers the resolution adopted during the eightieth ordinary session of the African Commission on Human and Peoples' Rights (African Commission), mandating the Special Rapporteur on the Rights of Women in Africa to develop a model law for implementing the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[19] Additionally, the article argues that there is no need to wait for a model law to be put in place. It looks at regional bodies such as the African Commission and the East African Court of Justice (EACJ) decisions to push the DRC government to discharge its responsibilities under the African Women's Protocol.

2 CONGOLESE WOMEN IN POLITICAL PARTIES, PUBLIC FINANCE OF POLITICAL PARTIES AND THE AFRICAN WOMEN'S PROTOCOL

2.1 Congolese women's experiences in UDPS and UNC

This part of the article is based on interviews conducted with both men and women from the Union for Democracy and Social Progress (UDPS) and the Union for the Congolese Nation (UNC), two leading political parties in the DRC, to demonstrate the experience of Congolese women.

UDPS is the oldest political party in the DRC that is still functioning. It was created in 1982 by Etienne Tshisekedi. As article 9 of the UDPS constitutive document notes, the fundamental values underlying UDPS are inspired by social democracy.[20] Today, UDPS is the leading party in the DRC with Felix Antoine Tshisekedi, son of the deceased Etienne Tshisekedi, as its national president and as the

18 A Mama 'Feminism or femocracy? State feminism and democratisation in Nigeria' (1995) 20 *African Development* 61.

19 African Commission 'Resolution for the development of a model law on implementation and domestication of African Women's Protocol – ACHPR/Res.592 (LXXX) 2024' (12 August 2024), http://www.achpr.org/RESOLUTION-FOR-THE-DEVELOPMENT-OF-A-MODEL-LAW-ON-THE-IMPLEMENTATION-AND-DOMESTICATION-OF-THE-AFRICAN-WOMEN'S-PROTOCOL (accessed 17 August 2024).

20 Art 9 Statute of the Union for Democracy and Social Progress (2013), Les Statutes - UDPS (accessed 17 August 2024).

President of the country.[21] On the other hand, UNC is a political party founded in 2010 by Vital Kamerhe, who currently is the president of the National Assembly. UNC fights for national unity, economic development and social justice. It advocates policies that promote private sector growth, job creation and poverty reduction, as well as greater transparency and accountability in the government.[22] UNC has positioned itself as a powerful political party since its creation by standing as a leading opposition party between 2011 and 2018, and by joining UDPS to lead the country since 2018.

It is a fact that women are not represented at the highest decision-making positions, both in UDPS and UNC. Article 22 of the UDPS constitutive document establishes the presidency of the party, which is the highest decision-making body of the party. This presidency has the mandate to represent the party, decide and orient the actions of the party, and supervise and generally coordinate all activities of the party. Article 22 goes on by outlining the composition of the presidency of the party. It is composed of the president of the party, the secretary-general of the party, the national secretaries and heads of departments and, finally the general treasurer of the party.[23]

The absence of women in these highest decision-making positions is due to the fact that men have historically led the UDPS party, and have successfully consolidated power and perpetuated male dominance. José Asuka Emina has been an active member of UDPS since 2006, and the president of the Women Federation of Bukavu (in Eastern DRC) and the advisor of the DRC President on matters concerning work and social purveyance.[24] In an interview with her she noted that, since the creation of UDPS almost half a century ago, no woman has ever occupied any of the positions available in the presidency of the party as provided for under article 22 of the UDPS constitutive document.[25] Furthermore, it is difficult for women to hold any of these positions. It is important to note that article 23(4) of the constitutive document gives the president of the party the power to nominate and dismiss any of the members of the presidency of the party.[26] For Emina, the representation of women in decision-making positions of the political party are a sign of power. She notes that when women choose to engage in a political party, it is to show that they can also start and lead. This is why she highlighted that we must give women space for decisions as stipulated in article 14 of the 2006 Constitution on parity between men and women in leadership positions

21 'Felix Tshisekedi steps out of his father's shadow to lead DR Congo' *BBC* 24 January 2019, http://www.bbc.com/news/world-africa-46929212 (accessed 27 February 2024).

22 Art 10 Statute of the Union for the Congolese Nation (2018), https://www.bing.com/search?q=le+documnet+constitutive+de+l%27+UNC+en+rdc&qs=n&form=QBRE&sp=-1&lq=0&pq=le+documnet+constitutive+de+l%27+unc+en+rdc&sc=9-41&sk=&cvid=AC051D678F924885861A4018F086D0A1&ghsh=0&ghacc=0&ghpl= (accessed 17 August 2024).

23 Art 22 Statute (n 20).

24 Interview with J Emina Asuka on 17 February 2024.

25 As above.

26 Art 23(4) Statute (n 20).

in society.[27] Similarly, article 27 of the 2018 constitutive document of UNC establishes the National Political Directorate as the body responsible for coordinating all party activities, ensuring the party's proper functioning, and leading it to achieve its goals.[28] The directorate is involved in formulating the social project, government programme and political strategies of the party.[29] According to article 28 of the UNC constitutive document, the members of the national directorate of the party include the president of the party; the advisor to the national president of the party; the secretary-general of the party; the permanent secretary of the party; and the inspector-general of the party.[30] Once again, as is the case with UDPS, the president of the party has the power to nominate other members of the national directorate, as per article 31 of the UNC constitutive document.[31] Blandine Banga is the UNC coordinator of women in Eastern DRC. In an interview with her, she noted that UNC has never had a woman member of the national directorate of the party.[32]

It is important to note that in 2018, UNC, led by Vital Kamerhe, held its congress to make significant changes to its constitutive document. One of the key changes concerned the interim period in the event of the absence or incapacity of the national president, Kamerhe himself. The change was that no election of the national president of the party may be held during the interim period.[33] Instead, the president's term will be suspended until their impediment or incompatibility ends, and then they will be reactivated.[34] This means that Kamerhe (who is male) can keep maintaining his position as national president even in the event of a temporary absence. This amendment allows Kamerhe to resume his duties as soon as the circumstances justifying his absence come to an end.[35] However, a critique may conclude that this amendment to the constitutive document has the potential of strengthening the already-significant power of the male president of the party and shield him from any form of internal challenge or renewal of the leadership. Importantly, it takes away all opportunities for a woman to become the leader of the party.

There are contradictions as to the place of women's ideologies in both UNC and UDPS. The national directorate of UNC is to decide on what should be the agenda of the party at any given moment. This has the effect of rendering women's ideologies in leading the party invisible because, as discussed in the preceding subpart, women do not hold any

27 Asuka (n 24).
28 Art 27 Statute (n 22).
29 As above.
30 Art 28 Statute (n 22).
31 Art 31 Statute (n 22).
32 Telephone communication with B Banga on 18 February 2024.
33 G Mpoyo 'DRC: UNC congress amends its statutes to avoid election of a national president during the interim period' (19 August 2023), http://www.libregrandlac.com/drc-unc-congress-amends-its-statutes-to-avoid-election-of-a-national-president-during-the-interim-period (accessed 23 February 2024).
34 As above.
35 As above.

of the positions available in the national directorate.[36] Similarly, in UDPS the presidency of the party is the one vested with the power to validate which policies to consider as part of the plans of the party. It is difficult to enhance women's ideologies, as long as women are not considered the principal actors in implementing feminism consciousness in their agenda.[37] Therefore, one may say, without fear of contradiction, that there is a lack of feminist consciousness in both UNC and UDPS. As noted, feminist consciousness means the struggle for women's political status, monitoring progress towards gender equality.

It may be important to note that article 48 of the UDPS constitutive document establishes the federation of women that deals with women's emancipation in the political party. Equally important to note is the fact that article 50 of the UNC constitutive document establishes that the national women's conference is to be held every year to discuss issues related to the advancement of women. However, both article 48 of the UDPS constitutive document and article 50 of the UNC constitutive document are ill-equipped to bring about a rise of feminist consciousness in UDPS and UNC respectively. This is because, as shared by Banga, women have to align with the party interests and the activities that are selected by the national directorate of the party in the UNC political party, which is male-dominated.[38] Francine Tshisungu is the deputy coordinator of the Federation of UNC Women in Kinshasa. Her insights reveal that the gender role discrimination present in DRC society is also reflected within the UNC.[39] She mentioned that during the Federation of Women meetings, they focus on teaching women how to organise their families, develop their political skills and embrace their roles as guardians of life (mothers of people).[40] However, she did not address the importance of women teaching as a means to achieve autonomy from men or to advance a women's agenda within the party.

During the interview with a UNC male member who has chosen to remain anonymous, the member shares that nothing stops women from vying for the highest positions in the party, but the problem is that women do not vote for women.[41] However, even if women decide to vote for women, the president of the party, who is male, still holds the decision-making power regarding the membership of the national directorate of the party. For UDPS, we refer to an interview with Elie Balol'Ebwami. Balol'Ebwami was the president of the Permanent Electorate Commission of UDPS in 2018 and the coordinator of the Provincial Electorate Surveillance during the 2018 elections in the DRC.[42] He contended that women in UDPS are still struggling to get to the highest level of decision making in the party, and added that

36 Art 27 Statute (n 22).
37 Art 22 Statute (n 20).
38 Banga (n 32).
39 Telephone communication with F Tshisungu on 18 February 2024.
40 As above.
41 Telephone communication with anonymous member of UNC on 23 February 2024.
42 Interview with E Balol'Ebwami on 17 February 2024.

women need to put in more effort to gain representation at the highest decision-making positions of the party.[43] The positions of both the anonymous male member of UNC and Balol'Ebwami of UDPS are not cogent, because article 23 of the constitutive document of UDPS and article 31 of the constitutive document of UNC provide that the only way a woman can access a leadership position in the party is if she has been nominated by the highest decision-making body of the party. As already noted, since the creation of both UDPS and UNC, no woman has ever made it to such a body.

This article is not mistaken in asserting that the lack of empowerment of Congolese women significantly contributes to the perpetuation of male dominance in political parties. The exclusion of women from the highest decision-making roles in their parties has led to a situation where women who appear to hold power often possess only pseudo-power. This power can be revoked at any time by the party's top decision makers. Consequently, the political agendas have been femocratised, failing to address the concerns of ordinary women. As I will demonstrate later, revising and implementing Law 8/005 could have improved this status of Congolese women in parties such as UDPS and UNC by giving them the option to create their own political parties and challenge existing male political agendas.

The next part examines the content of Law 8/005 and how it aligns with the provisions of the African Women's Protocol.

2.2 The Law on Public Finance of Political Parties as a way to promote articles 9(1) and 9(2) of the African Women's Protocol

The African Women's Protocol is one of the most advanced legal instruments for protecting women's rights in Africa.[44] The DRC signed the Protocol in December 2003, ratified it in July 2008 and deposited the instrument of ratification in February 2009. It was subsequently published as part of the laws of the DRC in the Official Gazette in March 2018.[45] Before ratification, the Protocol received parliamentary approval in 2006, along with authorisation to ratify it as expected under article 213 of the 2006 Constitution. Article 213 of the 2006 Constitution states that the government can conclude an international agreement, but it can only become law after having been approved by the National Assembly and the Senate.[46]

43 As above.

44 Women, Gender and Development Directorate (WGDD) 'African Women's Protocol on Women's Rights: a living document for women's human rights in Africa' 4.

45 TM Makunya 'Beyond legal measures: a review of the DRC initial report under the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa' (2023) 67(2) *Journal of African Law* 225-240.

46 Art Constitution of the Democratic Republic of Congo 2006 (n 7).

The African Women's Protocol mandates states to take specific positive actions to promote participative governance and the equal participation of women in the political life in African countries through affirmative action, enabling national legislation and other measures.[47] Article 6 of the 2006 Constitution enjoins the African Women's Protocol, allowing men and women to create or join a political party of their choice. It also provides for the financing of political parties' electoral campaigns and other activities under conditions defined by law.[48]

However, in the broader structural context, poverty in the DRC remains a significant barrier to women's political empowerment. This may explain the decline in women's political participation, as shown by statistics from the 2023 UN Women Africa report, which revealed a drop from 13,6 per cent in 2006 to 11,7 per cent in 2018 over the past two elections.[49] This is evident from the fact that while Congolese women constitute 52 per cent of the DRC's population, approximately 61,2 per cent of these live below the poverty line. They are economically dependent on their male relatives and face challenges in accessing basic needs such as food, water, healthcare, shelter, social services, education and opportunities.[50] Without economic independence and access to basic needs, the idea of creating a political party or fighting for their empowerment within a political party may prove to be difficult. Furthermore, even of the 38,8 per cent of Congolese women who live above the poverty line, many still face historical and structural barriers that prevent them from accessing the financial support needed to start a political party or fairly compete in elections.

Indeed, it is difficult to discuss promoting women's political participation without addressing the financial support that men predominantly receive. Financial support is crucial in running an election or creating a political party. It enables political parties to maintain their regular administration, disseminate their political programmes, coordinate political actions, and prepare for electoral campaigns. Additionally, it supports the civic and political education of both party members and the general population, while ensuring that women have an equal chance of being eligible alongside men.[51] These measures, which require significant financial resources, are essential for securing the true independence of both the political party and its members.

Historically, in the DRC political arena, which has been heavily dominated by men, there has been a patriarchal belief that political party finances should prioritise male candidates due to their long-standing dominance in political positions and party leadership. This historical advantage means that men are more likely to win elections,

47 Art 9(1) African Women's Protocol.

48 Art 6 Constitution of the Democratic Republic of Congo 2006 (n 7).

49 UN Women Africa (n 11) 2.

50 Femnet 'Document d'orientation sur la participation Politique des Femmes en République Démocratique du Congo (RDC)' 5.

51 Art 6 Financing of Political Parties Act (n 13).

leading donors – who act as investors in electoral contexts – to allocate more resources to male candidates. For donors, this makes 'business sense', as men have been in the political arena for a longer time and are the faces that subconsciously Congolese society, which is in many ways practical,[52] expects to lead.[53]

For example, in the 2023 legislative elections, Denis Kadima, the head of the DRC Independent Electoral Commission, noted that the majority of parties and groupings that met the criteria – including financial criteria – were those of the presidential party and its allies, such as Jean-Pierre Bemba, Vital Kamerhe, Julien Paluku and Modeste Bahati. On the opposing side were figures such as Moise Katumbi, Augustin Matata Ponyo, Delly Sessanga and Adolphe Muzito, all of whom were presidential candidates in the 2023 election.[54] Notably, all these individuals have held political positions in the DRC government and led male-led-dominated parties since the beginning of the third republic, which came with the enactment of the 2006 Constitution.[55] It is significant to note that out of the 23 653 candidates selected to contest the 2023 legislative elections, only 3 955 or 17 per cent were women.[56] Consequently, we may conclude, and fairly so, that men are favoured by other men to hold political positions, which contributes to the persistently low percentage of women in political roles. This situation also explains the decrease in Congolese women's political participation.

The African Women's Protocol is crucial to addressing these issues. It mandates states to take positive actions to ensure at least three requirements are satisfied. One is women's participation without any discrimination in all elections.[57] The second is the equal representation of women with men at all levels in all electoral processes.[58] The third requirement is that women are equal partners with men at all levels of development and implementation of state policies and development programmes.[59] In adherence to this requirements, Law 8/005 allows for the financing of political parties to ensure equal opportunity and equal treatment for all political parties in the election process.[60] This Law may be the primary means to challenge the patriarchal *status quo* in the DRC and support women in politics.

52 C Panella Gomez 'How unequal access to funds hinders women's participation in politics' (21 January 2023), https://www.globsec.org/what-we-do/commentaries/how-unequal-access-funds-hinders-womens-participation-politics (accessed 15 February 2024).

53 As above.

54 RFI 'Legislative elections in the DRC: 23 653 candidates were selected, 17 per cent of whom were women' (21 August 2024), https://www.rfi.fr/en/legislative-elections-drc-23653-candidates-selected-17-women (accessed 21 August 2024).

55 M Smitall 'DR Congo adopts new constitution' (18 February 2006), https://reliefweb.int/report/democratic-republic-congo/dr-congo-adopts-new-constitution (accessed 27 August 2024).

56 RFI (n 54).

57 Art 9(1)(a) African Women's Protocol.

58 Art 9(1)(b) African Women's Protocol.

59 Article 9(1)(c) African Women's Protocol.

60 Financing of Political Parties Act (n 13).

3 NOT REVISING AND NOT IMPLEMENTING LAW 8/005: A VIOLATION OF THE AFRICAN WOMEN'S PROTOCOL AND A PROMOTION OF FEMOCRACY

3.1 A violation of the African Women's Protocol

Article 2 of the African Women's Protocol requires state parties to ensure increased and effective representation and participation of women at all levels of decision making.[61] As noted, on one hand, article 5 of the Law 8/005 mandates the state to allocate an annual subsidy of no less than 0,5 per cent and no more than 1 per cent of the national budget to political parties for the functioning of political parties.[62] On the other hand, article 9 mandates the state to contribute to the financing of electoral campaigns, which should be included in the national budget law of the year following the organisation of each electoral consultation, which is set at 2 per cent.[63] To receive this fund, the political party is required to take gender parity into account when establishing electoral lists.[64] This legal framework aims to create a more level playing field, encouraging the inclusion of women in politics by providing necessary financial support.[65]

To give life to the content of these two provisions in practice, this means, for example, that for the elections held in 2023, if Law 8/005 had been revised and implemented, political parties, including those created by women, could have benefited from 0,5 to 1 per cent of the DRC national budget between 2018 and 2022 to ensure the functioning of the political parties.[66] This amounts to a total of 68 589 billion Congolese francs, equivalent to US $34,079 billion, assuming an exchange rate of US $1 to 2 000 Congolese francs. If 1 per cent of the budget had been allocated to political parties, including those created by women, they could have received a lump sum of US $340,79 million. Moreover, the state fund for the electoral campaign, included in the national budget of the year following an electoral consultation, is set at 2 per cent. Considering the national budgets of 2012 and 2019, which follow the elections of 2011 and 2018 respectively, the combined amount totals 16 961,5 billion Congolese francs. This is equivalent to US $8 480,75 billion, assuming an exchange rate of US $1 to 2 000 Congolese francs. Consequently, the political parties, including those led by women, could have received an amount of US $169 615 million for their campaigns. However, it has never been implemented.

61 Art 2 African Woman's Protocol.
62 Art 5 Financing of Political Parties Act (n 13).
63 Art 9 Financing of Political Parties Act (n 13).
64 Art 3(5) Financing of Political Parties Act (n 13).
65 As above.
66 National Budgets Laws of the Democratic Republic of Congo (2018-2022).

Additionally, article 7 of Law 8/005 stipulates that for a party to receive public financing, it must be represented in at least one of the following: the National Assembly; the Senate; the Provincial Assembly; the Urban Council; the Municipal Council; or the Sector or Chiefdom Council in proportion to the number of their elected representatives.[67] This provision is inherently discriminatory because very few women and political parties led by women are represented in these positions at this point because of women's political representation declined in the DRC.[68] Moreover, women-led parties motivated to start due to the funds provided by Law 8/005 will face significant challenges in accessing these funds. If they are new, they are unlikely to be represented in the National Assembly, the Senate, the Provincial Assembly, the Urban Council, the Municipal Council, or the Sector or Chiefdom Council. Without such representation, they cannot be eligible to receive the financial support that Law 8/005 makes available.

Due to this lack of revision and implementation of Law 8/005, to secure a seat Congolese women are pushed to join with male-dominated parties. In 2022, among the 66 validated parties running for seats in the National Assembly, the *Alliance pour la Réforme de la République* (A2R) was the only party led by a woman (Henriette Wamu).[69] However, this may raise questions about whether Henriette Wamu truly is in charge ideologically or financially, as her party is allied to the male-led and male-dominated ruling party, the Union for Democracy and Social Progress (UDPS).[70]

This article, therefore, is not out of mark in holding the position that the lack of revision and implementation of Law 8/005 significantly contributes to the inadequate representation of Congolese women in political parties and positions. The failure to revise and implement this law not only constitutes a violation of the African Women's Protocol, which is dedicated to the empowerment and increase in political participation of women in politics.

In the next part this article demonstrates how the failure to revise and implement Law 8/005 has fostered femocracy. It will be referring to the experiences of women in the two leading political parties, namely, the Union for Democracy and Social Progress (UDPS) and the Union for the Congolese Nation (UNC).

67 Art 7 Financing of Political Parties Act (n 13).

68 UN Women Africa (n 11) 2.

69 CENI-RDC 'Liste des partis politiques ayant atteint le seuil de recevabilité à la députation nationale' (11 August) CENI RDC - Annexe I - Liste des Partis et Regroupements Politiques ayant atteint Seuil de Recevabi.pdf (accessed 12 January 2024).

70 'RDC: Henriette Wamu Alliance Pour la Reforme de la Republique pour soutenir la vision de Tshisekedi' *Africa News* November 2020, https://www.africanews rdc.net/actu/wamu-lance-a2r-soutenir-fatshi/ (accessed 14 January 2023).

3.2 Promotion of femocracy

The concept of femocracy has been defined in various ways within political structures. Mama describes femocracy as a form of feminine autocracy that advances the interests of a small clique of women, whose power stems from their control or association with powerful men. It cannot function without male dominance, as it is a product of that system.[71] Femocracy suppresses feminism – the struggle for women's liberation from injustices, oppression and disadvantages – and instead positions women as targets rather than decision makers.[72] In this system, women's agency is ignored, and their fate is predetermined. Rather than enhancing gender equality in political participation, it ensures that women's political success is dependent on men.[73] In this way, femocracy makes women promote and sustain the patriarchal *status quo*, as is the case in DRC political parties.[74] As seen in UDPS ad UNC, even if Law 8/005 were revised and implemented to support women economically, the structure of these two political parties' constitutive documents effectively strips women of any opportunity to become party leaders, further entrenching their subordination.

This dynamic is closely tied to what Mazrui refers to as *malignant sexism* – one of the most pervasive and insidious forms of sexism.[75] Malignant sexism subjects women to both economic exclusion and political marginalisation by creating power disparities between men and women.[76] According to Mazrui, African women have been centred as custodians of life, the economy, politics and society, but have never been empowered to lead or govern due to differences in resources and power between women and men.[77]

This reality is starkly illustrated by the DRC's failure to implement articles 5 and 9 of Law 8/005. Without this implementation, Congolese women face significant economic barriers that hinder their ability to run for politi9cal office. Furthermore, article 7 of the same law entrenches malignant sexism by requiring political parties to be represented in at least one government institution to qualify for public funding. As already mentioned, this condition economically and politically excludes women, as they often lack the financial resources necessary to hold such positions. Additionally, women who attempt to establish new political parties face discrimination in accessing public funds because their parties are not represented in these key government institutions. The number of women holding such positions remains very low, as shown by UN Africa's report, which highlights a decline in women's political representation from 2006 to 2018. Many

71 Mama (n 18) 64.
72 Mama (n 18) 69.
73 As above.
74 Mama (n 18) 56.
75 A Mazrui 'The black woman and the problem of gender: an African perspective' (1993) 24 *Research in African Literatures* 98.
76 Mazrui (n 75) 84-104.
77 Mazrui (n 75) 101.

women who do manage to attain these roles often do so by aligning with male-dominated political parties, further perpetuating their marginalisation and lack of empowerment.

This situation is seen as a lack of feminist consciousness.[78] This means, while women may intervene in politics, contradictions arise when their agendas, though gendered, fail to address the needs of ordinary women. The only way to ensure the full participation of women in male-dominated political systems is through the development of gender consciousness.[79] As mentioned in both UDPS and UNC, in DRC, women's political participation does not guarantee that their institutionalisation will yield desirable outcomes. The failure to revise and implement Law 8/005 has left women with no option but to work towards advancing male-dominated agendas rather than addressing the needs and priorities of ordinary women, once in positions of pseudo power. This arrangement produces undesirable outcomes, as women are compelled to support male-dominated agendas simply to maintain their roles.

To address these issues, two main avenues for women's empowerment can be pursued. The first is the removal of male dominance in politics, as women remain victims of patriarchy, sex stereotypes and economic disadvantage. The second is to equip women with the same resources and tools as their male counterparts.[80] Law 8/005 directly responds to these two approaches of empowering women. It offers a legislative foundation that could transform the political landscape for women in the DRC. By challenging patriarchal structures and providing women with equal access to political resources, the law holds the potential to significantly enhance women's political participation and representation. However, it is yet to be revised or implemented.

Femocracy has emerged as one of the greatest consequences of lack of empowerment for women in politics in the DRC. It has reduced women to puppets of male-dominated political parties, undermining feminist consciousness and limiting women's empowerment. Therefore, urgent action is needed from civil society and allies to address these systemic challenges and ensure meaningful progress in women's political participation and empowerment.

4 WAY FORWARD: AFRICAN WOMEN'S PROTOCOL'S MODEL LAW

This part proposes potential pathways to address the lack of revision and implementation of Law 8/005. Drawing on the resolution from the eightieth ordinary session of the African Commission, held from 24 July to 2 August 2024, one key recommendation is the development of

78 A Gouws 'The rise of the femocrat?' (1996) 12 *Agenda* 32.
79 As above.
80 Mazrui (n 75) 108.

a Model Law for the Implementation and Domestication of the African Women's Protocol across African countries.[81] This initiative, mandated to the Special Rapporteur on the Rights of Women in Africa, provides a crucial framework that could guide the DRC in aligning its national laws, including Law 8/005, with the principles of the African Women's Protocol. The Model Law would outline specific measures for enhancing women's political participation, ensuring economic empowerment, and combating gender-based discrimination in political structures.[82] Additionally, the DRC's membership in regional treaties, such as the African Charter on Human and Peoples' Rights (African Charter)[83] and the East African Community (EAC),[84] presents new opportunities for external pressure to be applied on the government to fulfil its obligations under the African Women's Protocol. Notably, the country has not yet published its report on implementing the Maputo Protocol. As of 21 May 2024, the DRC began drafting its second report, covering the period from 2016 to 2023.[85] The previous report (2005-2015) highlighted low female representation in decision-making due to outdated customs and procedures as key barriers.[86] The development of this Model Law could significantly enhance the DRC's capacity to reform these outdated customs and procedures, thereby promoting meaningful progress toward gender equality and enabling the country to fulfill its commitments under the Africa Women's Protocol.

At the eightieth ordinary session of the African Commission held from 24 July to 2 August 2024,[87] the African Commission, being aware of the poor implementation and domestication of the African Women's Protocol in many legal systems on the continent, as well as the inconsistent and inadequate legislation on women's rights, tasked its Special Rapporteur on the Rights of Women in Africa – Janet Ramatoulie Sallah-Njie[88] – to work in collaboration with the Pan-African Parliament Committee on Gender, Family, Youth and People with Disabilities, and the African Union Commission on International Law (AUCIL), to develop a model law to assist African countries in

81 African Commission (n 19).

82 As above.

83 East African Community 'Democratic Republic of the Congo' (22 July 2024), https://www.eac.int (accessed 10 October 2024).

84 As above.

85 Africa Media Agency, 'The Ministry of Gender, Family, and Children launches the drafting of the state report on the implementation of the Maputo Protocol in the Democratic Republic of Congo' (29 May 2024), The Ministry of Gender, Family, and Children launches the drafting of the state report on the implementation of the Maputo Protocol in the Democratic Republic of Congo - African Media Agency (accessed 13 December 2024).

86 African Commission on Human and Peoples' Rights, *Report to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (Initial Report and 1st, 2nd and 3rd Periodic Reports)* (2015).

87 African Commission (n 19).

88 As above.

harmonising their national legislation with the Protocol and ensuring its effective implementation under article 26 of the African Women's Protocol.[89]

It is beyond the remit of this article to comprehensively and meticulously provide an account of what such a model law should look like so that existing legislation or the lack of relevant legislation on financing political parties in African countries does not foster femocracy. However, for women to be truly empowered and have access to equitable opportunities, including in the running of political affairs, such a model law has to be detailed on some key elements that have been discussed in this article. One is the fact that it should comprehensively explain the relevance of public finances for political parties to foster the political emancipation and independence of African women. It should explain, for example, that state financial support for political parties is crucial because it grants genuine independence to both the members and the parties themselves. This funding allows them to efficiently handle party administration, communicate their political programmes, coordinate their actions, and prepare for electoral campaigns. Furthermore, it aids in the civic and political education of party members and the public, ensuring that women have equal opportunities to participate and be eligible in political processes alongside men.[90]

Furthermore, the model law should be mindful of the fact that while a law may exist and articulate the importance of financial support, there may still be procedural hurdles that impede its effectiveness. The model law must provide a clear implementation framework, establishing precise requirements for accessing public funds to challenge the patriarchal mindset ingrained in Congolese society. Article 7 of Law 8/005 should be revised given their direct economic and political discrimination of women, which is particularly concerning given the decrease in the number of women elected to government positions, which could lead to male favouritism and further perpetuate gender inequality. The model law should also ensure that the DRC submits a report every two years, detailing the progress made, the extent to which Law 8/005 has be revised and implemented, and whether the government is meeting its obligations to address femocracy, as stipulated under article 26 of the African Women's Protocol,[91] and article 62 of the African Charter on Human and Peoples' Rights (African Charter).[92] This reporting requirement will enable human rights stakeholders to engage annually with the state, advocate the liberation of women from femocracy, and promote collaboration to monitor gender parity. Additionally, it will help the state to receive support from both national and international human rights actors.[93]

89 As above.
90 Art 6 Financing of Political Parties Act (n 13).
91 Art 26 African Women's Protocol.
92 Art 62 African Charter.
93 Makunya (n 45) 226.

However, we do not have to wait for the model law to come into existence in order to fight the femocracy to implement articles 9(1) and 9 (2) of the African Women's Protocol. Congolese civil society and allies should present this case to the Constitutional Court, arguing that the failure to revise and implement Law 8/005 has forced women to align with male-dominated political parties to access necessary finances. Within these parties, women are often excluded from the highest decision-making roles. Even when they appear to hold positions of power, their authority is often superficial, as it can be revoked at any time by the party's top leaders. As a result, political agendas have become femocratised, failing to address the concerns of ordinary women.

The Constitutional Court of the DRC is composed of nine judges: three appointed by the President of his own volition, three by the Superior Council of the Magistracy and three by a Parliament dominated by males, as evidence in this article.[94] If five of the nine judges decide to act conscientiously, they should find this argument constitutionally valid. However, if they opt not to, a diligent civil society, along with its allies, will have exhausted all domestic remedies.

As an additional avenue, this study proposes the decision from the African Commission at a regional level and the East African Court of Justice (EACJ) at a sub-regional level. As a member of these African human rights systems, the DRC is bound by the provisions of the African Charter and the East African Community Treaty, particularly with regard to promoting gender equality and women's political empowerment.[95]

In the case of *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* on 16 May 2017, Equality Now and Women Lawyers Associations submitted a case to the African Commission on behalf of Woineshet Zebene against the Federal Republic of Ethiopia.[96] The complainant alleged that at age 13, she was raped by Aberew Jemma and his accomplices.[97] Although initially sentenced to 10 years' and eight years' imprisonment respectively, the High Court quashed the decision on 4 December, claiming that the acts were consensual, and the men were released.[98] Zebene's appeals to the Supreme Court and Cassation Bench were dismissed, with the latter citing lack of jurisdiction.[99]

94 Art 158 Constitution of the Democratic Republic of Congo 2006 (n 7).

95 Article 62 African Charter; art 6 East African Court of Justice Treaty.

96 African Commission on Human and Peoples' Rights 'Decision on Request for Review of Merits Decision Communication 341/2007 – *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*' (*Zebene* case) para 1.

97 *Zebene* (n 96) para 2.

98 *Zebene* (n 96) para 4.

99 *Zebene* (n 96) para 6.

In 2007 Zebene turned to the African Commission. After two years of failed amicable settlement efforts by the respondent, the Commission admitted the case for consideration of its merits.[100] The respondent applied for a review, but it was dismissed under Rule 111(2)(c), as the Commission found no compelling reasons to justify a review, ensuring fairness and respect for human and peoples' rights.[101]

Additionally, in *Nyong'o & Others v Attorney General of Kenya* at the EACJ, a dispute arose over Kenya's 2006 election of representatives to the East African Legislative Assembly (EALA). The plaintiffs, led by Peter Nyong'o, argued that the process violated article 50 of the EAC Treaty, as no proper election or parliamentary debate occurred. They also contended that the 2001 Election Rules, under which the election took place, were invalid as they did not allow for the direct election of nominees, contradicting the EAC Treaty.[102] The applicants obtained an injunction preventing the swearing-in of Kenyan nominees until the case was resolved. The respondents argued that the High Court of Kenya had exclusive jurisdiction over the legality of Kenyan elections and that the EACJ could not assume this role. They also claimed that the applicants lacked standing, asserting that only the Attorney-General could bring such a public interest case.[103]

The EACJ ruled that the 2001 Election Rules were inconsistent with article 50 of the EAC Treaty, as they did not establish a voting procedure for EALA representatives.[104] It also held that the applicants had *locus standi* under article 30 of the EAC Treaty, which allowed them to bring the case without exhausting local remedies.[105]

It is worth concluding that regional and sub-regional African human rights systems, supported by civil society resistance, have made bold decisions when authoritative governments impose discriminatory policies without considering their impact on marginalised social groups.[106] These systems have increasingly become avenues for affected individuals and groups whose domestic legal frameworks fail to offer adequate protection, stepping in to uphold justice and human rights. The involvement of civil society in challenging such actions plays a crucial role in promoting accountability and ensuring that governments adhere to fair, inclusive and non-discriminatory governance.[107]

100 *Zebene* (n 96) para 54.

101 *Zebene* (n 96) para 1.

102 V Lando 'The domestic impact of the decisions of the East African Court of Justice' (2018) 18 *African Human Rights Law Journal* 469.

103 Lando (n 102) 104.

104 *Nyong'o & Others v Attorney General of Kenya* EACJ Application 1/2006 (EACJ) paras 17-20.

105 Lando (n 102) 470.

106 J Ghatii 'Twenty-second annual Grotius lecture: the promise of international law: a Third World view (including a TWAIL bibliography 1996-2019 as an appendix)' (2020) 114 Proceedings of the Annual Meeting (American Society of International Law) 170-171.

107 As above.

Civil society, feminist groups and allies in the DRC should strategically leverage Congo's accession to advocate the government's implementation of Law 8/005 on Public Financing of Political Parties. Organisations such as the Permanent Framework for Women's Consultation (CAFCO) are well-positioned to lead this change. Emerging from the Inter-Congolese Dialogue, CAFCO seeks to integrate gender perspectives into decision-making processes and promote collaboration among Congolese women across political, economic and social spheres. CAFCO's partnerships with global organisations, such as UN Women and the United Nations Children's Fund (UNICEF), enhance its influence on democratic and peace processes in the DRC.[108]

Additionally, the Konrad-Adenauer-Stiftung (KAS) can contribute to the democratic strengthening of the DRC. With a global reach and long-term partnerships, KAS supports democracy, the rule of law and human rights through political education and policy reform. Its initiatives, such as workshops and seminars, build the capacity of political leaders and activists, helping to foster a more inclusive political environment.[109]

The African Women's Development and Communication Network (FEMNET) is another key actor. With over 800 members across 49 African countries, FEMNET focuses on facilitating the exchange of ideas and advocacy for women's rights. Its advocacy and capacity-building efforts can further the conversation on women's participation in governance and promote gender-sensitive reforms in the DRC.[110]

These organisations, through advocacy and collaboration, can create momentum for the DRC to uphold Law 8/005, ensuring a democratic framework that prioritises women's rights and representation.

5 CONCLUSION

This article has examined how the failure to revise and implement the DRC's Law 8/005 on Public Financing of Political Parties violates articles 9(1) and 9(2) of the African Women's Protocol, which collectively aim to ensure women's political empowerment and participation without discrimination. This violation promotes femocracy over democracy concerning the role of Congolese women in political parties and electoral processes. This study aimed to achieve three objectives.

First, it examined Congolese women's experiences in two leading political parties, the Union for Democracy and Social Progress (UDPS) and the Union for the Congolese Nation (UNC). It also analysed the

108 Cafco 'About Cafco', https://cafco-cd.org (accessed 20 June 2024).

109 Devex 'Konrad Adenauer Stiftung (KAS)', https://www.devex.com (accessed 22 August 2024).

110 See, generally, https:www.femnet.org (accessed 22 August 2024); and Femnet (n 50) 8-10.

extent to which Law 8/005 aligns with articles 9(1) and 9(2) of the African Women's Protocol. Second, it explored how the non-revision and non-implementation of Law 8/005 violate article 9(1) and 9(2) of the African Women's Protocol, and how it promotes femocracy. Lastly, it was to suggest to the eightieth ordinary session of the African Commission, which mandates the Special Rapporteur on the Rights of Women in Africa, to develop a model law for implementing the African Women's Protocol. It looked at regional bodies, such as the African Commission and EACJ, decisions to push the DRC government to discharge its responsibilities under the African Women's Protocol.

In the first part of the study, which examined Congolese women's experiences in two leading political parties, UDPS and the UNC, it also analysed the extent to which Law 8/005 aligns with articles 9(1) and 9(2) of the African Women's Protocol. The findings revealed that, since the creation of UDPS and UNC, no woman has held a top decision-making position, resulting in a concentration of power among male leaders. This has excluded women from leadership roles and requires them to work towards advancing male-made agendas, as party presidents dictate priorities. It also found that Law 8/005 aligns with the African Women's Protocol, as it has the potential to eliminate the financial barriers that hinder women's political empowerment. This could lead to increased and more effective participation of women in politics by providing funding for their electoral education and campaigns.

In the second part, the article aimed to explore how the non-revision and non-implementation of Law 8/005 violate articles 9(1) and 9(2) of the African Women's Protocol, and how it promotes femocracy. The findings revealed that article 5, 9 and 7 of Law 8/005, which conditions funding on representation in government, discriminates against women and those women who want to create political parties, since it is difficult to found them occupying such positions. As a result, women often align with powerful male-dominated parties to secure seats since they are not represented in the government. This reliance on male support reinforces femocracy and prevents women from achieving genuine leadership roles, pushing them to remain in the shadows and abandon the causes of ordinary women.

Lastly, the article proposed potential pathways for implementing Law 8/005, including leveraging African regional bodies such as the African Commission and the East African Court of Justice. The finding revealed that the African Union is aware of the government's failure to implement the provisions of the African Women's Protocol, which is why it mandated the Special Rapporteur on the Rights of Women in Africa to develop a model law to facilitate implementation of the Women's Protocol. The study recommends that this model law emphasises the importance of public financing for political parties to ensure candidate independence and challenge femocracy. It should also outline a clear method for calculating political party financing, considering women's historical participation and current involvement in politics. Additionally, the composition of the inter-institutional body responsible for regulating party financing must be amended to prevent

male favouritism in elections. The model law should require countries to submit annual reports on women's political advancement to hold them accountable. Finally, civil society should not wait for the implementation of Law 8/005 but actively leverage regional organisations, such as the African Commission and the EACJ, to advocate its enforcement, paving the way for genuine democracy and the empowerment of Congolese women.

To forge a path toward true gender equality and women's empowerment, the DRC government and civil society must address the profound violation caused by the failure to revise and implement Law 8/005. This law's neglect undermines the African Women's Protocol, which was designed to liberate and empower women from the colonial structures of male-dominated political institutions that have long silenced women. Such neglect has perpetuated an agenda of femocracy. Dismantling femocracy demands a colonial deconstruction of these entrenched structures, which have been sustained by post-independence male leadership. One effective approach is to revise and implement Law 8/005, which has the potential to economically empower women to lead, create, or join political parties without being compelled to uphold the patriarchal *status quo*. This would allow them to advance the causes of ordinary women and the interests of society as a whole.

II

SPECIAL FOCUS ON THE AFRICAN UNION'S THEME FOR 2024: EDUCATE AN AFRICAN FIT FOR THE 21ST CENTURY – BUILDING RESILIENT EDUCATION SYSTEMS FOR INCREASED ACCESS TO INCLUSIVE, LIFELONG, QUALITY, AND RELEVANT LEARNING IN AFRICA

FOCUS SPÉCIAL SUR LE THÈME DE L'UNION AFRICAINE POUR L'ANNÉE 2024 : ÉDUQUER UNE AFRIQUE DIGNE DU 21E SIÈCLE : CONSTRUIRE DES SYSTÈMES ÉDUCATIFS RÉSILIENTS POUR UN ACCÈS ACCRU À UN APPRENTISSAGE INCLUSIF, TOUT AU LONG DE LA VIE, DE QUALITÉ ET PERTINENT EN AFRIQUE

Zimbabwe's educational curriculum reforms from 2015 to 2024: human rights implications to learners, educators, parents and guardians

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ABSTRACT: The right to education is one of the most critical socio-economic rights for the African child. It unlocks a myriad of opportunities. The African Charter on the Rights and Welfare of the Child is categoric on the need to advance the child's right to education. Since 1980 Zimbabwe's education curriculum system has undergone an extensive metamorphosis. These reforms have affected the enjoyment of human rights. It is from this premise that this qualitative desk research seeks to interrogate the effects of Zimbabwe's education curriculum reform from 2015 to 2024 on the enjoyment of human rights by learners, educators, parents and guardians. The study was conducted through document analysis and thematic content analysis was employed for data analysis. The findings were that the introduction of the Continuous Assessment Learning Activities and the newly-introduced school-based projects increased the workloads of educators, learners, parents and guardians due to too many learning areas and projects, affecting their social rights. Economic rights have been affected by the high costs of learning materials, raw materials for projects and internet services. It was recommended that adequate financial resources be availed to the relevant ministry so that wifi and learning materials are availed at all schools.

TITRE ET RÉSUMÉ EN FRANÇAIS

Les réformes des programmes éducatifs au Zimbabwe (2015-2024) : implications en matière de droits humains pour les apprenants, enseignants, parents et tuteurs

RÉSUMÉ: Le droit à l'éducation constitue l'un des droits sociaux fondamentaux pour l'enfant africain, ouvrant la voie à une multitude d'opportunités. La Charte africaine des droits et du bien-être de l'enfant insiste sur l'impératif de promouvoir et de protéger ce droit. Depuis l'indépendance en 1980, le système éducatif zimbabwéen a connu de profondes transformations, avec des réformes qui ont eu des répercussions sur la jouissance effective des droits humains. Cette étude qualitative examine l'impact des réformes des programmes éducatifs entreprises au Zimbabwe entre 2015 et 2024 sur les droits humains des principaux acteurs éducatifs : apprenants, enseignants, parents et tuteurs. L'analyse repose sur une étude documentaire et une

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approche thématique de l'analyse de contenu. Les résultats mettent en évidence que l'introduction d'activités d'apprentissage à évaluation continue et de projets scolaires a significativement augmenté la charge de travail pour les enseignants, les élèves, ainsi que leurs familles, en raison d'un trop grand nombre de domaines d'apprentissage et de projets imposés. Cette surcharge a affecté la jouissance des droits sociaux de ces groupes. Par ailleurs, les coûts élevés associés au matériel pédagogique, aux matières premières nécessaires aux projets scolaires et aux services Internet ont eu des répercussions sur les droits économiques. Il est recommandé de doter le ministère compétent de ressources financières suffisantes pour garantir la disponibilité du matériel pédagogique et un accès universel au wifi dans toutes les écoles, afin de réduire les inégalités et de favoriser une mise en œuvre équitable des réformes éducatives.

KEY WORDS: Zimbabwe; education reforms; 2015-2024; human rights implications

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1 INTRODUCTION

The post-independence government of Zimbabwe adopted numerous reforms to address inequalities in the provision of education.[1] Despite the high literacy rate, Zimbabwe's education system inadequately prepared students for the demands of life and the labour market.[2] Like many former colonies, the education system was designed in line with the British model.[3] The educational systems that were put in place were created to maintain the colonial social hierarchy, promote neo-colonial dependence, uphold elitism, and inadequately train individuals for success and a constantly changing global environment.[4] Since the

1 T Mapolisa & T Tshabalala 'The impact of the economic meltdown on the education system of Zimbabwe' (2013) 3 *International Journal of Asian Social Science* 2254.

2 D Gory & others 'From content knowledge to competencies and exams to exit profiles: Education reform in Zimbabwe' in FM Reimers (ed) *Implementing deeper learning and 21st century education reforms: building an education renaissance after a global pandemic* (2021) 145.

3 As above.

4 P Chimbunde & BB Moreeng 'Post-colonial educational reforms in Zimbabwe: a fake badge of decolonisation of the curriculum' (2024) *Power and Education* 1.

system divided education on the basis of race, there was an urgent need to adopt an educational system detached from Eurocentric influence, and tailored to the specific needs of local communities.[5] In response, several initiatives designed to reform the education system with a more socialist orientation were put in place by the government of Zimbabwe.[6] The most momentous achievement was the significant rise in student enrolments during the first two decades of independence.[7] This expansion created challenges such as limited resources at educational institutions and overcrowding.[8] In 2000 governments across the world, including Zimbabwe and other various key stakeholders, participated in the World Education Forum (WEF) in Dakar, Senegal.[9] The participants of the forum agreed to adopt six Education for All (EFA) goals and the Dakar Framework for Action. In 2014 an inclusive curriculum reform was initiated by the Ministry of Primary and Secondary Education to ensure that the educational policies were aligned to international standards and improve the country's quality of education.[10]

Zimbabwe crafted a national plan of action setting the objectives and targets towards EFA in 2015. The Ministry of Primary and Secondary Education and the Ministry of Higher and Tertiary Education, Innovation, Science and Technology Development were responsible for implementing actions and activities to attain EFA goals. The national plan of action generated meaningful results with regard to realising the EFA goals such as increasing early childhood development availability to 98 per cent of primary schools, training early childhood development teachers and para-professionals, and consistently revising the education syllabi.[11] The government also transfigured the secondary education curricula in order to take in technical and vocational subjects and collaborate with industry partners to improve polytechnics and technical colleges.[12] The challenges that were encountered on the road to achieve the EFA include unavailability of adequate education finance; shortage of infrastructure and equipment; poor conditions of service for teachers; gaps in monitoring and supervision; and no provision of facilities for underprivileged children.[13]

5 As above.

6 C Gomba 'Post-colonial theory in Zimbabwe's education system: headmasters' views' (2018) 7 *International Journal of Research Studies in Education* 77.

7 E Shizha & MT Kariwo *Education and development in Zimbabwe: a social, political and economic analysis* (2011) 3.

8 As above.

9 Education for all 2015 national review report: Zimbabwe.

10 N Mapendere & N Masvimbo 'The Zimbabwe Continuous Assessment Learning Activity (CALA) analysis. Stakeholders' perceptions in cluster 35 of Nyajena in Masvingo District. A phenomenological approach' (2023) 4 *International Journal of Research Publication and Reviews* 233.

11 Education for all 2015 national review report: Zimbabwe (n 9).

12 As above.

13 As above

The 2015 WEF, which was held in Incheon, Republic of Korea, reaffirmed the legacies of Jomtien (Thailand) and Dakar (Senegal) that education is a fundamental human right and a public good.[14] The Forum plotted a way that is in sync with the ever-changing times and dedicated to ensuring that all children, young people and adults are equipped with knowledge and skills needed to live with dignity and contribute to their communities.[15] The WEF accentuated a child-centred approach, where the child is prioritised in the education for all agenda.[16] The WEF emphasised the importance of education as a key driver of economic development. Despite government efforts, colonial legacies still linger around Zimbabwe's education system.[17] It is against this background that the authors seek to unearth the education reforms in Zimbabwe from 2015 to 2024, bearing in mind the human rights implications for learners, educators and parents/guardians. It should be noted that this research will only focus on the Continuous Assessment Learning Activity (CALA) and heritage-based education curriculum.

2 THE EDUCATIONAL SYSTEM DURING THE COLONIAL ERA IN ZIMBABWE AND THE TRANSITION TO POST-INDEPENDENCE EDUCATION

Zimbabwe was under British rule from 1890 until gaining independence in 1980 after a prolonged war of liberation. The colonial educational system was characterised by racial bias and the exploitation of education for the African majority.[18] The 1899 Education Ordinance created distinct systems of education, one for whites and the other for blacks.[19] The system for European students was deliberately crafted to favour an elite ruling class that exploits Africans.[20] Its objective was to impart European children with knowledge and skills required to be superior and effective rulers over Africans.[21] There was a belief among white people that blacks were intellectually inferior and that they were only effective in the execution of manual and repetitive labour tasks.[22] Hence, education was only made accessible to very few black children. A separate curriculum was offered to the poorly-funded schools they attended compared to the

14 United Nations Educational, Scientific and Cultural Organisation World Education Forum 2015 final report.

15 As above.

16 Mapendere & Masvimbo (n 10) 233.

17 Gomba (n 6) 79.

18 CJM Zvobgo 'African education in Zimbabwe: the colonial inheritance of the new state, 1899-1979' (1981) 11 *African Issues* 13.

19 As above.

20 Chimbunde & Moreeng (n 4) 3.

21 As above.

22 Shizha & Kariwo (n 7) 18.

predominantly white schools.[23] The education offered to Africans prepared them to be employees of the colonialists. The extent of racial discrimination and unfair provision of social services such as education led to a protracted war of liberation, which gave birth to Zimbabwe's independence in 1980.[24]

The post-colonial government 'inherited a system of education that was racially biased and unequal in both governance and quality. The colonial Rhodesian government made European education compulsory and universal, and spent as much as 20 times more per European child than the African child.'[25] To eliminate the imbalances created by the colonial administration, a number of educational reforms had to be introduced to make education accessible to every citizen. The government understood that education was the substratum for political transformation and socio-economic development.[26] Public schools were made available for all and priority was placed on teacher training, setting a good example for other African countries.[27] The first 15 years of independence focused on massive expansion of Zimbabwe's education system.[28] However, in the early 2000s the situation changed for the worse as a result of political, economic and financial crises, which had a detrimental effect on the education system. Lack of funding for education as a result of the economic adjustment programmes of the 1990s and early 2000s was worsened by the economic collapse that followed the fast-track land reform programme initiated by the government in 2000.[29] The government recognised the need for an ambitious education reform that would benefit all children and save the country from its economic woes. In an effort to improve the quality of education, among other policies, the government adopted the CALA and heritage-based education curriculum.

3 ORIGIN OF COMPETENCY-BASED EDUCATION

The origin of competency-based learning was a conference that was held in Incheon, Korea in 2015 where the Incheon Declaration and Framework for Action of 2015 was adopted.[30] After this conference, Zimbabwe began the roll-out of its curriculum reform and commenced implementation of the CALA.[31] Historically, competency-based

23 GY Kanyongo 'Zimbabwe's public education system reforms: successes and challenges' (2005) 6 *International Education Journal* 65.
24 Shizha & Kariwo (n 7) 25.
25 As above.
26 Mapolisa & Tshabalala (n 1) 2255.
27 Gory and others (n 2) 145.
28 Mapolisa & Tshabalala (n 1) 2255.
29 Shizha & Kariwo (n 7) 3.
30 Mapendere & Masvimbo (n 10) 234.
31 As above.

education (CBE) emerged in the United States in the early 1970s.[32] European countries such as the United Kingdom and Germany followed suit and embraced the CBE in the 1980s.[33] In the 1990s Australia adopted the competency-based curriculum (CBC). The French community of Belgium adopted competences into its education curriculum in 1994 and 2001.[34] In British Columbia and Scotland, there have been moves toward extensive implementation of the CBE.[35] Competency-based policies were also introduced in Luxembourg, Mexico, Japan, Vietnam and Kazakhstan.[36] In Finland and New Zealand, the policy and practice have both shifted to adopt CBE in their systems.[37]

The rapidly-changing world has caused most countries to realise the need to revamp their education systems and implement key competencies that are required in the job market. For a long time, the content-based curriculum has been blamed for producing individuals with inadequate skills that deviate from real-life experiences. In Africa, at least half of the countries adopted CBE.[38] Zambia, Rwanda, Kenya, Tanzania, Nigeria and South Africa are some of the countries that have adopted this innovative policy into their education systems.[39] South Africa first adopted the CBC in 1998 to equip its citizens with employable skills needed to address contemporary issues.[40] Nigeria went on to change its curriculum from content to competency-based learning, after introducing universal basic education in 2004.[41] Other countries that adopted competency-based learning include Benin, Djibouti, Gabon, Madagascar, Mali, Mauritania, Senegal and Tunisia.[42] Algeria adopted competency-based learning but has not yet implemented it in classrooms.[43] Zimbabwe was lagging behind since it was relying on its traditional curriculum.[44]

32 SC Komba & M Mwandanji 'Reflections on the implementation of competence based curriculum in Tanzanian secondary schools' (2015) 4 *Journal of Education and Learning* 73.

33 As above.

34 Mapendere & Masvimbo (n 10) 234.

35 D Carlgren 'Competency-based curriculum transition: a conceptual framework' (2020) 6 *Journal of Competency-Based Education* 1.

36 Mapendere & Masvimbo (n 10) 234.

37 Carlgren (n 35) 2.

38 Mapendere & Masvimbo (n 10) 235.

39 FY Akinrinola and others 'Competency-based education in Africa: exploring teachers' perceptions, understanding, and practices' (2020) 2 *Teacher Education Through Flexible Learning in Africa* 2.

40 Komba & Mwandanji (n 32) 74.

41 Akinrinola and others (n 39) 2.

42 Mapendere & Masvimbo (n 10) 235.

43 As above.

44 As above.

4 THE 'BEST INTERESTS OF THE CHILD' AND THE RIGHT TO EDUCATION

The 'best interests of the child' is a guiding principle that ensures that decision makers prioritise the rights, needs and futures of children. In other words, the 'best interests' refers to the well-being of the child.[45] When making decisions regarding children, the government must assess whether its decision will be in the best interests of the child. Various international and regional instruments give children the right to have their best interests considered in all decisions and actions pertaining to their well-being and welfare. The right to education is enshrined in numerous human right treaties such as the 1960 United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention against Discrimination in Education (CADE); the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR); the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the 1989 Convention on the Rights of the Child (CRC).[46] CRC is the main legal instrument on the protection of children.[47] The Committee on the Rights of the Child monitors its implementation.[48] The best interests of the child ensure the full and effective enjoyment of all the rights preserved in CRC. ICESCR, CRC and CADE lay out the aims of education from a human rights perspective, and the Committee on the Rights of the Child recapitulates these as holistic development of the individual.[49] Article 3(1) of CRC points out that the best interests of the child shall take centre stage in all actions affecting children.[50] The right to education is also guaranteed in African human rights instruments, including the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter) and 1981 African Charter on Human and Peoples' Rights (African Charter). Furthermore, the right to education is stressed in the Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4 (SDG 4) that calls for 'inclusive and equitable quality education and promote lifelong learning opportunities for all' by 2030.[51] Education in the best interests of the child promotes the principle of equal educational opportunity.

45 The 'best interests' principle is one of the fundamental principles of the Convention on the Rights of the Child, ratified by many countries.

46 UNESCO & Right to Education Initiative *Right to education handbook* (2019).

47 United Nations High Commissioner for Refugees *UNHCR guidelines on determining the best interests of the child* (2008).

48 UNESCO & Right to Education Initiative (n 46).

49 As above.

50 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).

51 See Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all (2016), https://unesdoc.unesco.org/ark:/48223/pf0000245656 (accessed 15 October 2024).

5 EDUCATION AS A HUMAN RIGHT IN ZIMBABWE

The Zimbabwean educational system is managed by the Ministry of Primary and Secondary Education and the Ministry of Higher and Tertiary Education, Innovation, Science and Technology Development. The former is in charge of primary, secondary and non-formal education and the latter oversees tertiary education. The education system comprises primary, secondary and tertiary education. Primary education is made up of nine years of education; secondary education consists of four years of lower secondary education and two years of upper secondary education.[52] The Constitution and the Education Amendment Act (2020) influence the legal environment.[53] The international and regional policy framework includes the United Nations SDGs, 2015-2030; African Union (AU) Agenda, 2063; Continental Education Strategy for Africa (CESA), 2016-25; and Southern African Development Community (SADC) frameworks.[54] Zimbabwe's Education Sector Strategic Plan (ESSP 2021-2025), implemented by the Ministry of Primary and Secondary Education in line with the National Development Strategy (NDS 1 2021-2025) aims to safeguard universal education coverage.[55]

According to the ESSP, the Ministry of Primary and Secondary Education as the duty bearer on enjoyment of the right strives to ensure the realisation of the right to education in Zimbabwe.[56] The Ministry's goal is to ensure children's access to quality, inclusive and equitable education. This is in compliance with article 26 of the United Nations Universal Declaration of Human Rights (Universal Declaration); article 13 of ICESCR; article 17 of the African Charter; article 11 of the African Children's Charter; and sections 75(1)(a) and (b) of the Constitution of Zimbabwe.

The importance of the right to education in Zimbabwe is evidenced by its prioritisation in the NDS 1.[57] The NDS 1 gives the ministry the mandate to provide quality, equitable and inclusive education in the country. The government prioritised four focus areas in its quest to ensure effective implementation of its mandate. These areas are education infrastructure; curriculum and assessment frameworks; adequate safeguarding and learners' support with emphasis on regular and reliable provision of school feeding and nutrition; as well as

52 Ministry of Primary and Secondary Education 'Education sector strategic plan 2021-2025' Cadena International Development Projects.

53 As above.

54 As above.

55 Amh Voices 'Letters: Why Zimbabwe's education system is in decline' *The Standard* 10 March 2024, https://www.newsday.co.zw/thestandard/standard-people/article/200024164/letters-why-zimbabwes-education-system-is-in-decline (accessed 16 August 2024).

56 Ministry of Primary and Secondary Education (n 52).

57 As above.

enhancing the capacity of teachers through continuous professional development.[58]

These efforts are being undermined by several challenges that include inadequate education financing; multiple humanitarian challenges such as floods, cyclones, droughts and diseases; limited institutional capacity, the impact of COVID-19; as well as other socio-economic barriers that militate against attainment of quality, equitable and inclusive education for all children.[59] COVID-19 cost the education sector massive learning time that needed to be redeemed through catch-up strategies such as compression of syllabi and modification of the assessment system.[60]

Of concern also has been the high school drop-out rates. Between 2015 and 2019 drop-out rates for primary schools ranged from 2 to 3 per cent, while for secondary schools it ranged from about 3 to 4 per cent of the total enrolments.[61] The major reasons that were identified for learners dropping out of school included financial constraints, absconding, special needs and learning difficulties, illness and death.[62] The Basic Assistance Education Module (BEAM) was introduced to pay tuition fees for indigent learners, but the government has been struggling to provide funds to schools accommodating learners covered by BEAM.[63] Regarding special needs education, some schools have multi-disability resource centres to cater for learners with differing special needs, but these are not found in all schools, creating an inclusivity gap.[64]

All these challenges that are faced by the education sector can be mitigated by adequate funding so that interventions are put in place to ensure that the government's priorities are not derailed. However, the ministry's projected budget of US $5 089 billion for the period 2021-2025 is inadequate to cover all the needs of the ministry that relate to the focus areas discussed above as well as other costs such as text books and other learning materials; information and communications technology (ICT) infrastructure; upgrading and installation in areas without internet connectivity; the provision of ICT hardware; the setting up of computer laboratories at all schools; as well as capacity building of teachers.[65]

58 As above.
59 As above.
60 As above.
61 As above.
62 As above.
63 As above.
64 As above.
65 As above.

6 THE CONTINUOUS ASSESSMENT LEARNING ACTIVITIES AND HERITAGE-BASED EDUCATION CURRICULUM

The concept of CALA was implemented by the Ministry of Primary and Secondary Education in 2021 across all levels of Zimbabwe's education. The CALA programme was part of the 2015 new curriculum but was set aside due to the unavailability of resources.[66] The CALA aimed to provide a continuous assessment approach to learning. CALA is defined as 'any educational activity that demands students to demonstrate and perform their understanding, proficiency and knowledge of any subject they are learning'.[67] The CALA component was incorporated into the national education model in order to contribute to learner's assessments at the grade 7, form 4 and form 6 final examinations. CALA was created as a response to the recommendations of the 1998 Commission of Inquiry into Education and Training, which advocated a practice-based educational system.[68] It contributed 30 per cent to the students' final assessment marks, while the knowledge evaluated during examinations contributed 70 per cent to the final marks.

CALA encompasses learning activities or assessment that require learners to demonstrate their knowledge, understanding and ability.[69] The main goal of CALA was to produce tangible products that can act as evidence of learning.[70] Education that is only narrowed to the classroom and disengaged from the environment is irrelevant because it fails to equip students with vital work ethics and basic skills.[71] Curriculum innovations and reviews are crucial prerequisites that convert educational pedagogies into new methodical paradigms connected to learner experiences linked to the corporate world.[72] However, the CALA programme faced challenges and massive pushback from learners, educators, parents/guardians and various stakeholders who felt that the approaches and methods used in implementing the programme were not realistic. The CALA curriculum failed to meet the expectations of various stakeholders despite the planners' vision of it serving as a method to transform lives of learners through active participation and innovation.[73]

The curriculum was criticised by educators, learners and parents for failing to provide training to familiarise them with it and for being

66 Zimsec Continuous Assessment Learning Activities (CALA) tips, https://www.pressreader.com/zimbabwe/sunday-news-zimbabwe/20220220/282024740697459 (accessed 8 August 2024).

67 C Makamure & ZM Jojo 'The role of Continuous Assessment Learning Activities (CALA) in enhancing mathematics competency and proficiency in secondary school learners' (2023) 7 *Mathematics Education Journals* 1.

68 Mapendere & Masvimbo (n 10).

69 Zimsec (n 66).

70 Makamure & Jojo (n 67) 3.

71 As above.

72 Mapendere & Masvimbo (n 10) 234.

73 As above.

financially demanding.[74] Hence, the CALA programme was seen as burdensome by various stakeholders. Formal complaints were made by stakeholders regarding their dissatisfaction with CALA at curriculum review meetings, but the Ministry of Primary and Secondary Education was not at liberty to share the minutes with stakeholders. The handling of CALA by the Ministry of Primary and Secondary Education sparked discontent among teachers, who play a crucial role in its implementation.[75] The CALA component was a good programme. However, introducing it to school examinations without training educators resulted in a chaotic implementation due to their limited knowledge about the model. The exclusion of teachers in the curriculum preparation stages causes teachers to not fully understand the curriculum.[76] The Curriculum Development and Technical Services unit has a mandate 'not just to produce curriculum documents but to interface with teachers who interpret and implement those documents by engaging them in professional dialogue'.[77]

In 2024 the government made changes to the education curriculum, with CALA being replaced by the school-based projects with an emphasis on students focusing on practical aspects at school.[78] The transition from the CALA programme to school-based projects was a decisive change in Zimbabwe's education system. The school-based projects were adopted to improve practical learning and remove the burden on learners and teachers.[79] The heritage-based education 2024-2030 curriculum framework aims to transform the education system and to equip students with relevant skills, knowledge and values critical for national development.[80] The goal of the revised curriculum is to foster critical thinking, innovation and creativity. The learners should be able to provide goods and services needed in the community they serve by the time they complete the ordinary level.[81]

74 M Sibanda 'Govt to revisit Cala' *Newsday* 3 November 2022, https://www.newsday.co.zw/local-news/article/200002960/govt-to-revisit-cala (accessed 8 August 2024).

75 Mapendere & Masvimbo (n 10) 237.

76 A Mufanechiya & T Mufanechiya 'Selected primary school teachers' perceptions of implementing the competence-based curriculum in Zimbabwe: heartaches and opportunities' (2020) 1 *Journal of New Vision in Educational Research* 407.

77 As above.

78 I Zhakata & M Mashandure 'No CALA, no results for "O" and "A" level learners' *The Herald* 7 August 2024, https://www.herald.co.zw/no-cala-no-results-for-o-and-a-level-learners/ (accessed 7 August 2024).

79 Zviko 'From CALA to school-based projects: what parents and students need to know' https://zimprofiles.com/from-cala-to-school-based-projects-what-parents-and-students-need-to-know/ (accessed 8 August 2024).

80 E Huni 'Zimbabwe introduces heritage-based education curriculum with subject cap for O and A-levels', https://www.myzimbabwe.co.zw/news/170234-zimbabwe-introduces-heritage-based-education-curriculum-with-subject-cap-for-o-and-a-levels.html (accessed 9 August 2024).

81 Zviko (n 79).

The heritage-based education is supported by five pillars, namely, 'programmes/learning areas infrastructure; staffing infrastructure; physical and digital infrastructure; legal and regulatory infrastructure; and financial infrastructure'.[82] The curriculum has the potential to prepare students to become employable or entrepreneurs in the future. The heritage-based education gives more priority to vocational skills and technological proficiency, hence aligning with Goal 2 of the AU Agenda 2063. This goal emphasises well-educated citizens and skills revolution reinforced by science, technology and innovation.[83] To leave no one and no place behind, the government is focused on ensuring the provision of conducive teaching and learning infrastructure in marginalised areas such as rural areas, farming communities and new resettlement areas.[84]

7 THE CONCEPT OF HUMAN CAPITAL

The significant role of human capital development in the discourse of sustainable economic growth has been widely acknowledged by economists since the eighteenth century.[85] Human capital can be defined as the knowledge, skills, competencies and abilities of individuals, and the understanding attained through education, training and work experience.[86] In the eighteenth century Adam Smith ushered in an improvement in human capability central to production, and the term 'human capital' was introduced by Theodore W Schultz.[87] In the early 1960s the theory was established as a field of inquiry.[88] Adam Smith stressed the importance of education, particularly the role of acquired and useful abilities of members of society in his concept of fixed capital.[89] The idea was supported by Alfred Marshall, who highlighted the importance of education as a national investment.[90] According to Professor Gary Stanley Becker, a winner of the 1992 Nobel Memorial Prize in Economic Science, education and training are

82 'The Zimbabwe new education curriculum for 2024 to 2030 unveiled', https://zimsake.co.zw/notes/the-zimbabwe-new-education-curriculum-for-2024-to-2030-unveiled (accessed 15 August 2024).

83 Goals and priority areas of Agenda 2063, https://au.int/en/agenda2063/goals (accessed 10 August 2024).

84 B Chidakwa 'Govt scraps CALA, introduces school based projects' *The Herald* 28 February 2024, https://www.herald.co.zw/govt-scraps-cala-introduces-school-based-projects/ (accessed 8 August 2024).

85 S Abel, N Mhaka & P le Roux 'Human capital development and economic growth nexus in Zimbabwe' (2019) 23 *Southern African Business Review* 1.

86 T Sultana, SR Dey & M Tareque 'Exploring the linkage between human capital and economic growth: a look at 141 developing and developed countries' (2022) 46 *Economic Systems* 3.

87 N Wuttaphan 'Human capital theory: the theory of human resource development, implications and future' (2017) 18 *Rajabhat Journal of Sciences, Humanities and Social Sciences* 240.

88 SR Sweetland 'Human capital theory: foundations of a field of inquiry' (1996) 66 *Review of Education Research* 341.

89 Abel & others (n 85) 2.

90 As above.

important investments in human capital.[91] A higher level of education and training leads to an increase in wages and salaries, and people with advanced skills and knowledge have better chances to secure good jobs.[92]

The human capital theory states that investing in people results in economic benefits for individuals and society.[93] The theory emphasises the importance of formal education in transforming a population's productive capacity. McConnell and others, cited by Wuttaphan, state that 'a more educated, better-trained person is capable of supplying a larger amount of useful productive effort than one with less education and training'.[94] As individuals obtain skills and knowledge, it makes them more valuable to the economy. Education is a prime human capital investment because it tends to effect a control on population growth and improves quality of life.[95]

The 2021 World Economic Forum Human Capital Index shows that, on average, the world has developed 62 per cent of its human capital and neglected 38 per cent of its talent.[96] Low literacy and education levels pose significant obstacles to human capital development in the Global South.[97] To address the challenge of low literacy and education levels in developing countries, several policy interventions have been proposed.[98] Human capital development is essential in developing countries as gaining knowledge and skills leads to economic growth and development.[99] Countries in the Global North, such as Finland and South Korea, are moving forward due to huge technological investments and innovation.[100] In sub-Saharan Africa, 47 per cent of the population is underdeveloped. The majority of African students pursue social science, business and law, while only 4 per cent study engineering, manufacturing and construction, and a mere 2 per cent show interest in agriculture.[101]

The Zimbabwean government's central focus has been on the production of highly-skilled manpower following its policy of widening

91 GS Becker *'Human capital: a theoretical and empirical analysis with special reference to education* (1993) 3.

92 Wuttaphan (n 87) 242.

93 Sweetland (n 88) 341.

94 Wuttaphan (n 87) 242.

95 Sweetland (n 88) 341.

96 R Zvendiya 'New perspectives: investing in human capital to support structural transformation of Zimbabwe' *The Standard* 11 December 2022, https://www.newsday.co.zw/thestandard/standard-people/article/200004841/new-perspectives-investing-in-human-capital-to-support-structural-transformation-of-zimbabwe (accessed 10 August 2024).

97 M Entekhabi 'Human capital in developing countries: common challenges and the path forward' (2023) 1 *Journal of Emerging Trends in Marketing and Management* 18.

98 As above.

99 As above.

100 T Ncube 'Zimbabwe must use education for nation building' *Newsday* 8 February 2024, https://www.newsday.co.zw/opinion-analysis/article/200022817/zimbabwe-must-use-education-for-nation-building (accessed 14 February 2024).

101 Zvendiya (n 96).

access to education adopted in 1980.[102] The Transitional National Development Plan cited by Shizha and Kariwo states that

> the government recognises that education is a basic human right. It also recognises that education is an investment in human capital, which sustains and accelerates the rate of economic growth and socio-economic development. The challenge for Zimbabwe is not only one of redressing the educational qualitative and quantitative imbalances in the inherited system but also that of meeting the exceedingly large demands with limited resources.[103]

Due to economic hardships, many professionals, including educators, have left the country in search of greener pastures. Zimbabwe has become a training ground for human resources for other nations. In return, Zimbabwe has benefited from the emigration of intellectuals through remittances in foreign currency back into the country.[104]

8 FINDINGS

This part discusses the findings relating to the government's position on the benefits of the education curriculum reform as well as the human rights implications on educators, learners, parents or guardians. The findings are categorised in terms of the implications on each of the mentioned groups.

8.1 The government's position on the human rights benefits of the new curriculum

The thirty-seventh summit of the AU was held from 17 to 18 February 2024 under the theme 'Educate an African fit for the 21st century: Building resilient education systems for increased access to inclusive, lifelong, quality, and relevant learning in Africa'. The government of Zimbabwe has touted the country's new curriculum's thrust as being in tandem with the above-stated AU theme in that it seeks to empower learners with both theory and practical learning, including digital knowledge that are crucial in the twenty-first century. Informed by the AU Agenda 2063, its own Vision 2030 and NDS 1, the Zimbabwean government acknowledged that education is both a human right as well as a means of realising other rights by adopting the heritage-based education curriculum for both primary and secondary school levels.

Education must grow out of the environment and the learning process must speak to the needs of society, hence the need for a home-grown curriculum instead of relying on foreign designs.[105] That is the reason why in 2015 the government, through the Ministry of Primary and Secondary Education, adopted a competency-based curriculum

102 Shizha & Kariwo (n 7) 11.

103 As above.

104 As above.

105 W Rodney *How Europe underdeveloped Africa* (2018).

framework for primary and secondary education (2015-2022), which was a product of a multi-stakeholder consultative process. The new curriculum was influenced by findings from the Nziramasanga Commission Report on curricular reform that was published in 1999, which placed emphasis on competency-based learning.[106] The first education sector analysis was conducted in 2014 after commissioning of the national consultation for curriculum review. In 2015 the new curriculum framework was finalised and approved after adoption of the curriculum review narrative report published (2014-2015). From 2016 to 2022 implementation of the new curriculum commenced.

In 2016 syllabus development began as well as year 1 training of ECD A, Grades 1 and 3 and Forms 1, 3 and 5 teachers. In the same year the Education Sector Strategic Plan (ESSP 2016-2020) was developed and adopted to guide the curriculum reform process. In 2017 there was implementation of the curriculum in grades of year 1 trained teachers as well as year 2 training of ECD B, Grade 2, Form 2, 4 and 6 teachers. In 2018 there was implementation of the curriculum in grades of year 2 trained teachers as well as year 3 training of grade 4 and form 4 teachers and supervisors. In 2019 there was implementation of the curriculum in grades of year 3 trained teachers and year 4 training of ECD B, Grade 5, form 4 and 6 teachers. In 2020 there was implementation of the curriculum in grades of year 4 trained teachers, year 5 training of grade 6 teachers and supervisors as well as the second Education Sector Analysis. In 2021 there was implementation of the curriculum in grades of year 5 trained teachers, year 6 training of Grade 7 teachers and supervisors as well as curriculum review. In 2022 there was implementation of the curriculum of grades of year 6 trained teachers and some improvements in the curriculum as the implementation continued until 2030. Another curriculum review took place in 2023 resulting in adoption of the heritage-based curriculum.[107]

The government of Zimbabwe's basis for adopting a heritage-based education was said to be for the purpose of preserving the country's heritage, which is a vital link to the nation's cultural, educational, aesthetic, inspirational and economic legacies. The heritage-based curriculum is an educational method that assimilates culture and heritage into the teaching and learning process.[108] The Ministry of Primary and Secondary Education has indicated that the thrust of the curriculum is to impart on learners leadership and problem-solving skills, business and financial literacy, entrepreneurial skills and a sense of patriotism and ubuntu. Through heritage-based learning, Zimbabwe will produce graduates who are proud of their identity and participate peacefully in sustainable development as opposed to producing graduates with theoretical prowess.

106 CT Nziramasanga 'Zimbabwe: report on the Presidential Commission of Inquiry into Education and Training' (1999).

107 Government of Zimbabwe *Curriculum framework for primary and secondary education 2015-2022* (2015).

108 G Manyeruke 'Heritage-based curriculum preserves culture, identity' *The Sunday Mail* 17 March 2024, https://www.sundaymail.co.zw/heritage-based-curriculum-preserves-culture-identity (accessed 15 August 2024).

It is hoped that through this unique education curriculum, which emphasises the use of cutting-edge technology and innovation, learners are being capacitated to contribute to the country's development during and after completion of their studies. This will be achieved through incorporation of the cultural, historical and social contexts into the learning process so that the learners have a deeper understanding of their heritage and its relevance to the subject matter. The contextualisation of knowledge in local heritage will allow the grounding of academic concepts and enhance practical application of knowledge.

8.2 Human rights implications of the curriculum reform for educators

The researchers noted that the curriculum review that commenced in 2015 entailed concurrent training of educators and implementation of the introduced curriculum, which created strain on the educators whose workload increased exponentially due to the changes in teaching and learning approaches. The new curriculum introduced inquiry-based teaching approaches that sought to shift teaching practices from the traditional rote-learning lecture and drill to more learner-centred approaches where pupils are afforded the opportunity to develop their creativity, express their ideas, collaborate with one another and learn by doing. The learner-centred approach came with supervised school-based projects.[109] While commendable, these projects also further increased the workload of educators especially those at public schools whose classes can have more than 50 learners. Due to the high pupil-teacher ratio, it was said to be difficult to devote adequate time to supervise the projects of each learner in such a big class, especially those with learning challenges who require more attention and assistance.

This is why some educators ended up devoting their personal time to assist learners who required further coaching and charging a fee for what they call extra lessons or extra work. The fees for extra lessons range from US $1 per day or US $3 per week, depending on the teacher's proficiency and area where the school is located. During school holidays, educators were said to be conducting private vacation lessons at their homes or rented premises. These vacation lessons used to be conducted at schools but the government has prohibited teachers from conducting extra lessons and vacation school for non-examination classes.[110] The Zimbabwe Anti-Corruption Commission (ZACC) has been making arrests to deter teachers from conducting

109 F Moyo 'New school curriculum with practical focus earns mixed reviews in Zimbabwe' (2017) *Global Press Journal*.

110 P Manase 'Govt gets tough on paid-for extra lessons' *H-Metro* 19 March 2024, https://www.hmetro.co.zw/govt-gets-tough-on-paid-for-extra-lessons/ (accessed 15 August 2024).

these out-of-school learning arrangements.[111] However, some parents aided and abetted the practice of extra lessons and private vacation lessons on the basis that the new curriculum was work intensive and had too many learning areas that could not be covered during normal learning time, hence, the need for extra coaching.

8.3 Human rights implications of the curriculum reform for learners

Article 17 of the African Charter and article 11 of the African Children's Charter provide for the right to education for every individual and every child, respectively.[112] The Children's Charter reiterates that the education of the child should be directed to the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential. This should be achieved through fostering respect for human rights and fundamental freedoms; the preservation and strengthening of positive African morals, traditional values and cultures; self-reliance; fostering unity, peace and inclusivity; the preservation of national independence and territorial integrity; the promotion and achievements of African unity and solidarity; the development of respect for the environment and natural resources; as well as the promotion of the child's understanding of primary healthcare.

It is pertinent to note that the African Children's Charter places an obligation on the state to promote and protect the right to education. In Zimbabwe the state has taken the lead in facilitating the building of a resilient education system by adopting an empowering and inclusive heritage-based education curriculum after review of CALA.

It is commendable that Zimbabwe's new curriculum covers all the critical aspects of education provided for in the African Children's Charter such as fostering respect for human rights and fundamental freedoms; the preservation and strengthening of positive traditional values and cultures; self-reliance; fostering unity, peace and inclusivity; the preservation of national independence and territorial integrity; the promotion and the development of respect for the environment and natural resources; as well as the promotion of the child's understanding of primary healthcare. All these aspects are covered in subjects such as heritage, family, religion and moral education as well as agriculture, science and technology. The curriculum has also mainstreamed human rights, gender, disaster preparedness, human sexuality, woodwork, environmental issues and conflict management, which makes it a holistic empowerment tool.

111 B Ndlovu 'Corruption charges for teachers demanding extra lessons fee' *Sunday News* 23 April 2023, https://www.sundaynews.co.zw/corruption-charges-for-teachers-demanding-extra-lessons-fee/ (accessed 15 August 2024).

112 See African Charter on the Rights and Welfare of the Child (adopted by the Organisation of African Unity in July 1990, entered into force 29 November 1999); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).

The shift to the heritage-based education curriculum is to ensure that learners acquire life-enhancing skills, values and attitudes by producing goods and services that are useful to the economy, based on the country's heritage and natural resources.[113] Mainstreaming cultural heritage in the education system ensures the consistent socialisation of every child and youth in the morals and traditional values acceptable by the nation.

Unlike the colonially-influenced education curriculum, which emphasised rote learning with minimum practicality, CALA brought in practical aspects of learning. However, one of its main shortcomings was the increased workload for the learners. From infant level (ECD A) to grade 7, learning areas were reduced from 11 to six. At secondary level, the core and compulsory learning areas were reduced from seven to five. Learners at secondary school level are supposed to study at least three electives from the following disciplines: the sciences, languages, humanities, commercials, technical and vocational, physical education and arts. This diversity in terms of electives caters for differences in talent and ability. Of note also is the adoption of an inclusive and integrated approach that caters for learners with special needs through the provision of assistive devices as required by article 7 of the United Nations Convention on the Rights of Persons with Disabilities, which guarantees the rights of children with disabilities, and article 9(2)(h) on accessibility including access to assistive devices and technologies.

The curriculum review process did not only focus on reduction of learning areas but also included a review of the assessment modalities and tools.[114] CALA had several projects that needed to be done at home after a full learning day, affecting the learners' need for rest, play and recreation, which are necessary for a child's well-being. The newly-introduced school-based projects emphasise the observation of the learner while carrying out the practical aspects at school. The carrying out of projects at school eliminates the possibility of parents or guardians doing projects for the learners at home or buying the practical work models from craftsmen.

8.4 Human rights implications of the curriculum reform for parents and guardians

The African Children's Charter places the primary responsibility to fulfil the right to education on the state, but parents and guardians also have a secondary duty to ensure that children have access to quality education. In relation to the CALA programme, parents expressed dissatisfaction because they were not informed about its importance,

113 N Tshili 'Government backs heritage-based education' *Chronicle* 18 March 2024, http://www.chronicle.co.zw/government-backs-heritage-education/ (accessed 15 August 2024).

114 'Revised curriculum will enhance quality education delivery' *The Sunday Mail* 10 March 2024, https://www.sundaymail.co.zw/revised-curriculum-will-enhance-quality-education-delivery (accessed 8 August 2024).

and a majority of them failed to comprehend it.[115] Parents and guardians of primary and secondary school students raised concern over the programme, saying that it was elitist, making it difficult for children to have interest in schoolwork.[116] The introduction of the new curriculum brought unexpected economic commitments to some parents and guardians, especially those from the older generation who were not familiar with the new curriculum content and learning approaches. The homework load of learners increased such that parents and guardians had to become 'second teachers', otherwise the learners could not do the homework on their own due to its complexity. Parents and guardians with access to internet services or data bundles were spared physical research work since the learners could carry out online research on their own, but this meant increased costs for internet services to cater for homework research and receiving online homework.

Apart from the high costs of data, there was also a need for electronic gadgets such as tablets or I-pads for use to conduct research and receive online homework. In particular, parents were against the CALA programme because most of them could not afford materials needed by learners to successfully carry out projects.[117] Some parents and guardians indicated that they could not afford to buy electronic gadgets for the learners, with the result that educators sent online homework on their cellphones and if they delayed in receiving them, this affected the learners' timeous completion of homework, resulting in both the parents or guardians and the learners going to sleep late so that the homework could be ready the next day. The failure to avail electronic gadgets and internet connectivity affected the quality of work of some learners, especially those from the rural and farming communities. This was evidenced by the poor pass rates in some of these communities where some schools had zero per cent pass rate.[118]

The authors also noted that some learning exercises given to children are beyond their knowledge capacity levels, such that teachers request parents to do the exercises for them, especially the practical work. The children gain marks for the work done by parents on their behalf, which is not a form of learning at all. At times teachers give children exercises on topics they have not yet covered, putting mental strain on some parents who learnt the old curriculum and are not familiar with the learning areas of the new curriculum.

The curriculum review that reduced learning areas and introduced school-based projects was well received by most parents whose economic rights had been negatively affected by CALA, which required investment of substantial financial resources in buying the numerous text books for the new curriculum as well as electronic gadgets and

115 Mapendere & Masvimbo (n 10) 236.

116 Sibanda (n 74).

117 As above.

118 'Zero per cent pass rates in schools to be probed' *The Sunday Mail* 11 February 2024, https://www.sundaymail.co.zw/zero-percent-pass-rates-in-schools-to-be-probed (accessed 8 August 2024).

internet data bundles. Some schools required different books for each subject such as Ventures, Plus One, CPS, Red Spot and Work books, which are costly. The prices of the main text books ranged from almost US $4 to US $14 depending on the grade, publishing house and retail book shops.[119]

9 CONCLUSION

The government did not adequately interrogate the human rights implications of the increased workload on the educators, learners, parents and guardians as well as the high costs of learning materials. Too much homework in many learning areas per day affected the children's rights to recreation and enjoyment of childhood. Article 19 of the African Children's Charter gives children responsibilities towards their families and communities. Learners living far away from schools, especially in rural areas, are therefore expected to perform household chores when they get home, but due to the many learning areas, they tend to arrive home late with a lot of homework to be done and to be ready for submission the following day. The failure to balance the school work load and household chores could be one of the contributors of the zero per cent pass rate in rural and other marginalised schools discussed earlier in the findings. Such onerous school and home responsibilities left the children with very little or no time to play and do revision in preparation for the next learning day, thus further compromising the pass rates.

Marginalised and vulnerable children cannot afford to buy the numerous textbooks that are required as well as components for the CALA activities, compatible electronic gadgets and internet data bundles for research, costs for extra lessons and the exclusion of children who cannot pay for extra lessons. Compatible electronic gadgets cost between US $200 and US $300,[120] depending on brand, ram size and performance. Eight gigabytes of data cost almost US $16 (ZWL 222 684),[121] depending on the internet service provider. A lack of these devices and wifi impact on the quality of homework and a child's academic performance.

The divide between the rich and the poor has been amplified since well-to-do parents are shunning the ZIMSEC-examined curriculum in preference for the Cambridge-based curriculum, which does not have CALA, and the heritage-based education curriculum. Segregation on the basis of economic status has been revived just like it was during the colonial period where there was education for the marginalised indigenous people and for the Europeans.

119 College Press New curriculum text books price lists, https://www.collegepress.co.zw/files/USD%20Primary%20Pricelist.pdf (accessed 14 August 2024).

120 Fusertech price of 64 Gig Samsung tablet, https://fusertech.co.zw/product/samsung-smx2054gb64gb-10-5tablet/ (accessed 14 August 2024).

121 Econet Wireless Zimbabwe price of data bundles, https://www.econet.co.zw/data-bundles/ (accessed 14 August 2024).

10 RECOMMENDATIONS

The findings of the study indicated that there were concerns regarding the implementation of CALA and the new heritage-based education curriculum. Child rights advocates recommended the inclusion of the voices of children with the capacity to appreciate curriculum development issues in consultations on relevance, inclusivity and effects on their well-being and enjoyment of childhood since children have a mantra that says 'nothing for us without us'.

The government of Zimbabwe should consider the cost implications of implementing the new curriculum on parents and guardians and mobilise adequate resources for procurement of learning materials and internet connection at schools since most, if not all, government schools have no textbooks and each child should bring their own books from home.

The government through the relevant ministry must arrange workshops to cultivate positive perceptions on the new curriculum. The government should invest in the training of educators and impart them with the necessary skills, thus improving the quality of education. The government must also improve the welfare and working conditions of teachers. There is also a need to make the curriculum inclusive by ensuring that no place or individual is left behind in the education system.

The government should further collaborate with non-governmental organisations (NGOs) and the private sector to improve the country's education system. In the future, intensive training should be done prior to the introduction of a new curriculum. The government should also invest in the education of parents/guardians on the importance of curriculum reforms since the majority of them do not understand these changes.

Le droit à l'éducation des personnes handicapées: analyse à l'aune du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des personnes handicapées en Afrique

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RÉSUMÉ: Le 3 mai 2024, le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des personnes handicapées en Afrique est entré en vigueur. Ce droit catégoriel d'un intérêt sociétal évident constitue une avancée juridique majeure et historique, car il ouvre une nouvelle page qui témoigne de l'attachement des États africains à la protection des personnes handicapées. Cet article analyse le régime juridique mis en place par ce Protocole pour garantir le droit à l'éducation des personnes handicapées. Il procède à cet examen en présentant, d'une part, à l'aune du droit international, l'analyse du droit à l'éducation des personnes handicapées en Afrique et les lacunes de sa portée. D'autre part, il analyse la portée et la nature des obligations qui pèsent sur les États au titre de ce droit. De ces analyses, cet article met en évidence le besoin d'étendre la portée des obligations positives spéciales des États, de promouvoir la synergie des acteurs étatiques et privés et l'activisme interprétatif et judiciaire respectivement de la Commission et de la Cour africaines des droits de l'homme et des peuples y compris du juge national en vue de donner effet concret et effectif au droit à l'éducation des personnes handicapées.

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TITLE AND ABSTRACT IN ENGLISH

The right to education of persons with disabilities: an analysis in the light of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

ABSTRACT: On 3 May 2024, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa entered into force, marking a significant milestone in the legal protection of persons with disabilities on the continent. This historic development underscores the commitment of African states to safeguarding the rights of persons with disabilities and represents a major advancement in the region's human rights landscape. This article critically examines the legal framework established by the Protocol to guarantee the right to education for persons with disabilities. It begins with an analysis of the right to education for persons with disabilities in Africa, highlighting its limitations and gaps within the broader context of international human rights law. The article further explores the nature and scope of states' obligations under this right, emphasizing the necessity of adopting a more expansive approach to their positive obligations. Building on these analyses, the article argues for extending states' special positive obligations, fostering collaboration between state and private actors, and promoting interpretative and judicial activism by the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and domestic courts. These measures are essential to ensuring the concrete and effective realization of the right to education for persons with disabilities in Africa.

MOTS-CLÉS: personnes handicapées ; Protocole; droit à l'éducation ; éducation inclusive ; obligations positives spéciales ; activisme interprétatif et judiciaire

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1 INTRODUCTION

«Éduquer une Afrique adaptée au 21e siècle: construire des systèmes éducatifs résilients pour un accès accru à un *apprentissage inclusif*, qualitatif, tout au long de la vie et pertinent pour l'Afrique», tel est le thème choisi par l'Union africaine (UA) pour l'année 2024,[1] et qui traduit l'importance majeure qu'elle accorde au droit à l'éducation, en

1 Conférence de l'Union Africaine *Déclaration de Dar-es-Salaam sur le sommet des chefs d'Etat sur le capital humain de 2023 (Point proposé par la République-unie de Tanzanie)* (2024) 3 (nous soulignons).

particulier au droit à l'éducation inclusive.[2] L'attachement à ce droit est encore plus marqué par l'adoption, en 2018, du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des personnes handicapées en Afrique (Protocole) qui, en date du 3 mai 2024, est entré en vigueur à la suite du dépôt, le 3 avril 2024, du 15e instrument de ratification par la République du Congo.[3] L'adoption et l'entrée en vigueur de ce Protocole constituent, du point de vue juridique, une avancée on ne peut plus majeure et historique en particulier dans la protection du droit à l'éducation des personnes handicapées qui, de façon générale, demeure ineffectif pour un grand nombre des personnes handicapées.

Traditionnellement considérées comme des «objets de soins», les personnes handicapées sont aujourd'hui avant tout «sujets de droits».[4] Cette évolution est consubstantielle au fait que ces personnes handicapées continuent de souffrir cruellement de la discrimination, de la privation aux services sociaux de base, notamment l'éducation, et, en conséquence, de l'exclusion dans nombre secteurs de la vie politique, économique et sociale.[5] Dans le secteur éducatif en particulier, le handicap est considéré comme un «facteur flagrant d'exclusion scolaire».[6] Partant, le nombre d'enfants en situation de handicap dans les écoles demeure très faible.[7] Ce qui ne leur permet pas de jouer, dans leur vie d'adulte, un rôle clé dans la vie sociale. C'est fort de ce qui précède que le Protocole a été adopté afin de concourir à la protection et à la mise en œuvre des droits des personnes handicapées, et de garantir le respect de leur dignité qui leur est intrinsèque.[8]

En matière éducative, l'article 16 du Protocole reconnaît aux personnes handicapées le droit à l'éducation. Toutefois, il convient de remarquer que le droit international des droits de l'homme reconnaît déjà à toutes les personnes handicapées ce droit, et ce, dans le strict

2 En matière de handicap, cette inclusion constitue le 'leitmotiv' de toutes les politiques publiques y relatives. Voir I Hachez, L Triaille & J Vrielink 'Conclusion' in I Hachez & J Vrielink (dirs) *Les grands arrêts en matière de handicap* (dir) (2020) 798. Voir aussi l'article 3 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique. 'On parle d'inclusion dans le cas d'un processus de réforme systémique, impliquant des changements dans les contenus pédagogiques, les méthodes d'enseignement ainsi que les approches, les structures et les stratégies éducatives, conçus pour supprimer les obstacles existants, dans l'optique de dispenser à tous les élèves de la classe d'âge concernée un enseignement axé sur l'équité et la participation, dans un environnement répondant au mieux à leurs besoins et à leurs préférences'. Comité des droits des personnes handicapées *Observation générale n°4 sur le droit à l'éducation inclusive* (2016) para 11.

3 https://achpr.au.int/fr/news/communique-de-presse/2024-06-09/lentree-en-vigueur-du-Protocole-la-charte.

4 Hachez, Triaille & Vrielink (n 2) 783.

5 Préambule du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

6 E Antoinette *Éducation inclusive en Afrique subsaharienne* (2013) 18.

7 E Sarton & M Smith *Le défi de l'inclusion des enfants en situation de handicap - expériences de mise en œuvre en Afrique orientale et australe* (2018) 1.

8 Art 2 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

respect du principe d'égalité des chances et non-discrimination.[9] En droit africain des droits de l'homme, nombre d'instruments juridiques reconnaissent également ce droit. En effet, les article 17[10] et 18 alinéa 4 de la Charte africaine des droits de l'homme et des peuples (Charte) reconnaissent respectivement le droit à l'éducation à toute personne et le droit pour les personnes handicapées de bénéficier des mesures spécifiques de protection en rapport avec leurs besoins physiques ou moraux.[11] Les articles 11 et 13 de la Charte Africaine des Droits et du Bien-être de l'Enfant s'inscrivent dans le même sens s'agissant en particulier des enfants handicapés.[12] Il en est de même du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole de Maputo) qui, à son article 23, engage les Etats à prendre les mesures spéciales de protection en faveur des femmes handicapées. Le droit à l'éducation est aussi reconnu, sans discrimination, dans la Charte africaine de la jeunesse du 02 juillet 2006 (article 13) et dans la Charte africaine de la démocratie, des élections et de la gouvernance du 30 janvier 2007 (article 43). Quant à la Charte africaine des valeurs et des principes de la décentralisation, de la gouvernance locale et du développement local du 27 juin 2014, elle met en avant l'obligation d'intégrer les handicapés dans le processus de formulation des politiques publiques (éducatives y compris) ainsi que dans leur mise en œuvre et suivi (article 15). Enfin, le droit interne des Etats africains s'inscrit dans la même optique de protection du droit à l'éducation des personnes handicapées.[13]

9 Comité des droits des personnes handicapées (n 2) para 1 ; M El Berhoumi & I Hachez 'Lorsque l'inclusion se décrète: le décret de la Commission communautaire française du 17 janvier 2014 relatif à l'inclusion de la personne handicapée' (2015) *Revue interdisciplinaire d'études juridiques* 58-59.

10 Voir aussi *Commission africaine des droits de l'homme et des peuples c. Kenya* (fond), Arrêt, 26 mai 2017, para 176.

11 Art 18(4) de la Charte africaine des droits de l'homme et des peuples.

12 C'est en tenant compte des besoins particuliers des enfants handicapés que l'article 13 de la Charte Africaine des Droits et du Bien-être de l'Enfant dispose que les enfants handicapés ont le droit à des mesures spéciales de protection. En particulier, la Charte dispose que les États parties doivent veiller à ce que les enfants handicapés aient 'effectivement accès à la formation, à la préparation à la vie professionnelle et aux activités récréatives d'une manière propre à assurer le plus pleinement possible son intégration sociale, son épanouissement individuel et son développement culturel et moral'.

13 C'est le cas notamment de la République démocratique du Congo (RD Congo) et de la Côte d'Ivoire, dont leurs Constitutions reconnaissent aux handicapés le droit à des mesures spécifiques de protection en rapport avec leurs besoins (article 49 de la constitution congolaise de 2006 telle que modifiée et complétée en 2011 et article 32 de la constitution ivoirienne de 2016 telle que modifiée en 2020). En RD Congo en plus, la loi organique n°22/003 du 3 mai 2022 portant protection et promotion des droits des personnes vivant avec handicap leur reconnaît également le droit à l'éducation formelle et/ou non formelle sur base de l'égalité des chances. Cette loi exige aussi à l'Etat de mettre en place 'un système éducatif susceptible de favoriser l'insertion et l'inclusion de la personne avec handicap à tous les niveaux' (art 13). Au Rwanda, l'Etat a aussi adopté la loi n° 01/2007 du 20 janvier 2007 portant protection des personnes handicapées en général et qui leur reconnaît le droit à l'éducation (art 11). Un arrêté ministériel n° 007/2016 du 1er mars 2016 fixe les modalités de traitement particulier des personnes handicapées en matière d'éducation.

A la lumière de ce qui précède, il nous paraît judicieux de nous interroger sur deux préoccupations principales: le Protocole apporte-t-il une plus-value au droit à l'éducation des personnes handicapées déjà reconnu et protégé, en particulier, par le droit international et le droit africain des droits de l'homme? (2) La reconnaissance de ce droit dans un instrument juridique spécifique en droit africain des droits de l'homme engendre-t-il des nouvelles obligations juridiques des États en faveur des personnes handicapées? (3) C'est autour de ces questions à la fois distinctes et complémentaires que sont axées nos analyses dans le cadre de cet article. Il s'agit, au-delà de mettre en évidence les particularités du Protocole par rapport au droit international et aux instruments généraux de droit africain des droits de l'homme, de déceler les lacunes du régime juridique applicable au droit à l'éducation des personnes handicapées en Afrique et de formuler des mesures de nature à donner effet concret et effectif à ce droit.

2 LE DROIT À L'ÉDUCATION DES PERSONNES HANDICAPÉES: QUELLE PLUS-VALUE PAR RAPPORT AUX INSTRUMENTS JURIDIQUES DES DROITS DE L'HOMME EXISTANTS ?

Par l'adoption du Protocole, les États africains ont mis en place un droit catégoriel orienté vers la protection des personnes handicapées. Au nombre des droits que le Protocole reconnaît à ces personnes, il y a notamment le droit à l'éducation. En effet, aux termes de l'article 16 du Protocole,

1. Toute personne handicapée a droit à l'éducation.
2. Les États parties assurent aux personnes handicapées le droit à l'éducation sur la base de l'égalité avec les autres.
3. Les États parties prennent des mesures raisonnables, appropriées et efficaces pour assurer une éducation complète et de qualité pour les personnes handicapées, y compris en:

   a) faisant en sorte que les personnes handicapées puissent avoir accès à une éducation de base et secondaire gratuite, de qualité et obligatoire ; b) veillant à ce que les personnes handicapées puissent accéder à l'enseignement tertiaire général, à la formation professionnelle, à l'éducation des adultes et à l'éducation permanente sans discrimination et sur un pied d'égalité, notamment en assurant l'alphabétisation des personnes handicapées ; c) assurant un accommodement raisonnable des besoins de la personne et fournir aux personnes handicapées le soutien nécessaire pour faciliter leur éducation efficace ; d) offrant des mesures de soutien individualisées raisonnables et progressives, efficaces et efficaces, dans des mesures de soutien individualisées et efficaces, dans des environnements qui maximisent le développement scolaire et social, conformément à l'objectif de la pleine inclusion ; e) veillant à ce que les personnes handicapées qui choisissent d'apprendre dans des environnements particuliers disposent de choix appropriés en matière de scolarité ; f) s'assurant que les personnes handicapées acquièrent des compétences de vie et de développement social pour faciliter leur participation pleine et égale à l'éducation et en tant que membres de la

> communauté ; g) veillant à ce que des évaluations pluridisciplinaires soient entreprises pour déterminer les mesures d'adaptation et de soutien raisonnables appropriées pour les apprenants handicapés, une intervention précoce, des évaluations régulières et une certification pour les apprenants, quel que soit leur handicap ; h) veillant à ce que les établissements d'enseignement soient équipés des matériels didactiques, matériels et équipements nécessaires à l'éducation des élèves handicapés et à leurs besoins spécifiques ; et i) formant les professionnels de l'éducation, y compris les personnes handicapées, sur la manière d'éduquer et d'interagir avec les enfants ayant des besoins d'apprentissage spécifiques ; et j) facilitant le respect, la reconnaissance, la promotion, la préservation et le développement du langage des signes.[14]

Tel que formulé, cet article reconnaît aux handicapés le droit à l'éducation (2.1) qu'ils doivent jouir dans le respect de principes d'égalité et de non-discrimination (2.2), de gratuité (2.3) et d'accessibilité (2.4) en vue de parvenir aux finalités de ce droit (2.5).

2.1 Le droit à l'éducation des personnes handicapées en Afrique: article 16(1) du Protocole

D'un point de vue strictement textuel, la réaffirmation de ce droit dans le Protocole ne semble constituer aucune plus-value par rapport au droit africain et au droit international des droits de l'homme, en particulier celui découlant du Pacte international relatif aux droits économiques, sociaux et culturels (Pacte). Ce dernier reconnaît en effet le droit à l'éducation et à la non-discrimination, dont toutes les personnes handicapées peuvent se prévaloir.[15] Plus spécialement, en 2006, l'Assemblée Générale des Nations Unies a adopté la Convention relative aux droits des personnes handicapées (Convention), qui reconnaît le même droit aux personnes handicapées. Au demeurant, on peut se questionner sur l'utilité à reconnaître au Protocole dans ses dispositions relatives au droit à l'éducation. Répondre à cette question requiert une analyse croisée de tous les principes découlant de l'article 16 du Protocole.

2.2 Le droit à l'égalité et à la non-discrimination en matière d'accès à l'éducation: article 16(2) et 16(3)(b) du Protocole

Aux termes du Protocole, le droit à l'éducation ainsi que le droit d'accéder à l'enseignement tertiaire général, à la formation professionnelle, à l'éducation des adultes et à l'éducation permanente doivent être assurés aux personnes handicapées «sans discrimination»

14 Art 16 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

15 Comité des droits économiques, sociaux et culturels *Observation générale n°5: Personnes souffrant d'un handicap* (1994) para 5.

et sur la base de «l'égalité avec les autres». Ces derniers visent d'autres personnes non handicapées avec qui les droits ci-haut doivent être garantis conformément au principe général de non-discrimination.[16] Cette garantie est notamment protégée au travers le régime juridique applicable à la charge de la preuve, qui veut que lorsqu'une personne handicapée estime être victime d'une différence de traitement, il appartient à l'État de démontrer que celle-ci est justifiée.[17] Au travers ce principe d'égalité et de non-discrimination, l'article 16 du Protocole consacre le droit à l'éducation inclusive. Cette inclusion constitue la condition *sine qua non* en vue de la mise en œuvre de ce droit.[18]

Dans le cadre onusien, la Convention conçoit cette inclusion comme une mesure visant à interdire toute sorte de ségrégation en matière scolaire, qui consiste à scolariser les élèves handicapés dans des établissements spécifiques, sans contact avec les élèves n'ayant aucun handicap.[19] Pour le comité onusien des droits des personnes handicapées chargé de surveiller l'application de la Convention (Comité), ce type de scolarisation n'est pas conforme à la Convention. Cette dernière s'inscrit donc dans l'approche d'inclusion totale de toutes les personnes handicapées dans tous les milieux ordinaires d'éducation. Pour la doctrine cependant, cette approche du comité est sujette à critique. En effet, elle gagnerait à faire de ces deux établissements des mécanismes complémentaires et non exclusifs.[20] Dans le cadre du Protocole, ce dernier fait allusion à l'inclusion «complète et effective» comme un de ses principes généraux. L'article 16(3)(d) consacré au droit à l'éducation s'inscrit dans la même perspective en mettant en avant l'objectif de la «pleine inclusion». Le raisonnement ne saurait toutefois se limiter à ce qui précède en ce qu'il convient de considérer le Protocole comme un tout en le soumettant au principe d'intégration systémique. Si l'inclusion complète et effective est à la fois un objectif éducatif et un principe général, il coexiste avec un autre principe général du Protocole, qui vise à «garantir le respect et la protection de la dignité intrinsèque, de la vie privée, de l'autonomie individuelle, y compris la liberté de faire ses propres choix et de l'indépendance des personnes».[21] En matière éducative en particulier, le Protocole exige aux États parties de veiller «à ce que les personnes handicapées qui choisissent d'apprendre dans des

16 Il s'agit, pour les États, de prendre les mesures nécessaires afin que 'les personnes handicapées ne soient pas exclues, sur le fondement de leur handicap, du système d'enseignement général et à ce que les enfants handicapés ne soient pas exclus, sur le fondement de leur handicap, de l'enseignement primaire gratuit et obligatoire ou de l'enseignement secondaire'. Art 24(2)(a) de la Convention des Nations Unies relative aux droits des personnes handicapées.

17 Cour européenne des droits de l'homme, *Guberina c. Croatie,* Arrêt du 22 mars 2016, para 74.

18 Comité des droits des personnes handicapées (n 2) para 2.

19 Comité des droits des personnes handicapées (n 2) para 11.

20 Hachez, Triaille & Vrielink (n 2) 800-805.

21 Art 3(a) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

environnements particuliers disposent de choix appropriés en matière de scolarité».[22] On peut ainsi considérer, sur la base de ce qui précède, que les établissements spéciaux ne sont pas problématiques du point de vue du Protocole bien que la pleine inclusion soit l'objectif ultime. Cette approche nous paraît pragmatique[23] et soutenable dès lors que l'accès à ces établissements spécifiques est facilité et que les personnes handicapées ou leurs représentants sont en mesure de faire le choix entre l'établissement spécial et ordinaire. Cette approche gagnerait cependant à être lue conformément au Pacte, qui insiste sur le fait que, en dépit de ce choix, les États doivent s'assurer que les établissements choisis soient «conformes aux normes minimales qui peuvent être prescrites ou approuvées … en matière d'éducation».[24]

2.3 Le droit à la gratuité de l'éducation: article 16(3)(a) du Protocole

Le droit à la gratuité de l'éducation n'est pas nouveau dans son principe. Toutefois, il est significatif de souligner que le Protocole a étendu, de façon innovante, cette gratuité aux personnes handicapées. En effet, contrairement à la Convention[25] et au Pacte, qui reconnaissent la gratuité de l'école primaire et l'instauration progressive de la gratuité de l'enseignement secondaire sous ses différentes formes dans le cadre particulier du Pacte,[26] le Protocole consacre la gratuité à la fois de l'enseignement primaire et secondaire. Par ce qui précède, le droit catégoriel africain traduit une avancée considérable par rapport au droit international des droits de l'homme. A la différence du Pacte cependant, si le Protocole ne fait pas usage de termes «réalisation progressive», il limite cette gratuité à l'enseignement de base et secondaire alors que le Pacte l'étend, bien que de façon progressive, à l'enseignement supérieur. Ainsi, la gratuité de l'école primaire et secondaire, bien qu'elle soit nécessaire, ne nous paraît pas suffisante pour parvenir aux finalités du droit à l'éducation des personnes handicapées. L'une des finalités que poursuit le Protocole est d'«éduquer les personnes handicapées d'une manière qui favorise leur participation et leur inclusion dans la société».[27]

22 Art 16(3)(e) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

23 Ce pragmatisme s'explique par le fait que, comme nous le verrons, nombre d'obligations qui pèsent sur les Etats sont de réalisation progressive. Partant, ces établissements spéciaux peuvent utilement contribuer à l'éducation des personnes handicapées en attendant que l'objectif de pleine inclusion soit effectif.

24 Art 13(3) du Pacte international relatif aux droits économiques, sociaux et culturels.

25 Art 24(2)(a) et (b) de la Convention des Nations Unies relative aux droits des personnes handicapées.

26 Art 13(2)(b) du Pacte international relatif aux droits économiques, sociaux et culturels.

27 Art 16(4)(c) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

Cette participation et cette inclusion ne peuvent être réalisées à titre principal si pas exclusif que par l'intégration sur le marché du travail ou l'exercice d'une activité professionnelle indépendante. Or, le contexte actuel du marché du travail est tel que les études secondaires auxquelles la gratuité est limitée ne peuvent, sauf très rare exception, déboucher sur un travail salarié et décent. De manière générale, seules les personnes handicapées dont leurs familles ont de moyens peuvent s'offrir les études universitaires. Inversement, et c'est le cas en général, les personnes handicapées qui auraient bénéficié de la gratuité de l'enseignement secondaire n'auraient aucune possibilité d'accéder à l'enseignement supérieur. En conséquence, elles éprouvent des difficultés à s'intégrer dans le monde du travail. Dans ce secteur, le comité des droits économiques, sociaux et culturels fait observer que le taux de chômage parmi les personnes souffrant d'un handicap est de deux à trois fois supérieur à celui du reste de la population active. Et, lorsque ces personnes sont employées, elles n'occupent que des emplois non décents (faiblement payés, sans sécurité sociale, etc.). Bien que cela soit généralement associé à la discrimination,[28] on doit reconnaître que le taux élevé de chômage de personnes handicapées est aussi lié au fait que, globalement, elles ont un faible niveau d'éducation. Certes, le Protocole apporte dans ce domaine du travail quelques avancées majeures en vue de concourir à leur droit au travail. Concrètement, il prévoit en plus des obligations découlant du droit commun des droits de l'homme, deux obligations positives spéciales, qui consistent à

> d) recruter des personnes handicapées dans le secteur public, notamment à travers l'institution et l'application du système des quotas professionnels minimums réservés aux employés handicapés ;[29]
>
> e) promouvoir le recrutement des personnes handicapées dans le secteur privé par des politiques et des mesures appropriées, notamment par des mesures particulières telles que des incitations fiscales.[30]

Aussi importantes soient-elles, ces mesures peuvent souffrir d'infectivité si les personnes handicapées n'ont pas suffisamment accès à l'enseignement supérieur et/ou à la formation professionnelle. En effet, il est significatif de constater les limites du système de quotas qu'institue, bien que de façon novatrice,[31] le Protocole. A titre exemplatif, pour accéder à la magistrature, dans certains pays comme en RD Congo, il faut être titulaire d'un diplôme de docteur ou de licencié en droit.[32] Dans la fonction publique de façon générale, le diplôme universitaire est exigé au vu des impératifs actuels de

28 Comité des droits économiques, sociaux et culturels (n 15) para 20.

29 Voir art 27(1)(g) de la Convention des Nations Unies relative aux droits des personnes handicapées.

30 Art 19(2)(d) et (e) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

31 L'institution de ce quota est une innovation du Protocole par rapport au droit onusien, qui prévoit une obligation vague exigeant les Etats de prendre des mesures appropriées, y compris des mesures législatives, pour notamment employer des personnes handicapées dans le secteur public.

32 Art 1(6) de la loi organique n° 06/020 du 10 octobre 2006 portant statut des magistrats.

moderniser et rendre plus performante la fonction publique.[33] De même, pour être candidat Président, Parlementaire, Gouverneur ou Vice-gouverneur il faut, entre autres, comme condition «avoir un diplôme d'études supérieures ou universitaires ou justifier d'une expérience professionnelle d'au moins cinq ans dans le domaine politique, administratif ou socio-économique».[34] La gratuité des seuls enseignements primaires et secondaires ne permet pas aux personnes handicapées dépourvues de moyens de financer leurs études supérieures de réunir cette condition. Or, le système de quotas mis en place ne saurait déroger, en principe, à cette condition, et en particulier à la condition de diplôme universitaire que requiert l'exercice de certains métiers. En ce qui concerne en particulier le droit d'éligibilité, cette condition peut être comblée par l'expérience professionnelle. Mais le nombre d'années d'expériences et les secteurs exigés sont de conditions difficiles à remplir pour les personnes handicapées qui, pourvues de seuls diplômes primaire et secondaires et dans le contexte actuel de chômage accru et d'absence et/ou d'insuffisance des politiques publiques de création d'emplois, ne sont pas en mesure de les réunir. A ce sujet d'ailleurs, et c'est une lacune majeure, le Protocole n'organise aucun système de quota qui permettrait aux personnes handicapées de participer à toutes les instances de pouvoir[35] et d'influencer une approche politique gouvernementale ou parlementaire centrée sur leurs besoins. De plus, dès lors que l'approche d'éducation inclusive que vise le Protocole sous-tend un processus de réforme systémique qui va de pair avec des changements structurels, ce système de quotas serait plus que souhaitable. Cette lacune couplée au faible niveau d'éducation n'est pas de nature à favoriser la participation et l'inclusion des personnes handicapées dans la société. Dans le secteur privé, le Protocole fait peser sur les États une obligation positive spéciale visant à accorder des incitations fiscales aux employeurs afin de faciliter le recrutement des personnes handicapées. Si cette mesure est une réponse aux réticences des employeurs, qui estiment que le recrutement de personnes handicapées engendre des coûts financiers énormes, il n'en reste que certains postes, la plupart d'ailleurs, requirent au minimum un diplôme universitaire. Dans ces conditions, le diplôme d'études secondaires ne peut que limiter ces personnes handicapées à des emplois précaires, moins décents et qui, par ailleurs, ne sont pas aussi faciles à obtenir pour elles.

En considération de ce qui précède, le Protocole aurait pu étendre la gratuité de l'éducation à l'enseignement supérieur et à la formation professionnelle. Loin de constituer une suggestion ambitieuse, il s'agit non seulement de parvenir aux finalités du droit à l'éducation, mais aussi de veiller à la mise en œuvre d'autres droits des personnes

33 https://fonctionpublique.gouv.cd/lancement-concours-ena-session-2023-2024/.

34 Arts 103, 120 et 161: (modifiés par l'article 1er de la loi n° 11/003 du 25 juin 2011 modifiant la loi n° 06/006 du 09 mars 2006 portant organisation des élections présidentielle, législatives, provinciales, urbaines, municipales et locales).

35 Voir l'article 21 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

handicapées qui sont consubstantiels au droit à un niveau d'éducation suffisant. En effet, l'éducation est

> un moyen de rendre effectifs d'autres droits de l'homme. C'est principalement par l'éducation que les personnes handicapées peuvent sortir de la pauvreté, se donner les moyens de participer pleinement à la vie de leur communauté et échapper à l'exploitation.[36]

Cela s'explique par le fait que c'est grâce à un niveau d'éducation et/ou de formation professionnelle suffisant et les débouchés divers auxquels il permet d'accéder que les personnes handicapées peuvent jouer pleinement un rôle central aux côtés d'autres citoyens dans les différents secteurs de la vie sociale. A la lumière de ce qui précède, le Protocole aurait pu utilement se démarquer du droit international, qui consacre l'instauration progressive de la gratuité de l'enseignement supérieur à toutes les personnes[37] en le rendant gratuit immédiatement aux personnes handicapées.

2.4 Le droit à l'accessibilité à l'éducation: article 16(3)(a) du Protocole

En plus d'être un des principes généraux du Protocole, l'accessibilité est reprise en bonne place à l'article 16 consacré au droit à l'éducation. De cette façon, le Protocole s'inscrit dans la lignée de la Convention, qui considère l'accessibilité comme l'un de ses «principes fondateurs – une condition préalable essentielle de la jouissance effective par les personnes handicapées, sur la base de l'égalité [du droit à l'éducation]»[38] à tous les niveaux d'enseignement.[39] De façon plus concrète, l'accessibilité requiert que les personnes handicapées soient en mesure de fréquenter les établissements d'enseignement de proximité, avec les moyens de déplacement qui garantissent leur sécurité ou, à défaut, par les technologies de l'information et des communications.[40] Ce principe qui n'est pas développé s'agissant du droit à l'éducation, doit être interprété à l'aune de l'article 15 du Protocole,[41] qui permet de comprendre que l'accessibilité vise «le processus de scolarisation dans son ensemble qui doit être accessible, donc non seulement les bâtiments, mais aussi l'ensemble de

36 Comité des droits des personnes handicapées (n 2) para 10(c).

37 Art 13(2)(c) du Pacte international relatif aux droits économiques, sociaux et culturels.

38 Comité des droits des personnes handicapées *Observation générale n°2 Article 9: Accessibilité* (2014) para 4.

39 Comité des droits des personnes handicapées (n 2) para 24.

40 Comité des droits des personnes handicapées (n 2) para 27.

41 Cet article dispose que '1. Toute personne handicapée a droit à un accès libre à l'environnement physique, aux transports, à l'information, notamment aux technologies et aux systèmes de communications et aux autres équipements et services ouverts ou fournis au public. 2. Les États parties prennent des mesures efficaces et appropriées pour faciliter la pleine jouissance par les personnes handicapées de ce droit, et ces mesures s'appliquent, entre autres: a. aux cadres ruraux et urbains et tiennent compte des diversités de populations ; b. aux bâtiments, aux routes, aux transports et aussi bien à l'intérieur qu'à l'extérieur

l'information et de la communication…».[42] On peut donc constater que l'accessibilité s'inscrit dans le droit fil de l'éducation inclusive en ce qu'il s'agit de lever tous les obstacles qui empêchent aux personnes handicapées de jouir de leur droit à l'éducation. L'idée sous-jacente est d'assurer une large ouverture des structures d'enseignement à toutes les personnes handicapées.[43]

2.5 Les finalités à poursuivre au titre du droit à l'éducation: article 16(4) du Protocole Selon le Protocole

L'éducation des personnes handicapées doit être orientée vers: a) Le plein développement du potentiel humain, le sens de la dignité et de l'estime de soi ; b) Le développement par les personnes handicapées de leur personnalité, de leurs talents, de leurs compétences, de leur professionnalisme et de leur créativité, ainsi que de leurs capacités mentales et physiques, à leur plein potentiel ; c) Éduquer les personnes handicapées d'une manière qui favorise leur participation et leur inclusion dans la société ; et d) La préservation et le renforcement des valeurs africaines positives.[44]

A la lecture de ce qui précède, on s'aperçoit que le Protocole s'appuie largement sur la Convention.[45] Il se démarque toutefois du droit onusien en ce qu'il prévoit que l'éducation des personnes handicapées doit également être orientée vers «la préservation et le renforcement des valeurs africaines positives». Si ces dernières ne sont pas définies, elles feraient notamment allusion aux valeurs de solidarité africaine découlant du panafricanisme. De même, contrairement au Protocole, la Convention souligne que les possibilités d'éducation des personnes handicapées doivent viser «le renforcement du respect des droits de l'homme, des libertés fondamentales et de la diversité humaine» (article 24(1)(a) de la Convention).

L'une des finalités nous paraît la plus importante, à savoir l'éducation qui vise la participation et l'inclusion de personnes handicapées dans la société. En raison de leur exclusion et discrimination, l'un des moyens de rendre le Protocole effectif dans son

d'autres installations telles que les écoles, les logements, les installations médicales et les lieux de travail ; c. l'information, aux communications, au langage des signes et aux services d'interprétation tactile, au braille, aux services audio et autres, y compris les services électroniques et les services d'urgence ; d. à des aides à la mobilité, appareils ou technologies d'assistance, formes d'aide humaine ou animalière de qualité et à des prix abordables ; et e. à la modification progressive de toutes les infrastructures inaccessibles et à la conception universelle de toutes les nouvelles infrastructures'.

42 Comité des droits des personnes handicapées (n 38) para 39.

43 Comité des droits des personnes handicapées (n 2) paras 9, 11.

44 Art 16(4)(a) à (d) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

45 Voir l'article 24(1)(a) à (c) de la convention des Nations Unies relative aux droits des personnes handicapées.

ensemble consiste à doter les personnes handicapées de compétences qui leur sont nécessaires pour leur intégration sociale. Pour ce faire, en plus du fait qu'il doit s'agir d'une éducation qui procure un niveau suffisant requis par le marché du travail, les États devront être appelés à organiser ou à renforcer les filières d'enseignement, qui sont prometteuses d'opportunités professionnelles. Il ne s'agit pas de filières spécifiques aux personnes handicapées, mais plutôt de filières dans lesquelles elles peuvent être encouragées à suivre. Entre autres, les filières qui les forment aux compétences numériques seraient privilégiées. En effet, le secteur du numérique connaît une pénurie de profils sans précédent en Afrique[46] alors qu'il est en pleine expansion fulgurante dans le processus plus large de digitalisation de tous les secteurs. Bien plus, comme cela ressort de la première réunion préparatoire africaine de la conférence mondiale de développement des télécommunications tenue du 8 au 9 février 2024, les technologies numériques peuvent permettre la transformation économique et stimuler la création d'emplois dans la région africaine.[47] Qui plus est, ce secteur créé et est susceptible de créer encore nombre d'emplois adaptés aux handicapés (postes sédentaires ou en télétravail notamment).[48] Pour en tirer profit et favoriser l'inclusion et la participation des personnes handicapées dans le marché du travail numérique plus inclusif, il est indispensable de leur garantir l'accessibilité des outils numériques, favoriser leurs compétences numériques et promouvoir l'emploi numérique.[49] Une telle approche ne s'écarte d'ailleurs pas du thème 2024 de l'UA, qui met en avant la construction des systèmes éducatifs résilients. Cette résilience implique notamment l'adaptation du système éducatif au marché actuel du travail dominé par la révolution technologique.

46 Selon l'Organisations des Nations Unies pour l'éducation, la science et la culture, 'l'Afrique est le continent qui connaît le plus grand déficit d'ingénieurs au monde, avec seulement 55 000 ingénieurs pour près de 4,3 millions de demandes sur le marché du travail. Le manque de professionnels qualifiés dans le domaine des TIC limite la capacité des entreprises à innover et à se développer, ainsi que leur capacité à créer des emplois. Si le numérique se développe de manière exponentielle, la formation des ingénieurs ne permet pas aujourd'hui de répondre aux besoins croissants des industries africaines en matière de technologies avancées'. Voir le lien ci-après: https://blog.senmarketing.net/numerique-le-nouveau-monde-de-lemploi-en-afrique

47 Union africaine des télécommunications *Rapport de la première réunion Préparatoire Africaine de la Conférence Mondiale de Développement des Télécommunications (CMDT-25)* (2024) 13.

48 https://www.lenouveleconomiste.fr/lesdossiers/la-tech-secteur-prometteur-pour-les-travailleurs-handicapes/

49 Fundación ONCE and the ILO Global Business and Disability Network *An inclusive digital economy for people with disabilities* (2021).

3 LES OBLIGATIONS DES ÉTATS DANS LA MISE EN ŒUVRE DU DROIT À L'ÉDUCATION

Sous ce point, il convient d'analyser, dans un premier temps, la portée des obligations des États (3.1) avant d'étudier leur nature (3.2.)

3.1 Portée des obligations des États au titre du droit à l'éducation des personnes handicapées

Le Protocole énonce des obligations générales dans la mise en œuvre de tous les droits reconnus aux personnes handicapées, et des obligations spécifiques se rapportant à la mise en œuvre du droit à l'éducation. Au titre des obligations générales, le Protocole dispose que

> Les États parties prennent des mesures appropriées et efficaces, notamment mettent en place des politiques et prennent des mesures législatives, administratives, institutionnelles et budgétaires, pour assurer, respecter, protéger, promouvoir et réaliser les droits et la dignité des personnes handicapées, sans discrimination fondée sur le handicap, y compris: a) en adoptant des mesures appropriées pour la mise en œuvre pleine et effective des droits reconnus dans le présent Protocole ; b) en intégrant le handicap dans les politiques, les lois, les plans, les programmes, les activités de développement et dans tous les autres domaines de la vie ; c) en l'incluant dans leur constitution nationale et dans les autres instruments législatifs et en prenant d'autres mesures visant à modifier ou à abolir les politiques, les lois, les règlements, les coutumes et les pratiques en place qui constituent une discrimination à l'encontre des personnes handicapées ; d) en, selon le cas, modifiant, interdisant, pénalisant ou en faisant campagne contre toute pratique néfaste appliquée aux personnes handicapées ; e) en faisant la promotion de la représentation positive et l'autonomisation des personnes handicapées au moyen de la formation et la sensibilisation ; f) en prenant des mesures visant à éliminer la discrimination fondée sur le handicap émanant d'un individu, d'une organisation ou d'une entreprise privée ; g) en évitant de poser tout acte ou de s'engager dans toute pratique incompatible au présent Protocole et en veillant à ce que les autorités publiques, les institutions et entités privées agissent en accord avec le Protocole ; h) en apportant l'assistance et le soutien nécessaires et appropriés pour permettre la réalisation des droits énoncés dans le présent Protocole ; i) en mettant en place des ressources suffisantes, notamment par l'affectation de dotations budgétaires, pour assurer la pleine mise en œuvre du présent Protocole ; j) en assurant la participation effective des personnes handicapées ou de leurs organisations représentatives à tous les processus de prise de décision, y compris dans l'élaboration et la mise en œuvre des lois, des politiques et des processus administratifs du présent Protocole. k) Lorsque les personnes handicapées sont légalement privées de tous droits ou libertés prévus au présent Protocole, les États parties veillent à ce qu'elles soient sur un pied d'égalité avec les autres personnes bénéficiant de garanties conformément au droit

> international des droits de l'homme et aux objets et principes du présent Protocole.[50]

Telles qu'elles sont formulées, ces obligations ne sont pas nouvelles en droit des droits de l'homme. Elles impliquent que les États parties sont tenus de respecter, de protéger et de réaliser les droits humains. Ces trois types d'obligations ressortent de tous les traités des droits de l'homme portant sur les droits civils et politiques et les droits économiques, sociaux et culturels.[51] Ainsi, «*the right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide*».[52]

Dans le cadre précis des obligations liées à la mise en œuvre du droit à l'éducation, le Protocole fait peser sur les États les obligations positives relatives tout d'abord aux accommodements raisonnables. Ces derniers impliquent «la modification et les ajustements nécessaires et appropriés, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et des peuples».[53] En soi, cette obligation positive n'est pas nouvelle. En effet, elle se trouve déjà consacrée en droit international des droits de l'homme, notamment dans la Convention sur les droits des personnes handicapées à son article 24(2)(c). L'article 16(3)(c) du Protocole réitère cette obligation, car il exige des États parties qu'ils prennent des mesures «assurant un accommodement raisonnable des besoins de la personne et fournir aux personnes handicapées le soutien nécessaire pour faciliter leur éducation efficace». Pour ce faire, des évaluations pluridisciplinaires doivent être organisées aux fins de déterminer le soutien approprié.[54] Même si la disposition pertinente consacrée au droit à l'éducation ne le dit pas, cette évaluation doit impliquer la participation des personnes handicapées concernées, qui doivent être considérées comme des «partenaires», et non comme de «simples bénéficiaires de l'éducation».[55] A l'instar de la Convention, le Protocole exige aussi les États d'offrir

> des mesures de soutien individualisées raisonnables et progressives, efficaces et efficaces, dans des mesures de soutien individualisées et efficaces, dans des environnements qui maximisent le développement scolaire et social, conformément à l'objectif de la pleine inclusion.[56]

50 Art 4 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

51 N Lubell 'Les obligations relatives aux droits de l'homme dans le cadre de l'occupation militaire' (2012) *Revue internationale de la Croix-Rouge* 11.

52 Committee on Economic, Social and Cultural Rights, *General Comment N°. 13, Article 13: The Right to Education*, 1999, para 46.

53 Art 1 du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

54 Art 16(3)(g) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

55 Comité des droits des personnes handicapées (n 2) para 7.

56 Art 16(3)(d) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

Cette disposition, qui mériterait d'être bien formulée, ne s'écarte pas des aménagements raisonnables. En effet, comme le note le Comité, il s'agit des mesures d'accompagnement personnalisé dont chaque élève handicapé a besoin et qui sont appelées à déterminer les aménagements raisonnables, et ce, en pleine collaboration avec l'intéressé.[57] Il est important de souligner que les autorités compétentes sont appelées à examiner les possibilités d'aménagement non pas exclusivement selon qu'elles sont disponibles dans l'établissement d'enseignement concerné, mais plutôt en tenant compte l'ensemble des ressources éducatives disponibles dans le système éducatif national. Partant, un mécanisme de transfert de ressources éducatives doit être mis en place tout en gardant à l'esprit que les aménagements raisonnables à apporter varient d'un handicapé à l'autre.[58]

En vue de faciliter aux personnes handicapées leur participation pleine et égale à l'éducation et en tant que membres de la communauté, l'article 16(3)(f) du Protocole exige aux États de veiller à ce que ces personnes soient dotées des compétences de vie et de développement social. Formulée de façon laconique, cette disposition ne permet pas de comprendre la portée de cette obligation, déjà consacrée par ailleurs dans la Convention à son article 24(3). A cet égard, le Protocole doit être interprété à l'aune de la Convention, qui prévoit qu'au titre de cette obligation, les États

a) Facilitent l'apprentissage du braille, de l'écriture adaptée et des modes, moyens et formes de communication améliorée et alternative, le développement des capacités d'orientation et de la mobilité, ainsi que le soutien par les pairs et le mentorat ;

b) Facilitent l'apprentissage de la langue des signes et la promotion de l'identité linguistique des personnes sourdes ;

c) Veillent à ce que les personnes aveugles, sourdes ou sourdes et aveugles - et en particulier les enfants - reçoivent un enseignement dispensé dans la langue et par le biais des modes et moyens de communication qui conviennent le mieux à chacun, et ce, dans des environnements qui optimisent le progrès scolaire et la sociabilisation.[59]

Dans le cadre du Protocole cependant, l'obligation ci-haut est distincte de celle visant à «facilit[er] le respect, la reconnaissance, la promotion, la préservation et le développement du langage des signes».[60] Or, nous

57 L'accompagnement peut aussi consister en 'la fourniture d'aides compensatoires au titre de l'assistance, de matériels pédagogiques spécifiques sous des formes différentes/accessibles, de modes et de moyens de communication, d'aides à la communication et de technologies d'assistance et d'information. L'accompagnement peut également prendre la forme du recours à un assistant pédagogique qualifié qui assure, selon les besoins des élèves, un accompagnement collectif ou individuel'. Comité des droits des personnes handicapées (n 2) para 33.

58 Comité des droits des personnes handicapées (n 2) para 30.

59 Art 24(3) de la Convention des Nations Unies relative aux droits des personnes handicapées.

60 Art 16(3)(j) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits des Personnes Handicapées en Afrique.

venons de le voir, du point de vue du droit onusien, cette dernière obligation (développement du langage de signes) fait partie de mesures indicatives que les États doivent prendre pour donner effet à la première obligation (acquérir les compétences pratiques et sociales). La distinction opérée par le Protocole ne nous paraît pas apporter une plus-value et s'apparente quelque peu comme superfétatoire.

Les obligations positives des États au titre du droit à l'éducation des personnes handicapées leur commandent également d'équiper les établissements d'enseignement des matériels didactiques, matériels et équipements nécessaires à l'éducation des élèves handicapés et à leurs besoins spécifiques conformément à l'article 16(3)(h). Cette obligation appelle nombre d'observations. L'article susvisé limite cette obligation d'équipements aux élèves handicapés, ce qui a pour conséquence que les personnes handicapées qui poursuivent l'enseignement universitaire sont moins protégées. De plus, le Protocole occulte un préalable indispensable à l'équipement. En effet, le nombre d'écoles demeure très réduit et éloigné des personnes handicapées dans nombre d'États africains. Ainsi, l'équipement des établissements scolaires devrait suivre la construction de ces établissements. Cette dernière obligation ne ressort nullement du Protocole s'agissant du droit à l'éducation. Tout au plus, le Protocole, s'agissant de l'exercice de tous les droits des personnes handicapées, commande aux États de procéder «à la modification progressive de toutes les infrastructures inaccessibles et à la conception universelle de toutes les nouvelles infrastructures» (article 15(2)(e)).

Le Protocole à son article 16(3)(i) exige également des États de procéder à la formation des professionnels de l'éducation sur la manière d'éduquer et d'interagir avec les enfants ayant des besoins d'apprentissage spécifiques. Si cette formation est sans aucun doute indispensable,[61] deux préalables sont ignorés par le Protocole dans le cadre de cette obligation. En premier lieu, le Protocole, en parlant de la formation, semble considérer que les professionnels de l'éducation des personnes handicapées existent déjà en nombre suffisant. Ce qui n'est pas le cas. Le Protocole aurait pu tout d'abord, comme le note d'ailleurs le Comité, exiger aux États d'investir dans le recrutement de ces professionnels[62] avant qu'ils ne soient formés. Le deuxième préalable occulté par le Protocole consiste à considérer qu'une fois formés, ces professionnels seront à même de garantir une éducation appropriée aux personnes handicapées. Cette évidence est très contestable, car même en étant bien formés, ces professionnels manqueront cruellement la motivation nécessaire si le travail qu'ils exécutent n'est pas décent. En effet, en Afrique en général, le travail d'enseignement (surtout du primaire et du secondaire auquel le Protocole attache son plus grand intérêt) est loin d'être un travail décent. Ce dernier

> résume les aspirations des êtres humains au travail. Il regroupe l'accès à un travail productif et convenablement rémunéré, la sécurité sur le lieu de travail et la protection sociale pour tous, de meilleures perspectives de

61 Comité des droits économiques, sociaux et culturels (n 15) para 35.

62 Comité des droits des personnes handicapées (n 2) para 37.

> développement personnel et d'insertion sociale, la liberté pour les individus d'exprimer leurs revendications, de s'organiser et de participer aux décisions qui affectent leur vie, et l'égalité des chances et de traitement pour tous, hommes et femmes.[63]

La première aspiration énoncée dans l'Agenda 2063 de l'UA s'inscrit dans cette vision en ce qu'elle porte sur «une Afrique prospère fondée sur la croissance inclusive et le développement durable». Pour y parvenir, le premier domaine prioritaire que se sont fixés les États membres de l'UA est le travail décent.[64] A cet égard, il aurait été l'occasion de rappeler aux États l'obligation de garantir un travail décent, en particulier aux professionnels de l'éducation des personnes handicapées, qui sont les acteurs principaux de leur insertion sociale et professionnelle. En effet, sans travail décent de ces professionnels, il demeure difficile, même en étant formés, qu'ils procurent toutes les compétences nécessaires et de qualité aux personnes handicapées tel que voulu par le Protocole.

Toutes ces obligations ne peuvent être mises en œuvre que si les États disposent des statistiques fiables sur le nombre des personnes handicapées. Même si le Protocole ne le dit pas, il doit s'agir, à notre avis, d'une des premières obligations auxquelles les États doivent accorder leur attention en vue de la mise en œuvre du Protocole, en particulier dans ses dispositions relatives à l'éducation. En effet, les statistiques des handicapés exclus des systèmes scolaires sont mal connues de nos jours en Afrique.[65] Or, comme le souligne le Comité, ces statistiques sont d'un intérêt indéniable, car elles permettent d'identifier la situation et les besoins particuliers de certains groupes de personnes handicapées afin d'adopter des mesures juridiques et autres politiques publiques adaptées à leur situation.[66] En l'absence de ces données, la promotion de l'éducation inclusive de qualité ne peut qu'être contrariée.[67]

Enfin, il appert important de noter que la lecture critique présentée ci-haut de la portée du droit à l'éducation des personnes handicapées et des obligations qui pèsent sur les États repose une explication majeure. Si cette portée et les obligations qui en découlent demeurent similaires que celles découlant déjà du droit international et du droit africain des droits de l'homme, le Protocole ne serait lu que comme un instrument superfétatoire, qui viendrait s'ajouter, sans plus-value, aux règles existantes. Ainsi, une portée et des mesures spéciales de protection du droit à l'éducation de nature à celles suggérées ci-haut seraient plus

63 Organisation Internationale du Travail *La mesure du travail décent. Réunion tripartite d'experts sur la mesure du travail décent: document d'information* (2008) 6.

64 C Via Balole 'La protection des normes fondamentales du travail dans le droit de la zone de libre-échange continentale africaine. Contribution à l'émergence du régionalisme social dans le commerce régional africain' (2023) 7 *African Human Rights Yearbook* 249.

65 Antoinette (n 6)19.

66 Comité des droits des personnes handicapées *Observations finales concernant le rapport initial de la Belgique* (2014) para 42.

67 Comité des droits des personnes handicapées (n 2) para 4.

souhaitables. Certes, certaines spécificités du Protocole sont relevées, mais elles s'avèrent n'être que de mesures nécessaires, mais pas suffisantes. On se rappellera que la Charte africaine des droits de l'homme et des peuples affirme que «les personnes … handicapées ont … droit à des mesures spécifiques de protection en rapport avec leurs besoins physiques ou moraux».[68] En matière éducative, comme le souligne le Comité africain d'experts sur les droits et le bien-être de l'enfant, l'obligation des Etats parties en matière du droit à l'éducation implique «l'adoption et la mise en œuvre de mesures spéciales pour garantir aux enfants défavorisés l'égalité d'accès à l'éducation».[69] Ces obligations positives spéciales vont au-delà de ce qui est déjà exigé des États dans le cadre des instruments généraux des droits de l'homme. Cette extension s'explique aussi par le fait qu'un instrument des droits de l'homme surtout celui de nature spécifique comme le Protocole «a pour but de protéger des droits non pas théoriques ou illusoires, mais concrets et effectifs».[70] Si cela n'est pas garanti, le droit à l'éducation des personnes handicapées risque d'être perçu comme une «illusion, sinon comme une imposture».[71] Une telle lecture s'impose également parce qu'il s'agit de veiller à la protection d'un groupe aussi vulnérable et aussi désavantagé que forment les personnes handicapées. Pour cette raison, il convient de prendre

> mesures concrètes pour réduire les désavantages structurels et accorder un traitement préférentiel approprié aux personnes souffrant d'un handicap, afin d'arriver à assurer la participation pleine et entière et l'égalité, au sein de la société, de toutes ces personnes.[72]

Cela requiert de moyens financiers consistants et c'est au regard de ce qui précède que les États sont appelés à procéder une redéfinition de leur budget de sorte que ce dernier puisse allouer de crédits nécessaires au développement de l'éducation inclusive.[73] En conséquence, les obstacles d'ordre financier ne sont pas recevables sauf lorsque l'État parvient à démontrer qu'aucun effort n'a été épargné pour utiliser toutes les ressources qui sont à sa disposition en vue de remplir, à titre prioritaire, [ses] obligations … [Cependant,] même s'il est démontré que les ressources disponibles sont insuffisantes, l'obligation demeure, pour un État partie, de s'efforcer d'assurer la jouissance la plus large possible des droits pertinents dans les circonstances qui lui sont propres. En outre, le manque de ressources n'élimine nullement l'obligation de contrôler l'ampleur de la réalisation, et plus encore de la non-réalisation, des droits économiques, sociaux et culturels, et

68 Art 18(4) de la Charte africaine des droits de l'homme et des peuples.

69 Comité africain d'experts sur les droits et le bien-être de l'enfant *Décision sur la communication soumise par Minority rights group international et Sos-esclaves au nom de Said Ould Salem et de Yarg Ould Salem c. Mauritanie* 64.

70 Cour européenne des droits de l'homme, *Airey c. Irlande*, Arrêt du 9 octobre 1979, para 24, 25 & 32.

71 F Tulkens 'Préface' in in I Hachez & J Vrielink (dirs) *Les grands arrêts en matière de handicap* (dir) (2020) *Les grands arrêts en matière de handicap* (2023) 9.

72 Comité des droits économiques, sociaux et culturels (n 15) para 9.

73 Comité des droits des personnes handicapées (n 2) para 40.

d'élaborer des stratégies et des programmes visant à promouvoir ces droits.[74]

3.2 Nature des obligations des États au titre du droit à l'éducation des personnes handicapées

Il est admis, en principe, que les droits économiques et sociaux sont des droits de réalisation progressive. Cette réalisation progressive implique les efforts tant de l'État, au maximum de ses ressources disponibles, que ceux de la coopération internationale, notamment sur les plans économique et technique.[75] Si cet article n'entend pas s'écarter de cette affirmation, il cherche tout de même à démontrer que certaines composantes du droit à l'éducation des personnes handicapées sont de réalisation progressive et d'autres de réalisation immédiate.

Tout d'abord, il convient de noter que cette démarche qui s'inscrit dans le temps, bien qu'elle offre une marge de manœuvre à l'État, ne saurait être interprétée d'une manière qui priverait son obligation «de tout contenu effectif». A cet effet, elle doit être comprise comme l'obligation de prendre «aussi rapidement et aussi efficacement que possible» les mesures nécessaires pour donner effet aux droits garantis. De plus, l'État est tenu à l'obligation de *standstill* dans la mise en œuvre de ses obligations progressives[76] et doit mobiliser tous les moyens financiers à sa possession. Ainsi, les politiques d'austérité ne peuvent par exemple pas être invoquées pour justifier la non-réalisation progressive des droits des personnes handicapées d'accéder aux établissements scolaires. En effet,

> L'obligation d'assurer l'accessibilité est inconditionnelle, ce qui signifie que l'entité tenue d'assurer l'accessibilité ne peut s'en exonérer en arguant de la charge que représente le fait de prévoir un accès pour les personnes handicapées.[77]

De plus, en dépit de l'obligation de réalisation progressive, les États sont soumis à un contrôle rigoureux dans la restriction des droits des handicapés et leur marge d'appréciation est nettement réduite étant donné qu'il s'agit d'accorder une protection aux personnes qui ont été victimes de traitements défavorables aux conséquences durables (exclusion sociale).[78]

Enfin, il est important de noter que la réalisation progressive est sans préjudice des obligations de réalisation immédiate qui pèsent sur les États au titre de certaines composantes du droit à l'éducation des personnes handicapées. Ces composantes sont l'obligation de non-

74 Voir Comité des droits économiques, sociaux et culturels *Observation générale n°3 sur la nature des obligations des États parties* (1990) paras 10 & 11.

75 Art 2(1) du Pacte international relatif aux droits économiques, sociaux et culturels.

76 Comité des droits économiques, sociaux et culturels (n 74) para 9.

77 Comité des droits des personnes handicapées (n 38) para 25.

78 Cour européenne des droits de l'homme (n 14) para 73

discrimination en matière éducative: cette obligation n'est pas soumise à la règle de réalisation progressive. En effet, les États sont tenus immédiatement de prendre les mesures législatives, administratives et autres en vue d'assurer, dans l'immédiat, l'accès aux personnes handicapées à l'éducation conformément au principe d'égalité et de non-discrimination.[79] En plus de l'obligation de non-discrimination en matière éducative, l'obligation d'aménagement raisonnable se présente comme une obligation *ex nunc*, ce qui signifie qu'elle est «exécutoire dès le moment où un individu handicapé en a besoin dans une situation donnée, par exemple à l'école, pour jouir de ses droits dans des conditions d'égalité dans une situation particulière».[80] De même, l'obligation de rendre l'enseignement primaire gratuit échappe également à la règle de réalisation progressive.[81] Enfin, l'obligation de rendre l'enseignement secondaire gratuit, de qualité et accessible est aussi immédiate mesure où, contrairement au Pacte, le Protocole ne souligne pas que cette obligation est de réalisation progressive, cela sous-tend que les États parties doivent s'y conformer immédiatement après leur ratification.

Cette gratuité de l'enseignement primaire et secondaire s'accompagne de leur caractère obligatoire (article 16 du Protocole). Ce caractère, comme le souligne le comité africain d'experts sur les droits et le bien-être de l'enfant, «engage les États à prendre des mesures positives pour s'assurer que tous les enfants [y compris les handicapés] soient scolarisés».[82] Cette obligation de «*to take steps*» en vue de la pleine réalisation du droit à l'éducation est aussi de réalisation immédiate et ces mesures doivent être «*deliberate, concrete and targeted*».[83]

4 CONCLUSION

L'entrée en vigueur du Protocole en 2024 coïncide avec le thème annuel choisi par l'UA, qui manifeste son intérêt à un apprentissage inclusif. Le Protocole reconnait aux personnes handicapées le droit à une éducation inclusive, qui est un pilier nécessaire pour booster non seulement leur potentiel, mais également pour faire face à la discrimination dont elles sont victimes et qui les empêche de jouer un rôle clé dans la vie sociale.

Toutefois, si l'entrée en vigueur de ce Protocole est une avancée significative dans la protection du droit à l'éducation des personnes handicapées en Afrique, la prudence visant «à exclure toute déduction hâtive consistant à déduire de la seule présence d'un dispositif

79 Comité des droits des personnes handicapées (n 2) para 41(a).

80 Comité des droits des personnes handicapées (n 35) para 26. Voir aussi Comité des droits des personnes handicapées (n 2) para 31.

81 Comité des droits des personnes handicapées (n 2) para 24.

82 Comité africain d'experts sur les droits et le bien-être de l'enfant (n 69) para 64.

83 Committee on Economic, Social and Cultural Rights (n 52) para 43.

juridique …, la réalisation d'un projet d'action publique»[84] s'impose. En Afrique en effet, les droits des personnes handicapées ne sont pas respectés non pas parce qu'ils n'étaient pas reconnus avant l'entrée en vigueur du Protocole. Nous l'avons vu, ces personnes bénéficiaient déjà, à l'instar de tout être humain, d'un dispositif juridique important aussi bien au niveau international, régional que national qui protège leurs droits, sans discrimination, en particulier en matière d'éducation. Si l'on ne peut pas considérer le Protocole comme un instrument juridique superfétatoire dès lorsqu'il consacre quelques innovations majeures en termes de la portée du droit à l'éducation des personnes handicapées et des obligations positives spéciales qui en découlent, ces obligations et leur portée gagneraient tout de même à être étendues davantage comme illustré ci-haut. De plus, en vue de leur mise en œuvre, un effort collégial de nombre d'acteurs est indispensable pour rendre ce droit à l'éducation concret et effectif. En effet, bien que certaines obligations découlant du droit à l'éducation des handicapés soient de réalisation immédiate, plusieurs d'entre elles sont de réalisation progressive. Ce qui accorde une marge de manœuvre aux États qui, bien qu'encadrée juridiquement, pourrait constituer l'obstacle majeur à la mise en œuvre effective de ce droit.

A cet égard, les États (*via* le ministère de l'éducation)[85] sont appelés à procéder d'emblée à l'identification des personnes handicapées, à leurs besoins spécifiques et l'établissement d'une base de données pour ce faire. Cela nécessite l'implication non seulement des personnes handicapées qui sont encouragées à se grouper en association, mais également des établissements d'enseignement à tous les niveaux et des organisations de la société civile qui appuient l'éducation des personnes handicapées. L'implication des commissions nationales des droits de l'homme est aussi indéniable, car en plus de veiller au respect des droits des personnes vivant avec handicap, elles sont dotées, dans certains pays, de la sous-commission des droits des personnes avec handicap[86] qui est appelée à s'approprier le Protocole et à veiller à sa mise en œuvre. La synergie de tous ces acteurs est aussi

84 A Rouyère 'Le droit comme indice. Existe-t-il des politiques d'environnement' (2000) *L'analyse des politiques publiques aux prises avec le droit* 69.

85 En effet, il doit incomber au(x) ministère(s) ayant l'éducation et l'enseignement supérieur dans leurs attributions l'éducation des personnes handicapées. Une telle compétence, là où c'est encore le cas, doit être retirée des ministères ayant les affaires sociales et la santé dans leurs attributions. En effet, comme le note le comité onusien, le fait de confier l'éducation à d'autres ministères que celui de l'éducation a 'pour conséquence, entre autres, que les personnes handicapées ne sont pas prises en compte dans les lois, politiques, programmes et budgets généraux relatifs à l'éducation, que les ressources par habitant affectées à l'éducation des personnes handicapées sont inférieures à celles consacrées à l'éducation des autres personnes, que le nombre et la cohérence des structures d'encadrement favorisant l'éducation inclusive sont insuffisants, que trop peu de données intégrées sont collectées concernant la scolarisation, la persévérance scolaire et le niveau d'études et que les enseignants ne sont pas formés en matière d'éducation inclusive'. Comité des droits des personnes handicapées (n 2) para 60.

86 Voir notamment en RD Congo, arts 6(5), 12(5) et 14(6) de loi organique n° 13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme.

nécessaire pour pousser les États à mettre effectivement en œuvre les obligations positives spéciales qui découlent du droit à l'éducation des personnes handicapées.

Les organes judiciaires au niveau national ainsi que la Commission et la Cour africaine des droits de l'homme et des peuples au niveau régional sont aussi appelés à faire preuve d'activisme interprétatif (la Commission) et judiciaire (la Cour et le juge national) lorsqu'ils se prononcent sur des questions en lien avec le Protocole, en particulier celles qui se rapportent au droit à l'éducation. Cet activisme, qui doit s'appuyer sur l'ensemble du droit international des droits de l'homme et les réalités africaines, doit être de nature à amener les États à une plus grande prise de conscience sur le fait que le Protocole leur exige des obligations positives spéciales auxquelles ils doivent se conformer.

Ces quelques mesures indicatives sont indispensables, car sans elles, la portée du droit à l'éducation des personnes handicapées et les obligations qui en découlent et qui restent à étendre risquent, en dépit de leur originalité, de ne pas créer, juridiquement, d'importants bouleversements au sein des ordres juridiques internes des États. En conséquence, le Protocole risquerait d'être considéré comme un texte essentiellement programmatique, un «traité d'atmosphère», ou encore, de «bonnes intentions». Ainsi, l'accessibilité des personnes handicapées à l'éducation et leur degré de participation et d'inclusion sociales pourraient demeurer dans le *statu quo erat ante*.

III

CASE COMMENTARIES

COMMENTAIRES DE DECISIONS

The first decision of the African Commission on maternal mortality: *Community Law Centre and Others v Nigeria*

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ABSTRACT: This contribution examines the first decision of the African Commission on Human and Peoples' Rights under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), specific to the issue of maternal mortality. The discussion examines the issues raised in this Communication, and the findings of the African Commission in relation to admissibility and merits. More importantly, it evaluates the reasoning of the African Commission in relation to the decision on the merits, especially the reasons for the Commission's finding that the actions and non-action of the Nigerian government did not constitute a violation of any of the rights under the African Charter and the African Women's Protocol. The authors contend that the Commission adopted a restrictive and retrogressive approach to the interpretation of the African Charter and the African Women's Protocol. Furthermore, the authors note that the Commission missed an opportunity to contribute to jurisprudence on sexual and reproductive health, including maternal health guaranteed in the African Women's Protocol. It concludes by reflecting on the implications of this decision for future litigation on sexual and reproductive health and rights on the continent, particularly for the work of civil society and other stakeholders advocating for sexual and reproductive health and rights and other rights under the African Women's Protocol.

TITRE ET RÉSUMÉ EN FRANÇAIS

La première décision de la Commission africaine relative à la mortalité maternelle: *Community Law Centre et autres c. Nigeria*

RÉSUMÉ: Ce commentaire examine la première décision rendue par la Commission africaine des droits de l'homme et des peuples en application du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole de Maputo), portant spécifiquement sur la question cruciale de la mortalité maternelle. L'analyse s'articule autour des enjeux soulevés par la communication, ainsi que des conclusions de la Commission concernant la recevabilité et le fond de l'affaire. L'examen approfondi met en lumière le raisonnement juridique adopté par la Commission pour statuer sur le fond, en particulier les motifs ayant conduit à sa conclusion selon laquelle les actions et inactions du gouvernement nigérian ne constituaient pas une violation des droits protégés par la Charte africaine et le Protocole de Maputo. Les auteurs soutiennent que la Commission a adopté une approche restrictive et conservatrice dans son interprétation des dispositions de la Charte et du Protocole, ce qui reflète un recul par rapport aux objectifs progressistes

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de ces instruments. En outre, les auteurs soulignent que cette décision représente une opportunité manquée d'enrichir la jurisprudence sur les droits à la santé sexuelle et reproductive, en particulier la santé maternelle, garantie par le Protocole de Maputo. Enfin, les auteurs explorent les implications de cette décision pour les affaires futures concernant les droits à la santé sexuelle et reproductive sur le continent. Ils examinent notamment son impact potentiel sur le travail des acteurs de la société civile et des parties prenantes œuvrant pour la mise en œuvre et la défense des droits inscrits dans le Protocole de Maputo.

KEY WORDS: case discussion; *Community Law Centre and others v Nigeria*; African Commission on Human Peoples' Rights; Nigeria; maternal mortality; sexual and reproductive health

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1 INTRODUCTION

In May 2023, the African Commission on Human and Peoples' Rights (African Commission) adopted it first decision on the subject of maternal mortality as guaranteed under the African Charter on Human and Peoples' Rights (the Charter), and the Protocol to the African Charter on the Rights of Women (African Women's Protocol).[1] The decision followed a Communication brought to the Commission by the Community Law Centre, University of the Western Cape, and three other organisations against Nigeria in 2014. The decision comes in the context of global recognition of a period of stagnation, and in some aspects regression, in gender equality, including in the area of sexual and reproductive rights. Maternal mortality in particular is one in which there has been progress in general, but in respect of which Africa still leads in large numbers of per capita maternal deaths. According to the World Health Organisation (WHO), many of the countries with high maternal mortality ratios are in Africa, and accounted for 70 per cent of all deaths in 2020.[2] The odds of a woman dying during

1 Communication 564/2015, *Community Law Centre and Others v Nigeria*. Although the decision was adopted in 2023, it was transmitted to the parties only in August 2024, and was, by November 2024, yet to be published by the Commission (on its website). The decision is available online at https://www.chr.up.ac.za/images/researchunits/wru/documents_/caselaw/African_DECISION_ON_MERITS_ON_COMMUNICATION_564_TO_PARTIES-2.pdf (accessed 1 December 2024) (*Nigerian Maternal Mortality*).

2 World Health Organization and others *Trends in maternal mortality 2000 to 2020* (2020). According to the WHO, maternal mortality refers to the death of a woman while pregnant or within 42 days of pregnancy.

childbirth and pregnancy in Africa is put at 1 in 40, which is one of the highest in the world.[3] This reality portends grave danger for the health and lives of women and girls in the region. Several factors account for maternal deaths and morbidities in Africa. These include lack of skilled healthcare providers, discriminatory practices that perpetuate gender inequality, poor allocation of resources to maternal healthcare, lack of necessary facilities in healthcare settings, negative attitudes of healthcare providers, and limited access to safe abortion.[4]

The Communication was filed in the latter days of the Millennium Development Goals (MDGs), and just before the adoption of the United Nations Sustainable Development Goals (SDGs) in 2015. The MDGs aimed to reduce the maternal mortality ratio by 75 per cent, and to achieve universal access to reproductive health by 2015. Goals 3 and 5 of the SDGs, which set out the standard in place at the time of the decision, commit states to reducing the global Maternal Mortality Rates (MMR) to less than 70 per 100 000 live births by 2030, and to achieve gender equality and empower all women and girls.[5] SDG 3 further creates a basis for international assistance and cooperation in ending maternal mortality.[6] The Communication was therefore aligned to the prevailing political and social context. Beyond the SDGs, African governments have made other commitments to end maternal mortality, including adopting the Campaign for the Accelerated Reduction of Maternal Mortality,[7] and the Abuja Declaration on HIV/AIDS, Tuberculosis and other Infectious Diseases (Abuja Declaration).[8] These notwithstanding, the rates of maternal mortality remain unacceptably high in the region. Nigeria in particular has one of highest maternal mortality numbers in the world. This decision is therefore highly significant to the cause of reducing maternal mortality.

2 BACKGROUND TO THE COMMUNICATION

The Dullah Omar Institute at the University of the Western Cape,[9] and Alliance Africa, a non-governmental organisation based in Lagos, Nigeria, were concerned about the unacceptably high rates of maternal mortality in Nigeria despite numerous commitments by the country at the regional and international levels to address the phenomenon. They therefore filed a Communication with the Commission, alleging a series

3 As above.

4 As above.

5 United Nations Sustainable Development Goals, available at http://www.un.org/nsustainabledevelopment/sustainable-development-goals (accessed 5 September 2024).

6 As above

7 The Campaign for the Accelerated Reduction of Maternal Mortality is a collaborative project with UNFPA to address the high maternal mortality in Africa.

8 OAU/SPS/ABUJA/3, adopted at the African Union Assembly of Heads of States meeting, Abuja, Nigeria, April 2001.

9 At the time of filing, the Dullah Omar Institute operated under the name of the Community Law Centre, at the University of the Western Cape.

of violations of the Charter and the African Women's Protocol due to preventable maternal deaths of about 40,000 every year. In 2015 two other organisations, the Centre for Reproductive Rights and the Women Advocacy and Documentation Research Centre (WARDC), applied to join and were admitted as complainants.

Although the African Women's Protocol had been in place for more than ten years at the time of filing the Communication, the Commission had by then not yet decided a matter alleging the violation of rights under the Protocol.[10] This was despite the ground-breaking and potent nature of its provisions which seek to promote the equal rights of women in the region. The complainants thus considered it an ideal opportunity to explore the protection mandate of the Commission through a communication, so as to enforce Nigeria's duties to reduce the incidence of maternal mortality. The complainants also considered it an ideal opportunity for the Commission to pronounce itself on the protection of sexual and reproductive rights (SRHR), given the limited provisions on the subject in the treaties of the African human rights system.

3 FACTS OF THE COMMUNICATION

The complainants alleged that thousands of women in Nigeria had lost their lives due to the failure of the state to address the causes of maternal deaths in the country.[11] They contended that these deaths were preventable since the causes were well known, and that the high rates of maternal mortality in Nigeria were a matter of social justice that should be addressed by the state. The complainants alleged that maternal deaths in the country were aggravated by gender inequality, the inferior status of women in the society, and the patriarchal traditions of the society. They noted that Nigeria was endowed with natural resources, specifically oil, and yet, the per capita expenditure on health of 136 USD was much less than that of less endowed countries. The complainants argued that a three-year review of the budgets in Nigeria at the time revealed that spending on military and defence far exceeded the health sector and fell short of the recommendations in the Abuja Declaration.

The complainants further argued that since maternal mortality only affects women, the failure of Nigeria to address preventable maternal deaths constituted an act of discrimination against women. The complainants contended that the situation constituted a massive violation of women's rights to dignity, life, health and non-discrimination. They relied on reports by UN agencies and national institutions to corroborate the high maternal deaths in the country, and to demonstrate that the government of Nigeria was well aware of the

10 F Viljoen & M Kamunyu 'Articles 27 and 32: the interpretative mandate under the African Women's Protocol' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 547 at 565-566.

11 *Nigerian Maternal Mortality* (n 1).

high maternal deaths, but had done little or nothing to address or remedy the situation.

The prayers of the applicants were therefore for the Commission to find that Nigeria had violated articles 2, 3, 4, 5 and 16 of the African Charter, and articles 2, 4, 5, 10 and 14 of the African Women's Protocol; to order Nigeria to provide free prenatal and maternal healthcare services to all women, particularly those in the rural areas and to establish health centres throughout the country; request Nigeria to invest its resources for the improvements of the health sector; award a sum of 5 billion Naira in damages or compensation to women and their families who have suffered physical and psychological trauma including debilitating injuries due to pregnancy or childbirth related complications in the country; and to request Nigeria to devote more resources to the health sector in order to address the high maternal mortality in the country.

4 DECISION ON ADMISSIBILITY

The Commission reasoned that while the complainants focused on article 56(5) of the Charter for the basis of admissibility, the prerequisites for admissibility under the other provisions of article 56 had also been met. Relying on its previous decisions, the Commission adopted a progressive interpretation of the provision of the Charter regarding exhaustion of local remedies. The Commission noted that article 56(5) requires individuals to exhaust local remedies before approaching the Commission, unless local procedure is unduly prolonged. The idea behind this requirement is that the respondent state should first be made aware of the nature of the violations alleged and if possible be able to remedy the situation before asking the Commission to entertain any communication related to the alleged violation. In this regard, the Commission noted that the three crucial considerations for determining the exhaustion of local remedies are that the remedy must be available, effective and efficient.[12] Reiterating its position in earlier decisions, the Commission explained that a remedy is available if the complaint can pursue it without any impediments, it is deemed effective if there is any prospects of success, and it is sufficient if it is capable of remedy for the violation of rights experienced.[13] The absence of any of these criteria would mean that the requirement to exhaust local remedies have not been met.

Affirming the position of the complainants, the Commission reasoned that local remedies were not available, efficient and sufficient given the large number of victims, the serious and massive violations of rights involved and the fact that the victims were from disadvantaged

12 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 31.

13 As above.

communities without access to legal aid. Citing its decision in *Open Society Foundation v Côte d'Ivoire,*[14] the Commission emphasised the futility of exhausting local remedies where there have been massive violations of rights.

In the Commission's view, the prospect of success is an essential consideration for the exhaustion of local remedies where disadvantaged individuals without legal aid are involved. Furthermore, the Commission noted that the nature of rights violated by the Respondent state – that is, the right to health – were not enforceable under Nigeria's law because they were classified as Directive Principles of the state, which were not justiciable. The Commission noted that while the intention of section 6(6)(c) of the Nigerian Constitution is to make it impossible to enforce socio-economic rights, there was jurisprudence from Nigerian courts and the other bodies to the effect that these rights can still be enforced in the country. Citing *SERAP v Nigeria* as an example,[15] the Commission noted that the sum total of cases on this issue indicate that socio-economic rights are capable of being litigated in Nigeria.[16] Nevertheless, the Commission was satisfied that in light of the legal environment, the prospect of success in domestic litigation was undercut. Notably, Nigeria did not make any submissions on the admissibility of the complaint.

In sum, the Commission observed that in the totality of the facts available to it, the complainants had met the requirement for the exhaustion of local remedies. This reasoning of the Commission is commendable. Consistent with its previous jurisprudence, the Commission affirmed that massive violations of human rights constituted an exception to the rule of exhaustion of local remedies. Furthermore, the Commission's sympathetic consideration of disadvantaged groups without access to legal aid services resonates with the spirit of the SDGs that no one should be left behind. Arguably, through this decision, the Commission took additional steps towards broadening the scope of exceptions to the rule on exhaustion of local remedies to include massive violation of rights. However, it is still debatable whether the Commission was affirming that it would be inclined to waive the need to exhaust local remedies where there is massive violation involving disadvantaged groups, or whether this was mere *obiter dictum*.[17] If in the affirmative, the Commission's flexibility to waive the need to exhaust local remedies in the current Communication would be consistent with its previous jurisprudence, and would be progressive and in tune with growing development at international law. This is particularly important since the provision on the need to exhaust local remedies is one of the thorniest and most

14 See *Nigerian Maternal Mortality*, para 49. In Communication 318/06 *Open Society Foundation v Côte d'Ivoire* (2016) ACHPR, paras 48-50, the Commission determined that massive violations were a basis for derogation from the requirements of the exhaustion of local remedies.

15 Communication 300/05 *Socio-Economic Rights and Accountability Project v Nigeria* (2008) ACHPR.

16 As above.

17 *Nigerian Maternal Mortality,* para 48.

litigated aspects of article 56,[18] and has generated rich jurisprudence by the Commission.[19]

5 DECISION ON MERITS

While the Commission's reasoning on admissibility is progressive, the decision on the merits departs fundamentally from the prior jurisprudence of the Commission and established standards on socio-economic rights, adopts a restrictive approach to interpretation, is rather pedantic on the arguments of the complainants, and seems to absolve the respondent of responsibility even in respect of obligations already established in the African Charter.[20] This is despite the fact that Nigeria did not participate to counter any of the arguments or evidence filed. [21] Indeed, the Commission went out of its way to absolve Nigeria of its duty to prevent maternal deaths. The general tone of the decision is adversarial, often seemingly reprimanding the applicants' case, and overplaying interpretative technicalities. The approach is out of character with the Commission's prior approach, and misses the chance to address issues that have resonance in a majority of states parties to the Charter, and to break new ground in jurisprudence. The upshot is that the Commission found that Nigeria did not violate any of the rights alleged by the complainants.

We limit our analysis to four areas out of the several canvassed in the Communication. The featured areas are the rights to health, non-discrimination, life, and to be free from torture, inhuman and degrading treatment.

5.1 The right to health

The World Health Organisation (WHO) has noted that the direct causes of maternal injury and death are excessive blood loss, infection, high blood pressure, unsafe abortion, and obstructed labour, while the

18 See GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights (2008) 2 *African Human Rights Law Journal* 442, 445*;* see also International Justice Resource Centre *Exhaustion of domestic remedies under the African human rights system* (2017).

19 For a detailed discussion on this, see H Onoria 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1; and L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41(2) *Human Rights Quarterly* 374-398.

20 See for instance para 104 where the Commission observes that evidence is not produced to show that Nigeria has sufficient resources to prevent maternal deaths in the country. See also para 109, where the Commission made the argument that the implementation of the right to health is a long-term process, and that poverty and lack of resources is the reason why the right to an adequate standard of health is not realised.

21 *Nigerian Maternal Mortality,* para 42.

indirect causes include anaemia, malaria, and heart disease.[22] It further notes that maternal mortality is preventable with timely management by a skilled health professional working in a supportive environment. According to WHO, states are to ensure that healthcare providers deliver maternal healthcare services in the most respectful manner to pregnant women.[23]

In the case at hand, the complainants argued that the failure by the government of Nigeria to address preventable maternal deaths and morbidities constituted a violation of the right of health. Furthermore, they argued that most Nigerians pay for healthcare services out-of-pocket thereby making it difficult for a large number of the population, particularly women in rural areas, to access health services in general and maternal healthcare services in particular. They relied on norms and standards on the right to health under international law, including General Comments 14 and 22 of the Committee on Economic Social and Cultural Rights (CESCR), General Comments 6 and 35 of the Human Rights Committee, General Recommendation 24 of the CEDAW Committee, and the Resolutions and General Comments of the African Commission. However, the Commission found that the complainants had not proven that Nigeria had adequate resources to realise the right to health.

The approach of the Commission to the right to health is retrogressive. According to the Commission, the realisation of the right to health like other socio-economic rights is 'problematic in Africa' due to economic challenges and high poverty levels, thereby making it difficult to provide infrastructure and facilities to realise it.[24] The Commission noted that a state is only required to take 'positive and selective steps' under article 16 of the Charter to realise the right to health. The Commission concluded that the 15 per cent allocation to the health sector agreed during the Abuja Declaration is not binding on states and therefore cannot be enforced. Furthermore, the Commission noted that there wasn't enough evidence to show that Nigeria was not meeting its obligations as envisaged under article 14(2)(a). This conclusion is confusing, given that in the admissibility consideration, the Commission acknowledged its own prior jurisprudence that preventable maternal mortality was a violation of the rights to life, health and dignity of women in Africa. The complainants' argument was simply that the cost of health services in Nigeria is prohibitive and not in tune with the economic realities in the country. The Commission was not convinced by this argument, and therefore found no violations of the right to health against Nigeria. This outcome is retrogressive because it lowers the threshold of state responsibilities from settled standards, including those in the jurisprudence of the Commission itself.

22 WHO *Maternal Health* available at https://www.who.int/health-topics/maternal-health#tab=tab_1 (accessed on 2 November 2024).

23 See WHO *Recommendations on maternal health* (2017) 8.

24 *Nigerian Maternal Mortality*, para 109.

For instance, while it is true that the implementation of socio-economic rights, including the right to health, requires adequate resources, states are required to take concrete, positive and progressive steps towards realising this right.[25] One of the steps or measures that the government of Nigeria would be expected to take in this regard is to invest in primary healthcare services to facilitate access to healthcare for those in rural or disadvantaged communities. Even in the most literal sense, the term progressive implies incremental and measurable, as guided by a well-articulated and accountable plan. It cannot be interpreted, as the Commission seems to suggest, to mean that the state has absolutely no responsibility simply because it does not have resources.[26]

Furthermore, while the right to health as part of socio-economic rights is to be realised progressively, the minimum core content of the right is not subject to progressive realisation, but must rather be realised immediately.[27] The CESCR in its explanation of the minimum core in relation to the right to health, has referred to the Programme of Action of the International Conference on Population and Development, and the Alma-Ata Declaration as instruments reflecting an international consensus on the core obligations arising under article 12.[28] Furthermore, the Committee has recognised as part of the minimum core, the obligation '[t]o ensure reproductive, maternal (prenatal as well as postnatal) and child health care'.[29] In 2016, the CESCR adopted General Comment 22 on the right to sexual and reproductive health[30] and acknowledged as guidance for the purposes of specifying the minimum core 'contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA)'.[31] It therefore seems that the Commission backtracked on well-established and generally-accepted standards. Furthermore, the argument of the Commission in this regard shifts the burden of proof of resources to the complainants, and yet such duty is already established by treaty to rest upon the state. Indeed, the state is presumed to have resources, unless it can demonstrate the lack of resources and corresponding failure to obtain assistance to fulfil its obligations. In its

25 See and UN Committee on Economic, Social and Cultural Rights (ESCR Committee General comments 3 Nature of states obligations under the Covenant and UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant) 11 August 2000, E/C12/2000/4 (General Comment 14).

26 See for instance para 109 of the decision.

27 General Comment 14 (n 25).

28 General Comment 14 (n 25) para 43.

29 General Comment 14 (n 25) para 44(a).

30 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22.

31 General Comment 22 (n 14) para 49.

current iteration, the Commission seems to absolve the respondent state of its duties.

Rather than consolidate its position on the basis of the jurisprudence of the CESCR with regard to the nature of the state's obligation to realise the right to health, the decision refers to the state's duty to take 'positive and selective steps'[32] to realise socio-economic rights. This is a departure from the language of the CESCR's 'concrete and targeted' measures,[33] which has also previously been co-opted by the Commission.[34] The choice of terminology can be interpreted as introducing new parameters of interpretation. But this would be tantamount to lowering the standard. It is more plausible to assume a poor choice of terminology as opposed to a purposive redirection. The latter conclusion dents the credibility of the Commission's reasoning in the current decision, but may serve to discredit the influence of this line of reasoning in subsequent jurisprudence.

It is a settled standard that states ought not to take retrogressive steps in the realisation of the right to health. It is also generally established that beyond the question of the volume of resources, it is also about how judicious the state is in utilising the resources it has. The complainants had argued both that Nigeria had the resources as a result of its oil wealth, and established that the Nigerian government had allocated more resources to military and defence at the expense of the health sector, as a testament to the lack of political will to address maternal mortality in the country. Indeed, Nigeria is one of Africa's largest economies.[35] In the circumstances, and without a rebuttal of these representations by the state, the Commission ought to have assumed sufficiency of resources.

The concept of progressive realisation, implies incremental allocation to the health sector with a view to realising the right to health.[36] It is endorsed by the African Commission's Guidelines and Principles for the Implementation of the Socio-economic Rights in the Charter.[37] Based on an analysis of Nigeria's budgets for three years, the complainants had illustrated that the allocation to the health sector hovered between 5 and 6 per cent, while allocation to military and defence exceeded 10 per cent. This information was however not factored in the decision, thereby missing an opportunity to expound on the responsibilities of state parties in respect of resourcing the

32 *Nigerian Maternal Mortality,* para 110.

33 See General Comment 3 of the CESCR.

34 See Guidelines and Principles for the implementation of economic, social and cultural rights in the African Charter '(2011) para 14.

35 The World Bank Group 'World Bank in Nigeria' available at https://www.worldbank.org/en/country/nigeria/overview (accessed 25 September 2024).

36 L Chenwi 'Unpacking "progressive realisation" its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 39.

37 Guidelines and Principles for the Implementation of Economic, Social and Cultural Rights in the African Charter (2011).

implementation of women's rights, as required under article 10(3) of the African Women's Protocol.[38]

In the *Treatment Action Campaign* case, the Constitutional Court of South Africa rejected a similar argument of a lack of resources by the South African government on the basis that it did not provide evidence to support a lack of resources to roll out programmes for the prevention of mother-to-child transmission of HIV in the country.[39] In the absence of any evidence to the contrary, the Commission could have found the Nigerian state to be in breach of its obligation to realise the right to health under the Charter and the African Women's Protocol. This is significant because article 14(2)(a) of the African Women's Protocol is a codification of the reasoning of the CESCR in its General Comment 14 where it is stated that states are obligated to ensure available, accessible, acceptable and quality healthcare services to all.[40] In a country where the majority of women, particularly those in rural areas do not have adequate access to maternal healthcare services, it cannot be said that the government is meeting its obligations under the African Charter and African Women's Protocol.

Furthermore, the Commission held that there was no connection between access to safe abortion (article 14(2)(c)), and maternal mortality,[41] or between lack of family planning education and maternal mortality.[42] It is a settled fact that deaths from unsafe abortion contribute to maternal mortality. For instance, it has been noted that 77 per cent of abortions in sub-Saharan Africa are unsafe and about 6.2 million incidences of abortion take place each year,[43] thereby affecting the health of women and girls and contributing significantly to the high rates of maternal mortality in the region.[44] It is reported that an estimated 1.2 to 2 million abortions occur in Nigeria every year.[45] Coupled with restrictive abortion laws, it is not surprising that unsafe abortion contributes to the high rates of maternal mortality in Nigeria. There is an apparent break in logic, since the decision both

38 See A Budoo-Scholtz 'The right to peace' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 223.

39 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15.

40 See E Durojaye 'An analysis of the contribution of the African human rights system to understanding of the right to health' (2021) 21 *African Human Rights Law Journal* 751. See also E Durojaye 'Article 14' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 308.

41 *Nigerian Maternal Mortality,* para 121.

42 *Nigerian Maternal Mortality,* para 149.

43 A Bankole and others *From unsafe to safe abortion in sub-Sahara Africa: slow but steady progress* (2020).

44 As above.

45 PMA 2020 Abortion Survey Results (2018) available at https://www.pmadata.org/sites/default/files/data_product_results/NG-AbortionModule-Brief-v2-2020-03-18.pdf (accessed 28 November 2024).

acknowledges in the admissibility consideration that there was 'a significant number of victims involved in the respondent state'[46] and relies on this to waive the requirement of exhaustion of local remedies, but finds this immaterial to the responsibility of the state.

In terms of article 60 of the African Charter, the Commission should have drawn inspiration from decisions of UN treaty bodies and national courts in the region to affirm the links between lack of access to safe abortion, increased maternal mortality and violation of the right to health. For instance, in *Alyne da Silva Pimental v Brazil,*[47] the CEDAW Committee found the Brazilian government in violation of its obligation to realise the right to health and maternal healthcare of a woman from a disadvantaged and Afro-Brazilian community as guaranteed in article 12 of the Convention. The Committee affirmed that denial of maternal healthcare services violated Alyne's right to healthcare services. The Committee found that the state did not comply with its obligation under article 12(2) of the Convention to 'ensure to women appropriate services in connection with pregnancy, confinement and the postnatal period' because of its failure to meet Alyne's 'specific, distinctive health needs and interests' during pregnancy.[48] Cook has argued that the decision in the *Alyne* case has aided our understanding of maternal mortality as a violation of women's human rights and the articulation of collective obligations to ensure women's equal rights in the field of healthcare.[49]

Also, the Ugandan Constitutional Court held that the Ugandan government was in violation of the right to health of two women for failing to provide quality maternal healthcare services.[50] The Court found that the right to healthcare, including maternal healthcare services, guaranteed under the Ugandan Constitution, constituted a minimum core obligation which the government had to implement immediately.[51] More importantly, the Court held that maximum available resources include internal and external resources the state could mobilise in order to ensure effective delivery of maternal healthcare services thereby avoiding preventable deaths.[52] The Court invoked the indivisibility and interrelated approach to find that failure of the Ugandan government to prevent maternal deaths constituted violations of the rights to life, dignity, and health.

The Commission's views on the weight of the Abuja Declarations on HIV/AIDS, Malaria, Tuberculosis and other infectious Diseases (Abuja Declaration) for state responsibilities also raises concern. It noted that

46 *Nigerian Maternal Mortality*, para 54.

47 *Alyne Da Silva Pimentel v Brazil*, CEDAW/C/49/D/17/2008, 10 August 2011, para 7.7.

48 As above.

49 See RJ Cook 'Human rights and maternal health: exploring the effectiveness of the *Alyne* decision' (2013) 41(1) *Journal of Law, Medicine & Ethics* 103-123.

50 *Centre for Health, Human Rights and Development (CEHURD) & 3 Others v Attorney General* (Constitutional Petition 16 of 2011) [2020] UGCC 12 (19 August 2020) (*CEHURD* case).

51 *CEHURD* case (n 50) p 52.

52 *CEHURD* case (n 50) p 49-53.

the Abuja Declaration is not a binding instrument and that, as such, the Nigerian government could not be held accountable for not meeting the commitments in the Declaration.[53] It is true that the Abuja Declaration is a soft law norm and therefore not binding on states. However, it remains an important normative standard to gauge governments' commitments to realise the right to health in the region. The fact that a state is not complying with the Declaration is an indication of lack of political will to ensure the enjoyment of the right to health. The Declaration was made by the Assembly of Heads of State of African governments, the highest decision making organ of the AU. Therefore, even if it does not have binding force, it remains an important document to assess progress made by states towards resourcing health.

Nolan argues that 'soft law can include 'mechanisms [that] provide guidelines and principles which, while not legally binding, have force by virtue of the consent that governments, companies, and other civil society actors accord them'.[54] The author further notes as follows:[55]

> Thus to argue that soft law is simply not-law is perhaps too simplistic. The evolution of soft law instruments in the business and human rights sector has created at minimum, standards of expected conduct that, while not setting out to be legally binding, may have normative value that is intended to prescribe expected standards of behaviour.

According to Shelton non-binding normative instruments may do one or more of the following:[56]

(1) codify pre-existing customary international law, helping to provide greater precision through the written text;
(2) crystallize a trend towards a particular norm, overriding the views of dissenters and persuading those who have little or no relevant state practice to acquiesce in the development of the norm;
(3) precede and help form new customary international law;
(4) consolidate political opinion around the need for action on a new problem, fostering consensus that may lead to treaty negotiations or further soft law;
(5) fill in gaps in existing treaties in force;
(6) form part of the subsequent state practice that can be utilized to interpret treaties;
(7) provide guidance or a model for domestic laws, without international obligation, and,
(8) substitute for legal obligation when on-going relations make formal treaties too costly and time-consuming or otherwise unnecessary or politically unacceptable.

53 *Nigerian Maternal Mortality*, para 111.
54 J Nolan 'The corporate responsibility to respect rights: soft law or not law?' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility respect?* (2013) 8.
55 As above.
56 DL Shelton 'Soft law' in D Amstrong (ed) *Handbook of international law* (2008) 8.

From the above it is clear that while soft law is not necessarily binding on states, it is an important consideration in measuring a government's commitments to realizing human rights. In any case, the Abuja Declaration is not an isolated document, but rather part of a regular approach of the African Union to express shared policy commitments consistent with its agenda. In a cumulative sense, the soft law of the African Union has been a basis for momentous political and policy actions, as in the case of the African Union Agenda 2063. It is difficult to reconcile the weight of such instruments with the apparent position that such instruments have no bearing on the actions of AU member states.

In making its argument on the weight of declarations, the Commission stated that a declaration has '*symbolic scope* and is essentially the expression of the political will … a declaration has *only a recommendatory* value … cannot be used as a legal basis to argue that rights therein have been violated'.[57] The choice of words discounts the value of declarations altogether, not only in relation to their lack of binding force. This is at odds with the fact that binding force is not the only measure of value of an instrument.

In any case, the African Commission has cited soft law to buttress its points in numerous past decisions. For instance, in the *Egypt Initiative for Personal Rights and Interights v Egypt,*[58] the Commission relied on the Guidelines and Measures for the Prohibition of Torture, Inhuman and Degrading Treatment or Punishment in Africa and the 'Declaration on the Elimination of Violence against Women' in arriving at its decision. Relying on this 'soft law' as a tool for interpretative guidance, the Commission found that the Egyptian government was in violation of article 5 of the African Charter on the right to dignity. Also, in *Huri-Law v Nigeria,* the African Commission relied on the UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment to hold that the Nigeria government had failed in its obligations under the Charter to treat prisoners with respect and dignity.[59] In a nutshell, the Commission's approach to the weight of soft law as irrelevant in holding states accountable in its decisions is contradictory in as far as it considers them weighty in some instances and of little weight in other cases.

5.2 The right to life

Maternal deaths underscore failure on the part of the state to prevent loss of life. The complainants argued that since the deaths were preventable, the respondent state had failed to take positive steps to prevent loss of life. They relied on global and regional norms, including the jurisprudence of the Commission to support the argument.

57 *Nigerian Maternal Mortality,* para 111 (emphasis added).
58 Communication 323/06 of 2011.
59 *Huri-Law v Nigeria* Communication 225/98 of 2000, para 41.

For instance, the complainants referred to General Comments 6[60] and 36[61] of the Human Rights Committee on the Right to life, General Comment 3[62] of the Commission, and case law of the Commission.[63] However, the Commission found that no evidence had been presented to the effect that maternal deaths in the country were the result of the failure on the part of the Nigerian state to prevent such deaths. In particular, that there was no evidence that the respondent state had sufficient resources to prevent maternal deaths.

This is a restrictive approach by the Commission, particularly in light of plenty of evidence and reports including those of WHO, UNFPA, and the respondent state itself, indicating the high rates of maternal mortality in the country. The Commission did not reference its own jurisprudence such as General Comment 3 on the right to life, where it explains that states have the positive obligation to prevent loss of life, including preventable maternal deaths.[64] Furthermore, in *International Pen and Others v Nigeria*, the Commission affirmed that a violation of the right to health of a prisoner will result in the violation of the right to life.[65] Moreover, in Resolution 135 on Maternal Mortality, the Commission had declared maternal deaths in Africa a state of emergency and called on African governments to take decisive measures to address this.[66] The Commission further noted that maternal death is a violation of several rights of women, including the rights to life, dignity, non-discrimination and health.[67]

The approach of the Commission shows material inconsistencies in the approach to the link between the right to health and life. Needless to say, other human rights bodies[68] and national courts[69] have

60 Human Rights Committee General Comment 6 on the right to life in art 6 of the ICCPR.

61 Human Rights Committee General Comment 36 on the right to life in art 6 of the ICCPR.

62 General Comment 3 (n 18).

63 See, for instance, *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995, *Sudan Human Rights Organization & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) and *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

64 See General Comment 3, para 3.

65 *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

66 African Commission on Human and Peoples' Rights, Resolution 135 of 2008 available at http://www.achpr.org/sessions/44th/resolutions/135/ (accessed 5 September 2024).

67 For more on this, see, see E Durojaye 'The approaches of the African Commission to the right to health under the African Charter' (2013) 17 *Law Democracy and Development* 393.

68 See for instance, Human Rights Council *Preventable maternal mortality and morbidity and human rights* A/HRC/11/L.16/Rev 1, 16 June 2009., see also, Human Rights Council, *Practices in adopting a human rights-based approach to eliminate preventable maternal mortality and human rights* 18th Session A/HRC/18/ 27; 8 July 2011.

69 See for instance, the decision of the Indian High Court in *Laxmi Mandal v Deen Dayal Haringar Hospital*; and *Jaitun v Maternity Home, MCD*, MANU/DE/1268/2010, cases WP(C) 8853/2008 and 10700/2009 (High Court of Delhi) judgment on 4 June 2010.

affirmed that maternal death constitutes a violation of the right to life. For instance, in the *Alyne* case of Brazil, the central question was whether the failure by the Brazilian government to prevent death during childbirth constituted a violation of the right to life, and the CEDAW Committee agreed that it did. Scholars also support this view. For instance, Cook and others argue that when women die during pregnancy and childbirth, it is an indication of failure on the part of the state to guarantee the right to life.[70] They further argue that the effective protection of the right to life requires states to take measures that will ensure access to healthcare services for women and guarantee safe delivery.[71] Echoing Cook and others, Yamin has argued that states must be held accountable for the death of women during pregnancy and childbirth as these deaths constitute a violation of the right to life.[72]

5.3 The right to non-discrimination

The CEDAW Committee affirmed in its General Recommendation 24 that failure by the state to provide healthcare services specifically needed by women constitute an act of discrimination prohibited under the Convention.[73] Maternal healthcare services are peculiar to women's needs, and when a state fails to ensure access to these services, it violates the right to equality and non-discrimination. Similarly, the disparities in healthcare services between women based on geographic location, rurality or socioeconomic status constitute an act of discrimination. The reasoning of the Commission seems blind to the impact of such intersectionality on maternal health, and therefore fails to appreciate the discriminatory nuances in the maternal health outcomes. The glaring structural inequalities compounded by discrimination on the basis of sex, gender, age, disabilities and marital status could have informed the Commission's analysis of equality and non-discrimination in the current context.

A woman-centred approach or 'asking the woman question',[74] was imperative in the analysis since gender inequality and cultural practices aggravate maternal mortality. By asking the woman question the Commission could have analysed the laws, policies and practices that perpetuate the low status of women and prevent them from exercising their agency. In particular, the Commission ought to have considered the existing legal and social-cultural barriers that hinder access to maternal healthcare services for women in Nigeria. This would have

70 RJ Cook and others *Reproductive health and human rights integrating medicine, ethics and law* (2003) 159.

71 As above.

72 A Yamin 'From ideals to tolls: Applying human rights to maternal health (2013) 10(11) *Plos Medicine* e1001546, see also P Hunt & JB de Mesquita *Reducing maternal mortality: the contribution of the right to the highest attainable standard of health* (2010) 6.

73 CEDAW Committee General Recommendation 24 on women and health (1999).

74 E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Feminist Legal Studies* 315-336.

provided a more purposive interpretation of article 2 of the African Women's Protocol and yielded a substantive approach to equality.

The interpretation of the Commission that differential treatment in article 2 of the African Women's Protocol, must be 'based solely on the ground of sex', does not align with feminist scholars' reasoning. The African Women's Protocol itself already lists grounds of discrimination beyond sex, including grounds yielding intersectional vulnerabilities such as rurality and disability. It is inconceivable to interpret it to mean that the 'sole' purpose of the Protocol is to eliminate discrimination between men and women. Even if that were the case, the Protocol is more aligned with fostering gender equality more generally, which subsumes sex equality.[75] The treatment of women, particularly in the context of reproductive health, is largely influenced and driven by social gender norms.

The right to non-discrimination is an integral part of the principle of equality, and has been described as the right of everyone not to be denied their rights on the grounds of sex, race, religion, language, political affiliation or other status.[76] In *Purohit and Moore v The Gambia*, the Commission noted that articles 2 and 3 are some of the most important provisions of the Charter[77] and that the enjoyment of all other rights in the Charter depend on them. Against this background, the Commission's restrictive interpretation of the discrimination provision in the African Women's Protocol as 'solely based on sex' is absurd. Comparatively, the CEDAW Committee in the *Alyne case* noted that since maternal health is peculiar to women, the Brazilian government was violating the right to non-discrimination of women by failing to provide maternal healthcare services. The CEDAW Committee has also noted in General Recommendation 24 that failure by the state to ensure healthcare services peculiar to the needs of women will amount to discrimination under the CEDAW.[78]

A formal approach to equality ignores the existing differences and historical disadvantages which require the adoption of corrective measures to address.[79] The disparity necessitates a substantive equality approach to close the gap. There is no doubt that a response based on the narrow interpretation preferred by the Commission ignores the suffering of these women, and would result in injustice. With over 40,000 maternal deaths annually, the majority of which occur in disadvantaged communities, the need for urgent and corrective

75 See generally E Lubaale 'Elimination of discriminations against women' and M Kamunyu 'Definitions' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023).

76 See CESCR General Comment 20 Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights) July 2009.

77 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

78 General Recommendation 24 of CEDAW Committee.

79 See M Kamunyu 'Definition' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 42.

measures to address the situation based on a substantive equality approach cannot be overstated.

5.4 The right to dignity and to be free from torture, inhuman and degrading treatment

The complainants argued that mistreatment of women and the negative attitudes of healthcare providers towards maternity patients contribute to the high maternal deaths in Nigeria. They argued that the mistreatment of women during childbirth constitutes a violation of the right to dignity and amounts to torture, inhuman and degrading treatment in line with the reasoning of human rights bodies.[80] The complainants had relied on the jurisprudence of the Commission and other human rights bodies in this regard, as well as decisions of national courts.[81] In its decision, the Commission ignored its own General Comment No. 4, where it stated that acts such as involuntary sterilisation and other mistreatment of women in health facilities constitutes torture, cruel, inhuman and degrading treatment.[82]

Instead, the Commission relied on the jurisprudence of the Human Rights Committee to argue that the mistreatment of women during pregnancy and childbirth does not constitute cruel, inhuman and degrading treatment.[83] It is not clear why the Commission would cite a decision of the Human Rights Committee and depart from its own norms on the same issue. For instance, while explaining the meaning of the right to dignity in the *Purohit* case, the Commission stated that

> the term 'cruel, inhuman, or degrading punishment and treatment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental and that 'exposing victims to *personal suffering and indignity* violates the right to human dignity. Personal suffering and indignity can take many forms and will depend on the particular circumstances of each communication brought before the African Commission'.[84]

Until the present decision, the Commission had consistently followed this reasoning. For instance, in *Doebbler v Sudan*, the Commission noted that 'the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to

80 *Nigerian Maternal Mortality,* paras 67-73.

81 For instance, General Comment 4 of the African Commission, Report of the UN Special Rapporteur on violence against women and decision of High Court of Kenya.

82 African Commission on Human and Peoples' Rights General Comment 4 on the right to redress for victims of Torture and other Cruel, inhuman or degrading punishment or treatment (art 5).

83 *Nigerian Maternal Mortality,* para 126.

84 *Purohit and Moore v The Gambia*, 29 May 2003, Communication 241/01 (emphasis in original).

encompass the widest possible array of physical and mental abuses'.[85] In the *Equality Now* case,[86] which related to child and forced marriages, the Commission adopted a similarly progressive and purposive interpretation of the right to dignity as follows:

> At the core of human dignity is the idea and recognition that a human being has unique worth, value and significance that is innate, and not acquired. It also entails that a human being is a moral agent possessed with the conscience and personal volition to decide what happens to his or her body. The right to respect of dignity is a guarantee that a human being should not be subjected to acts or omissions that degrade or humiliate him or her. The worth, value and significance of a human being may not and need not be conceptualised with scientific precision.

In Resolution 260, the Commission declares that all forms of involuntary sterilisation violate, in particular; the right to equality and non-discrimination, dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health as enshrined in regional human rights instruments such as the African Charter and the African Women's protocol.[87] Some studies have shown that abuse and mistreatment of pregnant women in health facilities contribute to high maternal mortality.[88]

The foregoing jurisprudence is consistent with the trend of human rights bodies, special mechanisms and national courts to frame mistreatment, forced sterilisation and other coercive treatment as constituting torture, inhuman and degrading treatment. For instance, the Human Rights Committee has noted that forced sterilisation contravenes article 7 of the ICCPR which prohibits torture, cruel, inhuman or degrading treatment, and article 17 on right to privacy.[89] In *VC v Slovakia,* the European Court on Human Rights found that sterilisation was carried out with gross disregard to the right to autonomy and choice of the Applicant, and was therefore a violation of articles 3 on the prohibition of inhuman and degrading treatment, and 8 on the right to family life, of the European Convention.[90]

Also, the Special Rapporteur on the rights of persons with disabilities has condemned forced sterilisation of women with disabilities calling on states to guarantee healthcare services to persons

85 See *Curtis Francis Doebbler v Sudan,* 4 May 2003, Communication 236/00. For a detailed analysis of this case, see E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Feminist Legal Studies* 315.

86 *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*, Communication 341/2007, para 118.

87 See *Resolution* on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services - ACHPR/Res. 260(LIV)2013.

88 For instance, see Human Rights Watch 'Stop Making Excuses" Accountability for Maternal Health Care in South Africa' (2011) 8., see also, Amnesty International 'South Africa: Struggle for maternal health: Barriers to antenatal care in South Africa' (2014) 9.

89 See General Comment 28: Equality of rights between men and women, paras 11 and 20.

90 V*C v Slovakia* (no 18968/07), para 119.

with disabilities that are grounded in human rights, including respect for their autonomy, privacy, dignity, and to be free from torture, cruel, inhuman and degrading treatment.[91] Other human rights bodies such as the CEDAW Committee and the Special Rapporteur on violence against women have sometimes referred to the mistreatment of pregnant women in health facilities as obstetric violence. For instance, in *NAE* v *Spain* the CEDAW Committee found that mistreatment of a pregnant woman during delivery such as induced labour and separation from the new baby constituted obstetric violence. Echoing General Recommendation 24 on women and health, the Committee notes that

> quality health-care services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives.[92]

The Committee cited the definition of the Special Rapporteur on violence against women and its consequences as:

> as the violence against women experienced during facility-based childbirth and affirms that this form of violence has been shown to be widespread and systematic in nature or engrained in the health system.[93]

At the national level, the High Court of Kenya in *Millicent Awuor Omuya alias Maimuna Awuor & Another v The Attorney General & 4 Others* found that the detention and mistreatment of the petitioners, including being made to sleep on the floors due to inability to pay medical fees after delivery, constituted ill-treatment and undermined the right to dignity and to be free from torture, inhuman and degrading treatment.[94]

These developments point to the fact that coercion, abuse and mistreatment of women seeking maternal health services in health facilities is a form of torture, cruel inhuman and degrading treatment under international law. The Commission's departure from its own rights affirming reasoning to a restrictive interpretation of the right to dignity is therefore retrogressive.

6 IMPLICATIONS OF THE DECISION FOR THE REALISATION OF SRHR IN AFRICA

The present decision is a clear departure from some of the earlier decisions of the Commission, such as the *SERAC, Free Legal Assistance Group v Zaire* and *Sudan* cases.[95] In these decisions, the Commission demonstrated willingness to advance socio-economic

91 See Report of the Special Rapporteur on the rights of persons with disabilities 2018.

92 CEDAW Committee General Recommendation 24 on women and health.

93 A/74/137, paras 4, 12 and 15.

94 *Millicent Awuor Omuya alias Maimuna Awuor & Another v The Attorney General & 4 Others* (2015), Petition No 562 of 2012.

95 See n 63.

rights, including the right to health, robustly engaged with the issues, clarified state obligations, and elaborated on the nature of the rights. These decisions provide guidance and direction for states regarding their obligations to implement socio-economic rights at the national level.

Another concern with the decision relates to the length of time it took for the Communication to be finalised, given the nature of the underlying violations. The Communication was filed in late 2014 and the decision on the merits was only adopted in 2023, a period of nearly a decade. This is a major concern for a regional human rights body whose jurisdiction is only triggered after the exhaustion of local remedies. Delay in finalizing communication by regional human rights bodies does not inspire trust and confidence in the system. It undermines the goal of redressing injustice speedily. In the long-run, such delays would discourage victims of human rights violations, especially sexual and reproductive rights, from seeking redress with regional human rights bodies.

This decision is a missed opportunity by the Commission to clarify the nature of states obligations regarding the SRHR provisions of the African Women's Protocol. As the first Communication on maternal health under the African Women's Protocol, the Commission had an ideal opportunity to articulate a purposive and substantive position on the scope and content of sexual and reproductive rights, including the prospect of expansion beyond the scope of health. Instead, the Commission adopted a rigid approach, relying on technicalities peripheral to the subject, and seemed to ignore the human impact of avoidable and preventable maternal deaths and morbidities in the region. The Commission missed the opportunity to exert pressure on African governments to take urgent and decisive measures to address the high maternal mortality in the region.

The decision sets the clock back on the gains already recorded in advancing SRHR in the region through the progressive provisions of the African Women's Protocol and years of sustained advocacy for norms and standards on SRHR.

7 CONCLUSION

As the first decision of the Commission on the protection of SRHR under the African Women's Protocol, the current decision is disappointing. The Commission did not find any violation of the African Charter and the African Women's Protocol arising from the complaints made, even where the allegations were not contested. Our discussion is not nearly exhaustive of the issues emanating from the decision. Issues such as the apparent gender blindness in the reasoning of the Commission; the failure to appreciate and respond to the scourge of obstetric violence; the stance of the Commission that it cannot, of its own motion, address issues not directly raised by the applicants; the argument that violations must be specifically pleaded on the basis of specific articles; the approach that abandons the tenets of judicial notice especially in respect of widespread violations; the clear

departure from settled jurisprudence; the approach to the interpretation of what 'benefiting from scientific advancement' would entail; the question of reparations for SRHR violations; or the attempt to move the goalposts on the burden of proof in cases alleging violation of rights. Furthermore, some of the more obscure and peculiar issues highlighted in the complaint such as the question of mandated blood donation as a precondition for maternity care were overshadowed by the generally restrictive interpretation of the extent of state obligations. This is despite the fact that such practices resonate in a majority of the state parties to the Charter and would have benefited from clear pronouncement on related duties.

From the foregoing, the decision seems to have undone years of progressive jurisprudence on socio-economic rights including the right to health, and halted the momentum gathered towards upholding the reproductive rights of women and girls in Africa on an equal basis with the rest of the world. For a region plagued with high maternal deaths and lack of political will on the part of the governments, the Commission's position is utterly unresponsive on the subject matter, and contradicts its promotional mandate and prior commitments. There is an urgent need for the Commission to redeem itself from the aftermath of this decision, and for stakeholders to strategise towards containing the fallout from the decision.

Case discussion of *Mornah v Benin and 7 Others:* is the African Court on Human and Peoples' Rights prevented from implementing the right of self-determination?

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ABSTRACT: The applicant, Mornah, approached the African Court on Human and Peoples' Rights to hold the eight respondent states responsible for the violations of the human rights of the Sahrawi people of the Sahrawi Arab Democratic Republic. He alleged that the respondents failed to 'safeguard the territorial integrity and independence' of that country; and that their right to the enjoyment of their natural resources had been violated. According to him, the respondents were complicit in the alleged violations, in that they voted in favour of Morocco's readmission as a member of the African Union. The Court held that the respondents had exercised their right to vote as a prerogative of membership, which could not be interpreted as support for the alleged rights violations. This case discussion critiques the Court's judgment, which even though thoroughly analysing all arising issues, ended up with unsatisfactory conclusions. It examines the concept of the 'right to self-determination' and 'territorial integrity', as formulated in the African Charter on Human and Peoples' Rights and the African Union Constitutive Act. It also considers the works of learned authors, juxtaposing them with the objectives of the Charter. It finds that the conclusions drawn by the Court appear to favour a particular political stance, mirroring the precedents set by the Commission in similar matters. It finally recommends that the Court should boldly play its role as the supranational human rights court for the continent, by setting clear precedents in developing the jurisprudence of the African human rights system.

TITRE ET RÉSUMÉ EN FRANÇAIS

Analyse de l'arrêt *Mornah c. Bénin et 7 autres* : la Cour africaine entravée dans la mise en œuvre du droit à l'autodétermination ?

RÉSUMÉ: Dans l'affaire *Mornah c. Bénin et 7 autres*, Bernard Anbataayela Mornah, homme politique ghanéen, a saisi la Cour africaine des droits de l'homme et des peuples pour tenir huit États défendeurs responsables de violations des droits de l'homme en République arabe sahraouie démocratique (RASD). Le requérant alléguait que les défendeurs avaient manqué à leur obligation de «sauvegarder l'intégrité territoriale et l'indépendance» de la RASD et que le droit des peuples à disposer librement de leurs ressources naturelles avait été violé. Il accusait également les États défendeurs de complicité dans ces violations pour avoir voté en faveur de la réadmission du Maroc au sein de l'Union africaine. La Cour, dans sa décision, a conclu que le vote des défendeurs relevait de leur prérogative en tant que membres de l'Union africaine et ne pouvait être interprété comme un soutien aux violations alléguées. Ce commentaire critique cette approche, jugeant les conclusions de la Cour insatisfaisantes malgré une analyse approfondie des questions soulevées. L'article

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explore les notions de «droit à l'autodétermination» et d'«intégrité territoriale» telles qu'énoncées dans la Charte africaine des droits de l'homme et des peuples et dans l'Acte constitutif de l'Union africaine. Il juxtapose ces concepts avec la doctrine pertinente et les objectifs de la Charte pour évaluer la pertinence de l'interprétation retenue par la Cour. L'analyse souligne que la décision semble refléter une position politique plutôt qu'une interprétation rigoureuse des normes juridiques applicables, perpétuant ainsi les précédents établis par la Commission dans des affaires similaires. En conclusion, le commentaire appelle la Cour à affirmer son rôle de juridiction supranationale des droits de l'homme en Afrique. Il recommande l'établissement de précédents audacieux pour renforcer la jurisprudence du système africain des droits de l'homme, en particulier dans les affaires touchant au droit à l'autodétermination et à l'intégrité territoriale.

KEY WORDS: self-determination; sovereignty; territorial integrity; independence; Sahrawi; African Court on Human and Peoples' Rights

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1 INTRODUCTION: SELF-DETERMINATION AND TERRITORIAL INTEGRITY

The right to self-determination is provided for in articles 1(2) and 55 of the United Nations (UN) Charter of 1945. The International Covenant on Civil and Political Rights (ICCPR)[1] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2] in their common article 1 ascribe to 'all peoples' the right to self-determination, equal 'political status', and a guarantee of 'economic, social and cultural development'.[3] Instruments setting up various UN entities also echo these rights. They are usually linked with the concept of 'sovereignty' and 'territorial integrity'. Once self-determination, sovereignty and territorial integrity co-occur, a state is said to have achieved 'independence'. An independent entity enjoys unfettered control of its territory. Such a territory is defined as a 'state' in international law because it can boast of a permanent population; a defined territory; a government, and has capacity to enter into relations with other states.[4]

1 United Nations, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March 1976 (in accordance with art 49 of the UN Charter).

2 United Nations International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 3 January 1976 (in accordance with art 27 of the UN Charter).

3 Art 1(1), ICCPR and ICESCR, 1966.

4 Montevideo Convention on the Rights and Duties of States, 1933, art 1.

The African Charter on Human and Peoples' Rights (African Charter) provides for the right to self-determination in article 20, along with other rights and freedoms associated with it, in subsequent articles. The right to self-determination 'has two interconnected aspects: internal and external',[5] and is concerned with the plight of dependent people seeking to break away from the boundaries set by erstwhile colonial entities. Anyangwe aptly elaborates on the internal and external elements, where he states that self-determination 'is an enabling, collective human right for asserting claim to political autonomy within a state or to sovereign statehood'.[6]

By reaffirming the pledge to eradicate all forms of colonialism from Africa in its preamble, the African Charter must be read as implicitly including the eradication of similar acts of colonialism between African Union (AU) member states. The preamble emphasises that African states would honour the pledge

> solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. [7]

The right to self-determination guaranteed in articles 20 to 22 of the African Charter are not feasible without the assurance of sovereignty and territorial integrity. It is for this reason that political claims tend to be brought along with the right to enjoy the natural resources in the territory, as clarified by Anyangwe.

In view of these provisions of the African Charter, could the African Court on Human and Peoples' Rights (Cour) be barred from interrogating questions touching on self-determination, sovereignty and territorial integrity? This question arose in the context of the Court's decision in *Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tunisia, Tanzania*. These states have ratified the African Court Protocol and made declarations under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human Peoples' Rights (Court Protocol). Mornah brought a case against these states, alleging that when they, as sitting members of the AU Assembly of Heads of State and Government, in 2017 took the decision to admit Morocco to the AU, they failed to safeguard the sovereignty, independence and territorial integrity of the Sahrawi Arab Democratic Republic (SADR) and violated the rights of the Sahrawi people to self-determination.

5 C Anyangwe 'The normative power of the right to self-determination under the African Charter and the principle of territorial integrity: competing values of human dignity and system stability' (2018) 2 *African Human Rights Yearbook* 47, 48.

6 As above.

7 Preamble to the African Charter on Human and Peoples' Rights, para 4.

Answering this question, the Court rightly asserted that as long as there were commissions or omissions that also evinced violations of human rights, it has jurisdiction to determine them.[8] In fact, article 20(2) of the Charter provides that 'colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community'. The right to self-determination is a fundamental right, without which there can be no dignity for a people who have a rightful claim to it. In addition, article 21(1) of the African Charter declares as follows:[9] 'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' Under article 21(3), states are exhorted to 'exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity'. Article 22 goes on to assure that 'all peoples shall have the right 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'. It further states that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development'. It follows, therefore, that the Sahrawi Arab Democratic Republic (SADR) voluntarily contracted with Morocco to exploit its natural resources, even though doing so breaches the sovereign rights of the SADR.

The rights to self-determination, development and to a clean environment are interconnected, and have been portrayed as the pride of Africa and evidence of the progressive stance of Africa towards human rights development. In fact, Okafor and Dzah extol the African human rights system for bequeathing to the world the norms enshrined in the rights to self-determination, to environment and to development.[10] To them, the African human rights system

> has equipped diverse actors and rights systems with an enhanced toolbox, well beyond what usually is available in mainstream human rights praxis, for evolving norms and strategies for, and intervening in, contentious politico-legal affairs. The transformative force of the African human rights system thus is visible across key aspects of human rights law, especially in the way in which norms emerging from Africa socialise actors and their legal and policy choices and actions. Comprising treaty texts, protocols, declarations and resolutions as well as judicial and non-judicial processes, the African human rights system has enunciated, promoted and practised a significantly (even if only partly) organic African vision of rights, while still being responsive to the necessity for broader approaches to human rights.[11]

Robertson and Megrills reflect the above view with regards to the African Charter, stating that 'the creation of this specifically African

8 *Bernard Anbataayela Mornah v Benin and 7 Others (Sahrawi Arab Democratic Republic and Mauritius (Intervening),* Application 28/2018, Judgment, 22 September 2022.

9 Art 21(4), African Charter.

10 OC Okafor & GEK Dzah 'The African human rights system as 'norm leader': three case studies' (2021) 21 *African Human Rights Law Journal* 669-698.

11 As above.

machinery represents an attempt to settle disputes on a regional basis without referring them to the Security Council, which is … consistent with Articles 52 and 53 of the UN Charter'.[12] For Africa to deserve such accolades, each organ of the system must maintain a steady tempo of engagements that dispel any shadow of doubt in the precedents they set. There can be no arbitrariness attributable to the decision-making process of the Court, nor should conclusions reached not become applicable to similar scenarios.

The Court Protocol spells out its jurisdiction in article 3, as follows:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned. … In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

It bears emphasizing that the right to self-determination is a Charter right and should not be made inferior to the general objectives of the AU. The Court must be able to pronounce on a right once parties approach it to do so. In exercising such a wide jurisdiction and in view of the above provisions, which were exhaustively argued before the Court in *Mornah*, and which the Court scrutinised in detail, the conclusions finally reached by the Court left some questions unanswered.

Even before the Court started operating, the African Commission on Human and Peoples' Rights (Commission) has recognised that different forms of infringement of the right to self-determination persists in parts of Africa.[13] In a case concerning the Anglophone Cameroonians, it stated that 'post-colonial Africa has not been free of domination', but added that contemporary domination does not constitute colonialism 'in the classic sense'.[14] This interpretation raises the query as to whether, if slavery currently occurs within a state, it should be ignored for not corresponding with the forms as slavery that used to be practised.[15] Anyangwe decries the Commission's interpretive approach on this issue:[16]

> The exercise of the right of self-determination under the African Charter is constrained first by the equally important principle of territorial integrity, and second by the conservative and timorous interpretation of that norm by the African Commission.

In several cases, the Commission has refused to accede to claims for self-determination for fear of conflicting with the principle of territorial integrity, even though 'in all these cases, political, (cultural as well, in *Gumne*), social and economic oppression or domination is additionally

12 AH Robertson & JG Merrills *Human rights in the world – an introduction to the study of the international protection of human rights* (2005) 242.

13 *Kevin Mgwang Gunme et al v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Gunme*).

14 Gunme (n 13) para 181.

15 Gunme (n 13) 55, footnote 22.

16 Anyangwe (n 5) 55.

alleged'.[17] The Commission has not through its pronouncements advanced political solutions, to placate the yearning of the peoples of Africa who were promised that right under the Charter, even as the right is 'intertwined' with the struggle for 'decolonization' and 'independence'.[18] Anyangwe maintains that the 'territorial integrity' which the Commission prefers to defer to, exists merely as a policy or directive 'principle' of the AU Constitutive Act, which it vows to protect in its article 3.[19] It is not one of the AU's central goals. For the purpose of this case discussion, it is taken as trite that an objective does not override an assured right.

For avoidance of doubt, article 3(b) of the AU Constitutive Act provides that the Union would 'defend the sovereignty, territorial integrity and independence of its member states'. That is noble in itself, but the Constitutive Act also vows in article 3(h) to 'promote and protect human and peoples' rights in accordance with the African Charter ... and other relevant human rights instruments'. As between the SADR and Morocco, in the case under consideration, there are two sovereign states whose dispute on sovereignty and territorial integrity should not be allowed to continue to fester without a solution, making the AU appear to be a toothless bulldog. In playing its complementary role alongside the Commission, the Court must do better to fully achieve the objective of the Charter to ensure the self-determination of Africa's peoples, something that the Commission has continuously failed to do. Besides, the Court has its work cut out for it as the supranational regional court on human rights. It must be seen to give proper directions that create clear precedents to deter future violations by states. Membership of the AU comes with a mutual duty to make concerted efforts towards achieving African unity. The situation in SADR is still continuing, long after foreign occupation of African states has become a matter of history. The Court should not, like the Commission, fail to face the thorny issue of self-determination head on. It should also align itself with the Commission's decisions and appear to defer to the dominant power in that conflict.

Zewudie makes the point that

> the AU has been heavily criticised for not living up to its promises as far as human rights are concerned. Despite the establishment of human rights mechanisms, the AU, as a collective of States, has played an inadequate role in supporting and encouraging them. Discrepancies between AU's decisions and actions concerning its relation with the Commission led some scholars to conclude that the AU 'does not wish to see the

17 Anyangwe (n 5) 56 (footnotes 27-29): *Sir Dawda Jawara v Gambia* (2000) AHRLR 107 (ACHPR 2000); *DRC v Burundi, Uganda and Rwanda*, Communication 227/99, African Commission on Human and Peoples' Rights, 20th Annual Activity Report (2006) (*DRC* case); *Cabinda v Angola, Katanga v Zaire*, Communication 24/89, *Union National de Liberation de Cabinda v Angola,* African Commission on Human and Peoples' Rights, 7th Annual Activity Report.

18 B Gawanas 'The African Union: concepts and implementation mechanisms relating to human rights' in A Bösl & J Diescho (eds) *Human Rights in Africa: legal perspectives on their protection and promotion* (2009) 135.

19 Anyangwe (n 5) 67-8.

Commission to become more effective and forceful'. The AU has put inadequate effort in liberalising and democratising its members and in promoting human rights on the domestic level. It has also been observed to focus more on protecting leaders than the human rights of ordinary people. Constantly placing 'key policy issues' such as integration, peace and security and development at the centre of their discussions, leaders occasionally ignore grave human rights issues that warrant their special attention.[20]

2 BACKGROUND AND FACTS PRESENTED BY MORNAH

The applicant in this case is Bernard Anbataayela Mornah, a Ghanaian national and the national chairperson of a political party registered in Ghana. Mornah approached the Court to determine the international responsibility of the eight respondent states, who by their action of voting in favour of AU membership of Morocco, allegedly made themselves complicit in the violations of the rights of the Sahrawi people. The main violation of rights he complained of, is the continued occupation of the territory of the SADR by Morocco, which amounted to 'violations of the human rights of the Sahrawi people' and an 'erosion of the sovereignty, territorial integrity and independence of Western Sahara'.[21] The other alleged violation is that Morocco continues to exploit the natural resources of those areas under its occupation, against the rights and interests of the Sahrawi people.

The SADR had been colonised by Spain until February 1976, after which Morocco and Mauritania took over parts of its territory. The Sahrawi people resisted the occupation by the two states, resulting in Mauritania giving up its claim to any part of the country. However, Morocco remained an occupying power.[22] Different from Morocco, the SADR was a founding member of the AU. Morocco withdrew from the OAU in 1984 after the SADR had been admitted as a member of the OAU.[23] In 1992, the United Nations supervised a referendum on the independence of the SADR. Morocco scuttled that effort, by claiming that the electoral process was tantamount to secession. The bad blood between the two states continues to reverberate in international politics to this day. They remain pitted against each other, competing for the natural resources available in the territory of the SADR. As an erstwhile

20 TA Zewudie 'Human rights in the African Union decision-making processes: an empirical analysis of states' reaction to the Activity Reports of the African Commission on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 295-320, 298 http://doi.org/10.29053/2523-1367/2018/v2n1a13 (accessed 12 April 2024).

21 Para 8 of the Judgment.

22 Para 9 of the Judgment.

23 Para 10 of the Judgment.

colonial power, Spain has in furtherance of its own economic interests maintained close ties with Morocco.[24]

The allegation that Morocco continues to exploit the abundant natural resources of the territory to the detriment of the Sahrawi people is an important aspect of the applicant's case. Mornah also stated that in spite of Morocco being admitted to membership of the AU in 2017, the state had not shown any intention of relinquishing its occupation of the Sahrawi territory. He alleged that in spite of the AU's recognition of Sahrawi as 'the legitimate government in exile' and the fact that 'no less than eighty-four … countries have accorded it diplomatic recognition', parts of the country remained under Moroccan occupation.[25] The applicant categorically called into question the act of the AU in unconditionally admitting Morocco as a member, stating that the action contradicted 'the established practice with regard to admission of members' to the AU (previously, the OAU). He recalled that apart from condemning illegal and unconstitutional change of governments, the OAU and AU had in the past, refused to admit colonial powers as members. Examples of these were South Africa, which only joined the OAU after the demise of the apartheid regime, and in recent times, Côte d'Ivoire, Niger, Burkina Faso and Egypt, which were sanctioned for the unconstitutional change of government through *coups d'etat*.

All the respondents have ratified the African Court Protocol and made declarations under article 34(6) of the Protocol, giving access to NGOs enjoying observer status with the Commission and individuals to bring cases against them directly to the Court.[26] While some of the respondent states had withdrawn their declaration, the Court held that such withdrawal did not have retroactive effect or bearing on matters submitted to it prior to the withdrawal of the declarations. Such withdrawal would only come into effect after one year from the date the document for withdrawal had been deposited.[27] The withdrawal of these declarations therefore had no effect on the Court's exercise of jurisdiction. SADR and Mauritius applied to and were granted the right to join in the suit as interveners, and the African Union of Lawyers (PALU) joined as *amicus curiae*.[28]

24 EuroNews, 'Algeria suspends friendship treaty with Spain over Western Sahara', Published on 9 June 2022, https://www.euronews.com/2022/06/09/algeria-suspends-friendship-treaty-with-spain-over-western-sahara (accessed 14 April 2024).

25 Paras 11-13 of the Judgment.

26 Paras 3-5 of the Judgment.

27 Para 6 of the Judgment; see footnotes 1 to 3: *Andrew Ambrose Cheusi v Tanzania*, ACtHPR, Application 4/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39. *Houngue Éric Noudehouenou v Benin*, ACtHPR, Application 3/2020, Order of 5 May 2020 (provisional measures), paras 4-5 and corrigendum of 29 July 2020; *Suy Bi Gohore Émile and Others v Côte d'Ivoire*, ACtHPR, Application 44/2019, Judgment of 15 July 2020 (Merits and reparations), para 67; *Ingabire Victoire Umuhoza v Rwanda* (Jurisdiction) (3 July 2016) 1 AfCLR 562, para 69.

28 Para 7 of the Judgment.

3 THE COURT'S DECISION ON JURISDICTION AND ADMISSIBILITY

3.1 Jurisdiction

The respondents argued against the Court's jurisdiction to entertain the matter. According to them, the matter raised political issues, which the Court had no power to entertain, because of the constraints of 'international relations and diplomacy and the principle of non-intervention' in the affairs of sovereign entities.[29] States like Mali and Ghana, in addition to the above, threw in the palliative that the best the Court could do would be to issue an advisory opinion on the matter.[30] The interveners and the *amicus curiae* supported the case of the applicant, by insisting that by voting in favour of Morocco's membership, the respondents acquiesced to the alleged violations of the rights of Sahrawi people by Morocco.[31]

The Court started with the following general observation:[32]

> [A]n application may raise issues of a political or diplomatic nature or may seek reliefs that may require political decisions or diplomatic solutions. An application may also contain allegations that relate to a state's conduct in the arena of international relations, including its commitments or undertakings in international organisations. However, the mere fact that an application contains issues relating to State sovereignty or that it touches on political or diplomatic issues does not automatically remove the Court's competence to consider an application.... in general terms ... international law is essentially a product of the consensual undertaking of States and its consensual nature is the highest manifestation of their sovereignty and independence. Nevertheless, once States have willingly ceded their consent to the jurisdiction of an international tribunal to interpret and apply specific instruments, they cannot raise sovereignty as a defence or justification to preclude the tribunal from exercising its jurisdiction over a dispute insofar as the dispute relates to issues that fall within the scope of the tribunal's statutory competence.

The Court thus justified its power to exercise jurisdiction on the matter by emphasising aspects of the application that disclosed that the Sahrawi people had been denied their right to self-determination by Morocco with impunity from the AU, as evidenced in Morocco being admitted to become an AU member.[33] The Court also established its competence to determine whether the respondent states were responsible for the alleged violations of the rights and freedoms of the peoples of SADR, even though 'territorial disputes' also arose from the scenarios.[34] The Court vehemently countered the contention by Tunisia at the AU Conference of 2018, it was agreed that the AU would

29 Para 57 of the Judgment.
30 Paras 58 & 59 of the Judgment.
31 Paras 62 & 63 of the Judgment.
32 Paras 64 & 65 of the Judgment.
33 Paras 86 & 87 of the Judgment.
34 Para 93 of the Judgment.

leave the matter of SADR to be decided by the UN. It cited the AU document *in extenso*, and from the text, pointed out that the AU never agreed to adopt a 'hands off' approach to all matters relating to SADR. It concluded that operating under the AU, the Court remained bound by the Charter, its Protocols, and other international human rights instruments ratified by the parties before it. The Court therefore confirmed its material jurisdiction in the case.[35]

Having reviewed the submissions of the parties and the *amicus curiae* on each head, the Court also claimed both personal and temporal jurisdiction over the matter.[36]

On the challenge to its territorial jurisdiction, the Court noted that, unlike the treaties on which the European and Inter-American Courts of Human Rights are founded, neither the Charter nor the Protocol delineated the 'territorial scope of its application'. It noted that, in practice, the Court habitually examined that aspect of jurisdiction, sometimes, *suo motu*.[37] The Court further noted as follows:[38]

> ... in recent times, with the increasing extra-territorial undertakings of States and the erosion of the defence of sovereignty with respect to violations of human rights, the classical notion of territorial jurisdiction has seen some changes. International human rights jurisprudence has also continuously expanded the territorial application of international human rights conventions beyond the physical national boundaries to areas where States have effective control and to acts and omissions committed by their agents or persons under their military, political, and economic influence.

The Court further noted that the UN Human Rights Committee, in its General Comment 12, has established that where the right to self-determination is concerned, 'specific obligations on states parties exist not only in relation to their own peoples but vis-à-vis all peoples' seeking the right.[39] It concluded that viewed against the provisions of the African Charter, the violation may result from either commission and omission.[40] However, it noted that to exercise its territorial jurisdiction, 'the Court must also establish that such alleged violations must have occurred in the territory of a State Party against which an application is filed or by persons under its control'.[41] The Court went on to attribute the breach by the respondents to their omission to act in the face of the breach of the Charter in relation to the Sahrawi people, and concluded that it had territorial jurisdiction to examine the application.[42]

35 Paras 94-99 of the Judgment.
36 See paras 123 & 131 respectively.
37 Para 146 of the Judgment.
38 Para 148 of the Judgment.
39 Para 149 of the Judgment.
40 Para 153 of the Judgment.
41 Para 155 of the Judgment.
42 Para 159 of the Judgment.

3.2 Court dismissed objections to admissibility

The respondents raised numerous objections to the admissibility of the case, all of which the Court dismissed.[43] Some of these objections had to do with the identity of the applicant and the basis for bringing the case; and reliance on matters relayed through the mass media. The Court thoroughly examined each and every head of the objections. In particular, in relation to the objection against non-exhaustion of local remedies, the Court recalled the Commission's decision in *World Organisation against Torture and Others v Zaire* (*Zaire Mass Violations* case),[44] in which it stated that 'when an application involves an allegation of a series of serious and massive violations of human rights, the rule of exhaustion of local remedies becomes inapplicable'. It applied to the case the exception to the rule on the exhaustion of local remedies, as the violations have gone on for years and were still ongoing. It took a similar stance with regards to the applicability of 'reasonable time' within which to bring an application to the Court. According to the Court, it did not matter whether the matter was filed in 1975 or in 2016, since 'the alleged breach of their obligation under the Charter renews itself every day and hence, an application may be filed at any time'.[45]

4 THE COURT'S DECISION ON THE MERITS

4.1 The issues

The issues presented to the Court for determination by the applicant include: violation of the objectives and principles of the Union enshrined in articles 3, 4 and 23 of its Constitutive Act; articles 1 and 2 of the African Charter on Democracy, Elections and Governance (Democracy Charter) and articles 1, 2, 7, 13, 19, 20, 21, 22, 23 and 24 of the Charter. The applicant called for sanction against the respondent states for not having protested against the admission of Morocco at the time the AU Assembly of Heads of State and Government took the decision to admit Morocco.[46] There were, as such, two main issues before the Court.

The Court noted that in addition to the provision of article 20 of the Charter,

> ... in international law, the right to self-determination has achieved the status of *jus cogens* or a peremptory norm; thereby, generating the corollary obligation *erga omnes* on all States. As such, no derogation is permitted from the right and "all States have a legal interest in protecting

43 Para 166 of the Judgment.

44 Para 211; footnote 42 of the Judgment: Communications 25/89, 47/90, 56/91 & 100/93, *World Organisation against Torture and Others v Zaire (Zaire mass violations case),* Ninth Annual Activity Report, para 3.

45 Paras 220 & 221 of the Judgment.

46 Paras 15 & 16 of the Judgment.

> that right". Where a peremptory norm is breached, States are also under an obligation not to recognize the illegal situation resulting from such breach and not to render aid or assistance in maintaining the situation.[47]

The Court established that it had already been determined that, historically, Morocco had no right to claim the territory of Western Sahara.[48]

With regards to the respondent states, the Court relied on established international law norms in order to decide their culpability:[49]

> ...in international law, a State incurs international responsibility where three cumulative conditions are proven to have existed: an act or omission violating international law, that is, an internationally wrongful act; the act must be attributed to a State (attribution); and the act must cause a damage or loss (causal link). In addition, there should not be circumstances precluding responsibility. These conditions are spelt out in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts and have been generally considered as reflecting customary international law.

The Court further observed that even though article 20 of the Charter imposes an obligation on AU member states to take steps to support the self-determination efforts of the peoples generally, it does not impose specific obligations. In the instant case, it observed that the respondent states refuted the applicant's allegation that they supported Morocco's violations of the stated rights, by stressing that they were fulfilling their obligations to the Sahrawi people through the instrumentality of the AU and the UN. They submitted that they could not, therefore, be said to have omitted to fulfil their obligations to the SADR and its people. Even though it expressed concern that the respondents might not have been providing adequate support to the SADR, the Court ruled that exercising the right to vote 'by a Member State cannot in itself *a priori* constitute a breach of its international obligation or in the instant application, a violation of the right to self-determination' of the SADR.[50] Noting that the requirements of article 29 of AU Constitutive Act for approving membership was by a simple majority, the Court concluded that the respondent states' 'individual decision to support or oppose the admission of Morocco does not alone necessarily determine the final outcome'.[51] The Court further stated that states' 'individual decisions to vote in favour of Morocco's admission to the Union *per se*

47 Para 298; footnote 65: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion Of 9 July 2004, § 163. See also footnotes 63 and 64: The Court also relied on the following decisions: UN Human Rights Committee (HRC), General Comment 31, para 80, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev1/Add.13, para 6. ICJ, *Advisory Opinion on Chagos Archipelago* (2019), para 180; see also *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Reports 1970, para 33; *East Timor (Portugal v Australia)* case, ICJ Reports 1995, p. 102, para 29.

48 Footnote 70, ICJ *Advisory Opinion on Western Sahara* (1975) para 162, among others; paras 302 & 303 of the Judgment.

49 Para 304 of the Judgment.

50 Paras 314 & 315 of the Judgment.

51 Paras 317 & 318 of the Judgment.

cannot be taken as a recognition of Morocco's occupation of the territory of the SADR'.[52]

Finally, and equally disappointingly, the Court declared as follows:[53]

> With regard to the alleged human rights violations directly ensuing from Morocco's occupation of Western Sahara, the Court finds it unnecessary to examine or pronounce itself on them, as Morocco is not a party to this case. As far as the responsibility of Respondent States' is concerned, there is no evidence available before it to attribute these violations to them. There is also no demonstrated causal link between the complained conduct of the respondent States and such violations.

The Court dismissed the case against the respondents and rejected the application for reparation; and ordered parties to bear their own costs.

The Court rightly resisted the claim by the respondents that it could not pronounce on any matter concerning sovereignty and territorial integrity. It distinguished situations where such matters also included human rights violations, in accordance with its jurisdiction. It disagreed with the position that the most it could do would be to issue an advisory opinion on such matters. In my view, the Court arrived at the right conclusion. The right to self-determination, as has been analysed above, is a Charter right, and not merely a policy thrust of the AU. If the situation were otherwise, it would be impossible for a people to ever aspire to the right to self-determination through the Court. The Charter provisions on self-determination would be inoperable too, as would be the objective of the Charter, which aims

> to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism.[54]

The Court admitted that Morocco has been in adverse possession of parts of SADR territory since 1976. However, it was not rigorous enough in pressing the need to protect the rights assured to the SADR and its people under articles 20 to 22 of the Charter. To me, Morocco's claim that the obligation imposed on AU members by article 20 (to take steps to support the self-determination efforts of relevant peoples) does not impose specific obligations, is unconvincing. The Court fundamentally undermined the rights of the SADR by splitting hairs in the interpretative distinction it drew between 'general' and 'specific' obligations. How will the 'transformative force' that Okafor and Dzah extol burgeon from such a decision that sounds more like an extended apology for siding with the suppression of self-determination? The Court certainly did not get in the saddle as that 'African machinery' that would 'represents an attempt to settle disputes on a regional basis without referring them to the Security Council', which Robertson and Megrills envision for the Charter.

52 Para 320 of the Judgment.

53 Para 321 of the Judgment.

54 Para 8 of the Preamble to the African Charter.

The Court allowed the respondent states to dodge a bullet by finding that they did not encourage Morocco's violations of rights because they merely 'welcomed' them to the membership of the AU. Since the Court interpreted article 29 of the AU Constitutive Act by stating that an individual state's vote did not determine the final outcome of membership, it should not have shied away from upholding the applicant's argument on the effect of article 30 of the Act. Article 30 forbids the Union from admitting governments that come into power by unconstitutional means. The respondents should have been found in violation of article 30 for voting in favour of Morocco's membership while it was in adverse occupation of the SADR's territory. The Court, itself, had held respondents to have omitted to act in the face of continuing violations, against the spirit of the Charter. Its reasoning begs this question: What other 'specific obligation' was the Court searching for? The Court should have relied on the authority it cited regarding the 'corollary obligation *erga omnes* on all States' to act in concert whenever the right of self-determination is breached. However, it did not do so.

With regards to the exploitation of natural resources of the Sahrawi people in the territories that Morocco currently occupies, the Court found that it had jurisdiction because the violations were ongoing. However, it failed to find the respondents in violation for not being mindful of 'their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa'.[55] Unfortunately, because it was not a party to the African Charter, or to the African Court Protocol (and had of course not made a declaration under article 34(6) of the Court Protocol), Morocco could not be held in violation by the Court.

5 CRITIQUE AND RECOMMENDATIONS

The Court ought to have more strongly admonished the respondent states for their apparently tolerant disposition towards Morocco. The applicant was right to insist that these states should have protested by withholding their votes allowing for Morocco's admission to the AU. The Court should have found applicable in the exercise of its inherent jurisdiction the customary international law precept of attribution and of acts that enabled the situation of violation. Such an approach would have captured justice as encapsulated in the preamble of the Charter, especially to the people of the SADR whose right to self-determination has been impeded for many years. Morocco might not have been a party to the case, but the evidence of the violations has long been a matter of judicial notice. In its finding in *Mornah*, the Court passed by an opportunity to contribute to the liberation of the SADR and its people from Morocco's domination.

55 See para 10 of the Preamble of the African Charter.

Based on the above analysis, it is my conclusion that the African Court is not barred from determining violations of human rights in claims related to sovereignty, territorial integrity and independence. The Court should in *Mornah* have adopted a more proactive stance and should have placed less 'timorous' reliance on the black letter of the law, which the judgments of the Commission has been criticised for.[56] It is my firm view that the right to self-determination is a right that urgently needs to be made accessible in view of the state of agitation in various parts of Africa. The Court spoke from two sides of its mouth on the matter. On the one hand, it noted that the right was being infringed. On the other hand, it refused to accept that the actions of the respondents in welcoming into the community of African states a state at odds with their core common precepts could be interpreted as enabling violations by that state.

How did the fact that the respondent states voted in favour of Morocco not reflect their acceptance of the country's already condemned adverse occupation of the territories of the SADR? How did the Court not see a causal link between the respondents' votes (of confidence in Morocco) and the continuing exploitation of the natural resources of SADR by Morocco? Above all, how are the respondents demonstrating their adherence to the African Charter, which exhorts them in its preamble 'to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation'?[57] In spite of the heavy weather it made, dismissing the various objections to its jurisdiction, the Court's decision appears at the end of the day, to be an exercise in futility.

Hopefully, the views canvassed in this case discussion may redirect the Court with regards to its interpretative role concerning the objectives of the African Charter. In addition to the upbeat views of Okafor and Dzah, referred to above, such roles have been attributed to the African human rights system as evidenced in the views expressed by Solomon Dersso, a former Chairperson of the Commission, on the occasion of the Charter's 40 years of existence in 2021.[58] He identified the primacy of 'piercing the veil of sovereignty' as the main achievement of the Charter through developing the African human rights system. According to him,

> in embracing human rights and extending their scope and articulation, the African Charter ended the debate about the legitimacy of human rights in Africa. This is of particular importance as the African Charter opens further avenues for the recognition and articulation of human rights both at the continental and national levels. The Charter inspired the adoption of various human rights and democracy and governance norms within the OAU and its successor, the AU. This also accounts for the huge space given to human rights in the AU's founding treaty, the Constitutive Act. The

56 See sources cited in n 17 above.

57 Para 3 of preamble, African Charter.

58 S Dersso 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights' (2021) 21 *African Human Rights Law Journal* 649-668, http://dx.doi.org/10.17159/1996-2096/2021/v21n2a26645 (accessed 15 June 2024).

> African Charter and the various other human rights instruments that succeeded it served as a source of inspiration in the elaboration of national bills of rights and various laws giving effect to specific human rights.[59]

The above statement communicates the need for a broader approach, rather than a restrictive one, in the Court's interpretation of the Charter rights. One of the recurring challenges in the African human rights system is the lack of state compliance. My view is that it may well be this state of affairs that accounted for the Court stepping back on holding the respondents partly responsible, thus enabling Morocco's violations against the SADR. In other words, the apprehension that the respondents would have ignored the judgment with impunity, could well have played a role in the Court arriving at the decisions it made.

Besides, this writer has noted that the demarcation of the Court's powers, relative to the other organs of the AU, is often blurred, thus chipping away at the claim to being the supranational court on human rights in Africa. The respondents relied heavily on this weakness to dare the Court to accuse them of wrongful acts enabling rights violation. This writer is of the view, further, that to liberate itself from impending obscurity, the Court must, without fear or favour, stand its ground by delivering judgments that clarify and grow its autonomous jurisprudence.

The African Court possesses unique characteristics which it must take advantage of, going by the view of Nyman-Metcalf and Papageorgiou,[60] who state that in comparison with other regional courts of human rights, the African human rights system

> emphasises the collective rights of peoples as well as those of individuals and it is the strongest on developing *actio popularis* to permit groups to support protection of human rights.

More individuals and CSOs like the applicant in the present case, ought to be encouraged to approach the Court on similar matters of public interest. It is bad enough that article 34(6) of the Court Protocol allows member states to opt in and opt out of the Court's jurisdiction at will. This exerts a huge restraint on seizing the Court's jurisdiction. To further burden the system with lacklustre and unconvincing reasoning portends badly for the development of the Court's jurisprudence. In fact, Trésor Makunya describes the effect of article 34(6) of the Protocol as a 'haemorrhagic trend' which if allowed to continue, would result in loss of opportunities for individuals 'to effectively engage the Court and that the ability of the latter to serve as a regional arbitrator of human rights violations will be significantly undermined'.[61]

59 Dersso (n 58) 654.

60 K Nyman-Metcalf & I Papageorgiou 'Why should we obey you? Enhancing implementation of rulings by regional courts' (2017) 1 *African Human Rights Yearbook* 167-190 http://doi.org/10.29053/2523-1367/2017/v1n1a9 (accessed 14 June 2024).

61 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1230, 1235.

In addition, Makunya reviewed several cases in his article, and found that the Court has shown little rigour in the pronouncements it has been making. For instance, in respect of the *XYZ (010)* case against Benin, he criticised the Court for arriving at the conclusion that article 22(1) of the Charter was breached based on a 'single sentence-paragraph'.[62] According to him, if the Court had consulted the jurisprudence of the Commission, its reasoning would have been strengthened by placing reliance on precedents such as the following:[63]

> In *Institute for Human Rights and Development in Africa v Democratic Republic of Congo* the Commission considered that the right to development under article 22 of the African Charter was both an individual and a collective right. In *Endorois* it held that the right to development was 'both constitutive and instrumental, or useful as both a means and an end'.

Conscious of its role in the promotion of human rights in Africa, the African Court has reached out on several occasions, to seek the collaboration of stakeholders to contribute to improving the impact of its judgments on the continent. It is in that spirit that this case discussion calls on the Court to pay attention to these reviews. The Court must aim to prove itself as a supranational body which parties may resort to for refuge against violations of rights. Africa is badly in need of an even-handed arbiter to strengthen the integration and development of members of the AU. It goes without saying that a perpetual state of conflict between states will not augur well for meaningful development.

A strong recommendation was made in the communique that came out of the Conference of the African Court in November 2021,[64] namely, for an amendment to the Court Protocol to remove article 34(6), so that access to the Court would no longer be impeded at the will of state parties. It is a small gain that the Court, as already stated above, can continue to hear cases already before it, even if a state withdrew its article 34(6) declaration. Of course, the removal of the restriction will no doubt result in an influx of cases to the Court. The AU may then have to consider amending the Court's enabling instruments to increase the number of judges; and possibly, convert the tenure of judges from part time to full time, as has happened with its European counterpart. Considerations of the resulting increase in funding need not be overwhelming if member states begin to demonstrate the political will to achieve the Charter objectives. Besides, the amicable settlement option in the Protocol, if activated, should be useful in dealing with the increased load on the Court.

Whatever the anticipated difficulties, that amendment must now be seen as a *sine qua non* for the development of human rights in Africa. One must not, however, ignore the positive recorded fact that in

62 Makunya (n 61) 1262.

63 Makunya (n 61) 1262 (footnotes omitted).

64 African Court on Human and Peoples' Rights, 'Implementation and Impact of Decisions of the African Court on Human and Peoples' Rights: Challenges and Prospects', held at Julius Nyerere Convention Centre, Dar Es Salaam, Tanzania, 1-3 November 2021.

Mornah two states requested to join in a matter in the interest of the public, albeit one (the SADR) with a very direct interest. However, the intervention of Mauritius was altruistic. Mauritius's intervention is in line with both the principles of the Charter and other settled international customary law that make the question of the right to self-determination the concern of all states. One hopes that with similar interventions human rights in Africa will continue to develop with the attendant benefit of developments in other areas of governance. The AU should be wary in the face of ongoing skirmishes all over the world, not least of which is the ongoing Israeli-Palestinian war, to be alert to such eventualities between its members.

L'arrêt *Ligue ivoirienne des droits de l'homme (LIDHO) et autres c. Côte d'Ivoire:* une mutation complexe du contentieux environnemental *Trafigura*

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RÉSUMÉ: Dans l'intérêt des victimes des déchets toxiques déversés dans la ville d'Abidjan et sa banlieue en 2006, trois organisations non-gouvernementales demandent en 2016 à la Cour de dire et juger que la République de Côte d'Ivoire est responsable de certaines violations des droits de l'homme. L'arrêt rendu par la Cour intervient en 2023, sept longues années après le dépôt de la requête conjointe de ces organisations. Dans ses conclusions, la Cour dit que la République de Côte d'Ivoire a violé le droit à la vie, le droit à un recours effectif, le droit de jouir du meilleur état de santé physique et mentale possible, le droit à un environnement satisfaisant et global, propice au développement, et le droit à l'information, tous protégés par la Charte africaine des droits de l'homme et des peuples. La Cour répond ainsi à la question centrale posée par les requérants, celle ayant trait à l'invocation de la responsabilité étatique de l'Etat de Côte d'Ivoire pour sa négligence aussi bien dans la réalisation du dommage environnemental que dans la gestion des fonds alloués aux réparations. Mais il convient d'affirmer que derrière cette question de responsabilité étatique se cache la problématique de la responsabilité des entreprises, en matière de droits de l'homme, pour les mêmes faits d'atteinte à l'environnement. En effet, le déversement des déchets toxiques à Abidjan et sa banlieue avait connu, en dehors de celle de l'Etat, une très forte implication de quelques entreprises dont Trafigura, véritable cheffe d'orchestre. Le présent commentaire plaide pour l'édiction des normes permettant à la Cour africaine des droits de l'homme et des peuples d'engager la responsabilité des entreprises. Ces normes, si elles existaient, auraient permis de sanctionner l'entreprise Trafigura au même titre que l'Etat ivoirien, voire plus. Cela étant, l'article considère que le contentieux porté devant la Cour est en réalité un contentieux contre les entreprises et l'Etat, indûment transformé (par les requérants et la Cour) en un contentieux contre l'Etat.

TITLE AND ABSTRACT IN ENGLISH

The *LIDHO and others v Côte d'Ivoire* Judgment: reframing the Trafigura environmental liability dispute

ABSTRACT: In 2016, three non-governmental organisations petitioned the African Court on Human and Peoples' Rights, seeking a ruling that the Republic of Côte d'Ivoire was responsible for human rights violations arising from the 2006 toxic waste dumping in Abidjan and its suburbs. The Court delivered its judgment in 2023, seven

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KA Kpla 'L'arrêt *Ligue ivoirienne des droits de l'homme (LIDHO) et autres c. Côte d'Ivoire*: une mutation complexe du contentieux environnemental *Trafigura*' (2024) 8 *Annuaire africain des droits de l'homme* 523-539
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years after the petition was filed. It found that Côte d'Ivoire violated multiple rights under the African Charter on Human and Peoples' Rights, including the right to life, the right to an effective remedy, the right to the highest attainable standard of health, the right to a healthy environment, and the right to information. The Court addressed the central issue of whether Côte d'Ivoire should be held liable for both the environmental harm and the mismanagement of reparations funds. However, the case also implicates corporate accountability. The toxic waste dumping involved several entities, notably Trafigura, which played a key role. This commentary argues that international human rights law should be developed to enable the African Court to hold corporations accountable for human rights violations. Such standards would allow for Trafigura to be sanctioned alongside, or even more severely than, the Ivorian state. The article contends that the dispute before the Court should have been framed as one involving both the state and the corporations, rather than solely the state.

MOTS-CLÉS: *Probo Koala* ; Trafigura ; Etat ; entreprises ; environnement ; responsabilité ; déchets toxiques ; Cour africaine des droits de l'homme et des peuples

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1 INTRODUCTION

Dans l'arrêt *Ligue ivoirienne des droits de l'homme (LIDHO) et autres c. République de Côte d'Ivoire* (ci-après l'arrêt), les juges se prononcèrent à l'encontre de la République de Côte d'Ivoire «à la majorité de dix (10) voix pour, et une (1) voix contre (...)».[1] A l'occasion de cette longue affaire relative à l'atteinte à l'environnement et aux droits de l'homme, l'absence d'unanimité parmi les juges montre bien l'intérêt et la pertinence d'un débat doctrinal sur la responsabilité des entreprises en matière des droits de l'homme.

1 *Ligue ivoirienne des droits de l'homme (LIDHO) et autres c. Côte d'Ivoire,* Fond et réparations, 5 septembre 2023, Req. 041/2016, para 265, disponible sur https://www.african-court.org/cpmt/storage/app/uploads/public/64f/ebe/001/64febe001b94f995908074.pdf (consulté 14 septembre 2024).

L'affaire est principalement marquée par l'intoxication, en août 2006, de populations victimes[2] du déversement de 528 m^3 de déchets toxiques[3] à Abidjan et banlieues. En provenance du port d'Amsterdam (Pays-Bas) via les ports de Paldiski (Estonie), de Lomé (Togo) et de Lagos (Nigéria) où l'on a observé des tentatives infructueuses de déversement,[4] ces déchets avaient été transportés jusqu'à Abidjan par le navire vraquier *Probo Koala*.[5] Ce dernier, battant pavillon panaméen,[6] et appartenant au moment des faits à la compagnie grecque *Prime Marine Management*[7] est affrété par l'entreprise suisse[8] et néerlandaise[9] *Trafigura*, laquelle dispose de son centre opérationnel à Londres (Royaume-Unis).[10] Le déversement des déchets toxiques dans la capitale ivoirienne, suite à ce long parcours effectué par le *Probo Koala*, a lieu à partir du 19 août 2006, date d'arrivée du navire au port d'Abidjan. Ce déversement relève de

2 Selon les informations officielles, 17 personnes sont décédées après avoir inhalé les gaz toxiques. Des centaines de milliers d'autres ont été infectées du fait des gaz et de la contamination de la nappe phréatique. Le chiffre exact de personnes infectées est incertain, et varie selon les sources. Le Rapporteur Spécial de l'ONU sur les déchets toxiques avait de son côté annoncé un total de plus de 100.000 personnes intoxiquées ; voir Amnesty international et Greenpeace Pays Bas *Rapport à propos de Trafigura, du Probo Koala et du déversement de déchets toxiques en Côte d'Ivoire: une vérité toxique* (septembre 2012) 54 ; voir aussi FIDH, LIDHO, MIDH *Rapport sur l'affaire du 'Probo Koala' ou la catastrophe du déversement des déchets toxiques en Côte d'Ivoire* (avril 2011) 9.

3 Les déchets toxiques résultent du processus de 'lavage à la soude caustique', utilisé par *Trafigura* pour 'nettoyer' un produit pétrolier extrêmement sulfureux mais bon marché, le naphta de cokéfaction. Selon Amnesty international, *Trafigura* comptait mélanger le naphta de cokéfaction avec de l'essence puis le vendre à bas prix sur le marché ouest-africain dans l'optique de récolter un bénéfice de 7 millions de dollars par cargaison. Les déchets produits par le lavage à la soude caustique ont été entreposés dans les réservoirs de stockage des déchets du navire *Probo Koala*. *Trafigura* a voulu s'en débarrasser à Gibraltar, en Italie, à Malte, et en France. Aucun de ces États n'ayant la capacité de traiter ces déchets, la multinationale s'est dirigée vers les Pays-Bas. Elle a fait conduire le *Probo Koala* à Amsterdam, présentant les déchets comme des substances moins dangereuses. Un début de déchargement a lieu au port d'Amsterdam, lorsque des analyses approfondies effectuées par l'entreprise néerlandaise *Amsterdam Port Services* (*APS*) permettent d'évaluer la véritable charge polluante des déchets. *APS* hausse donc les prix du traitement spécial de ces déchets hautement toxiques. Jugeant le coût du traitement trop élevé, *Trafigura* choisit de faire décharger la cargaison du *Probo Koala*, à moindre coût, en dehors d'Amsterdam, cette fois en prenant la direction de l'Afrique de l'Ouest avec une escale en Estonie ; voir Amnesty (n 2) 11 ; voir aussi https://www.amnesty.org/fr/latest/news/2016/04/trafigura-a-toxic-journey/ (consulté 14 septembre 2024).

4 Amnesty (n 2) 11.

5 M Bourrel 'La complaisance du droit face aux trafics illicites de déchets dangereux: l'affaire du *Probo Koala*' (2012) 1 *Revue Juridique de l'environnement* 25.

6 Bourrel (n 5).

7 Bourrel (n 5).

8 L'entreprise possède son siège social à Lucerne (Suisse) ; voir Bourrel (n 5).

9 L'entreprise possède son adresse fiscale à Amsterdam (Pays-Bays) ; voir Bourrel (n 5).

10 Bourrel (n 5).

l'initiative de *Trafigura*, grâce au soutien de sa filiale ivoirienne *Puma Energy CI* et de la société abidjanaise *Tommy*.[11] *Tommy*, qui visiblement fut créée dans le seul but de ce déversement de déchets toxiques,[12] a sous-traité les déchets à des camionneurs qui les ont ensuite librement déversés dans des endroits non adaptés de la capitale ivoirienne.[13] Les premières plaintes des riverains, dues à l'odeur suffocante des déchets, ont immédiatement provoqué la réaction de l'administration ivoirienne. Le Centre ivoirien anti-pollution conduit une première enquête soldée par une injonction de bloquer le *Probo Koala* aux fins d'enquêtes supplémentaires.[14] Malgré cette injonction, les autorités portuaires laissent partir le vraquier du port d'Abidjan le 22 août 2006.[15] Le *Probo Koala* sera bloqué un mois plus tard au port de Paldiski par des militants de l'ONG *Greenpeace*[16] et par une décision du Procureur estonien à la demande du ministère ivoirien de l'environnement.[17]

Dans l'intervalle, l'Etat ivoirien crée une commission interministérielle, une commission nationale et une commission internationale d'enquête[18] qui adoptent à l'encontre de certaines autorités quelques mesures administratives disciplinaires. En outre, la police ivoirienne procède à l'arrestation de deux hauts dirigeants de *Trafigura* et un dirigeant de *Puma Energy CI*.[19] Toutefois la conclusion d'un protocole d'accord cinq mois plus tard, entre *Trafigura* et l'Etat ivoirien, change la donne. Comme l'exigent les termes du protocole d'accord, *Trafigura* verse la somme de 95 milliards de francs cfa à l'Etat de Côte d'Ivoire, pour indemniser les victimes et mener les opérations de dépollution. Réciproquement, l'Etat de Côte d'Ivoire libère les trois cadres de la multinationale qui quittent aussitôt le territoire ivoirien.[20] Dans la foulée, ce qui peut sembler paradoxal, le Tribunal d'Abidjan-Plateau condamne le gérant de *Tommy* et un agent maritime de la société *WAIBS* impliqué dans l'affaire, respectivement à

11 Bourrel (n 5).

12 C'est ce que constate la Cour à la page 5 de l'arrêt, nbp 7 ; la compagnie *Tommy* est enregistrée le 12 juillet 2006 en Côte d'Ivoire. Un mois plus tard, un agent maritime de la société *West African international Business Services* (*WAIBS*) présente *Tommy* au Directeur de *Puma Energy CI*. Aussitôt, *Tommy* est chargée par *Trafigura* de décharger les déchets à Abidjan, avant même l'arrivée du *Probo Koala* en Côte d'Ivoire. C'est donc *Tommy* qui engage les conducteurs de camions à déverser les déchets sur les différents sites d'Abidjan ; voir Amnesty (n 2) 12 ; voir aussi FIDH (n 2) 9.

13 Près d'une dizaine de sites, à forte densité de population, sont concernés par le déversement. Le site principal de déversement des déchets est la décharge d'Akouédo située dans la ville d'Abidjan.

14 Amnesty (n 2) 12.

15 Amnesty (n 2) 12.

16 Amnesty (n 2) 12.

17 FIDH (n 2) 11.

18 Amnesty (n 2) 12.

19 Amnesty (n 2) 12.

20 Amnesty (n 2) 13.

20 et 5 ans de détention.[21] Plus tard en juin 2007 le gouvernement ivoirien commence la distribution des indemnisations aux victimes.[22]

Toutes ces manœuvres politiques et judiciaires traduisent une apparente réaction de l'Etat ivoirien, mais contestée par les victimes, ce qui entraîne de longues années de procédures judiciaires tant en Côte d'Ivoire qu'en Europe, à l'encontre de *Trafigura* et l'Etat ivoirien.[23] De tels événements reflètent la complexité et la spécificité de ce contentieux porté devant la Cour africaine des droits de l'homme et des peuples (la Cour) par la LIDHO, la FIDH et le MIDH (les ONG requérantes) dans l'intérêt public des victimes des déchets toxiques. D'abord ce contentieux soulève la problématique des droits collectifs d'un groupe d'individus dans le système particulier africain de protection des droits de l'homme.[24] Ensuite, il traite de la responsabilité de protéger les droits de l'homme, laquelle en matière de protection de l'environnement suscite des réflexions sur la manière dont la Cour pourrait appréhender, outre les Etats, les entreprises responsables. Enfin, le contentieux implique une multitude de personnes physiques et morales, toutes relevant de la compétence d'Etats différents, parfois en dehors du continent africain.

Dans la requête introductive d'instance, les ONG requérantes[25] allèguent la violation du droit à un recours effectif et le droit de demander réparation du préjudice subi, du droit au respect de la vie et à l'intégrité physique et morale de la personne, du droit de jouir d'un meilleur état de santé physique et mentale, du droit des peuples à un environnement satisfaisant et global, propice à leur développement, et des droits protégés par la Convention africaine sur la conservation de la nature et des ressources naturelles de 1968, révisée en 2003 (la Convention d'Alger).[26] Elles demandent, en outre, à la Cour d'ordonner

21 Amnesty (n 2) 13.

22 Amnesty (n 2) 13.

23 Voir ci-dessous, partie 2.

24 Le système africain de protection des droits de l'homme est à l'égard des groupes d'individus un système très particulier et inédit. Outre la recherche active de l'intérêt collectif régulièrement prônée par la Cour africaine des droits de l'homme et des peuples et la Commission du même nom (ci-après la Commission), le système africain accorde une importance particulière aux notions sœurs de population, communauté et peuple, en étendant parfois son action à la 'collectivisation des droits individuels' ; Lire ainsi avec intérêt M Marnet *Les figurations du sujet 'peuple' dans la Charte africaine des droits de l'homme et des peuples: examen contextualiste d'une subjectivité collective* (2022) Thèse de doctorat de droit public, Université Paris 1 Panthéon Sorbonne 1-528 ; voir aussi L Paiola 'La jurisprudence de la Cour africaine des droits de l'homme et des peuples relative aux droits des peuples' *in* G Le Floch (Dir.) *La Cour africaine des droits de l'homme et des peuples* (2023) 297-300.

25 Dotées du statut d'observateur auprès de la Commission, ces ONG peuvent valablement saisir la Cour d'une requête directe au nom des victimes dans l'hypothèse d'une déclaration préalable de l'Etat mis en cause ; voir en sens art 34(6) du Protocole à la Charte africaine des droits de l'homme et des peuples, portant création d'une Cour africaine des droits de l'homme et des peuples; Comme la Cour a eu à le rappeler, le retrait de la déclaration par la Côte d'Ivoire le 29 avril 2020 n'a pas d'effet rétroactif sur la requête déposée en 2016, voir ainsi *LIDHO* (n 1) para 2.

26 *LIDHO* (n 1) para 16.

à l'Etat ivoirien de mettre en œuvre un certain nombre d'actions réparatrices.[27] Toutes ces allégations sont réfutées par l'Etat défendeur, qui pour l'occasion demande à la Cour de se déclarer incompétente et de déclarer la requête irrecevable.[28] La Cour, après avoir rejeté les exceptions d'incompétence et d'irrecevabilité,[29] fait sienne la quasi-totalité des demandes des ONG requérantes.[30] En conséquence, elle condamne l'Etat ivoirien à réparer le dommage causé aux victimes des déchets toxiques en Côte d'Ivoire.[31] En agissant de la sorte, la Cour tranche en faveur d'une responsabilité principale de l'Etat en l'affaire, affichant ainsi sa position sur la problématique générale de la responsabilité partagée des entités privée et étatique dans le contentieux environnemental. Pourtant, l'avènement superflu de l'affaire aurait pu empêcher son règlement par la Cour; et pour cause, la particularité affichée par les interactions entre les procédures judiciaires internes et internationales (2). Les observations sur l'arrêt au fond concernent, quant à elles, les interactions entre les droits de l'homme et le droit de l'environnement (3).

2 LES INTERACTIONS ENTRE LES PROCÉDURES JUDICIAIRES INTERNES ET INTERNATIONALES

Il est vrai qu'en pratique, les commentaires de décisions de justice se focalisent sur le fond. Les éléments relatifs à la procédure se restreignent généralement à figurer dans les propos introductifs. Mais l'espèce étant jugée particulière, quelques observations importantes relatives à la procédure doivent être émises. En fait, vu l'origine externe du contentieux vis-à-vis de la Côte d'Ivoire, les victimes ont saisi certaines juridictions internes d'Etats européens (ci-après les juridictions étrangères) parallèlement aux actions judiciaires intentées en interne.[32]

Comme l'exigent les règles relatives à la recevabilité du litige devant la Cour de céans, celle-ci est tenue de veiller à ce que d'éventuelles circonstances entourant les procédures judiciaires internes à l'Etat défendeur ne l'empêchent pas de statuer au fond. Il appert que, dans le cas d'espèce, l'existence de procédures internationales – celles menées par les juridictions étrangères – est intervenue comme une difficulté supplémentaire que la Cour devait surmonter. Dans une analyse comparative de la procédure devant la Cour (cette procédure naissant

27 *LIDHO* (n 1) paras 21-22.

28 *LIDHO* (n 1) para 23.

29 *LIDHO* (n 1) paras 24-122.

30 *LIDHO* (n 1) para 265.

31 *LIDHO* (n 1) para 265.

32 La chronologie des évènements exposée par le rapport d'Amnesty et *Greenpeace* montre que les juridictions néerlandaise, britannique et française ont été saisies en faveur des victimes des déchets toxiques en Côte d'Ivoire, aussi bien par *Greenpeace* que par la Coordination nationale des victimes des déchets toxiques de Côte d'Ivoire (CNVDT) entre 2009 et 2012.

du fait de l'existence de procédures internes ivoiriennes) et des procédures internationales susvisées, les honorables juges majoritaires ont considéré que les procédures internationales ne constituent pas un «règlement international de l'affaire».[33] Notamment, ils s'alignent sur la jurisprudence interprétative de la Cour concernant l'article 56(7) de la Charte africaine des droits de l'homme et des peuples (la Charte). En vertu de cette jurisprudence, la comparaison d'une procédure devant la Cour avec une autre procédure internationale ne permet de qualifier la seconde de «règlement» qu'à la réunion cumulative de trois conditions: premièrement l'identité des parties, deuxièmement la similitude des requêtes ou leur nature alternative, complémentaire ou consécutive. Ces deux premières conditions relèvent de la question de l'assimilation des procédures internes et internationales (2.1). Troisièmement, la jurisprudence de la Cour impose la condition de l'existence d'une décision internationale sur le fond (2.2).

2.1 De l'assimilation des procédures internes aux procédures internationales

Il n'y a pas de doute que le contentieux *Trafigura* présenté à la Cour est une affaire comportant des procédures internes et internationales vis-à-vis de la Côte d'ivoire. En vertu du principe *ne bis in idem*, la Cour fut contrainte de s'assurer de la non-existence d'un «règlement international» préalable de l'affaire. C'est une démarche complexe que la Cour a tant bien que mal tenté de contourner en utilisant les trois critères jurisprudentiels suscités. En particulier, il est objectivement difficile de prétendre que les procédures internes (*mutatis mutandis* la procédure devant la Cour) et les procédures internationales préalables dans cette affaire du *Probo Koala* ne concernent pas le même et unique contentieux. A ce titre, l'analyse de la Cour peut être fortement relativisée.

En ce qui concerne l'identité des parties, la Cour estime qu'il n'est nullement prouvé que les requérants de part et d'autre sont les mêmes. S'agissant des défendeurs, elle affirme qu'en la présente affaire, le défendeur est l'Etat ivoirien tandis que les défendeurs dans les procédures devant les juridictions étrangères sont *Trafigura* et l'Etat ivoirien. Pourtant, la jurisprudence de la Cour, mentionnée à bon escient dans l'arrêt, aurait pu l'amener à émettre un avis contraire. Par exemple, dans son propos formulé dans l'arrêt *Tike Mwambipile et Equality Now c. Tanzanie*, la Cour avait affirmé que «l'identité des parties dans différentes requêtes peut être considérée similaire dans la mesure où elles visent toutes deux à protéger l'intérêt du public dans son ensemble, plutôt que seulement des intérêts privés spécifiques».[34] Il semble ici perceptible que les actions judiciaires concurrentes de la Coordination nationale des victimes des déchets toxiques de Côte d'Ivoire (CNVDT) et *Greenpeace* devant les juridictions étrangères, et

33 *LIDHO* (n 1) para 117.

34 *Tike Mwambipile et Equality Now c. Tanzanie*, Compétence et recevabilité, 1er décembre 2022, Réq. 042/2020, para 50.

l'action judiciaire collective des ONG requérantes devant la Cour, visent les mêmes objectifs à savoir protéger l'intérêt des victimes de déchets toxiques en Côte d'Ivoire. La Cour aurait pu, en outre, analyser l'identité des défendeurs à l'aune de la condition tenant à la similitude des requêtes ou à leur nature alternative, complémentaire ou consécutive.

En effet, en ce qui concerne cette condition, il paraît clair que la requête des ONG requérantes devant la Cour est complémentaire et consécutive à celles de la CNVDT et de *Greenpeace* déposées devant les juridictions étrangères.[35] En exigeant que les défendeurs soient les mêmes dans toutes les requêtes, la Cour fait une interprétation très, voire trop, stricte de l'article 56(7) de la Charte. Car il est évident que si les mécanismes de la Charte et du Protocole créant la Cour permettaient une option de saisine de la Cour, d'une requête contre les entreprises, les ONG requérantes l'auraient utilisée aussi bien à l'encontre de la côte d'ivoire qu'à l'encontre de *Trafigura*.[36] A cet effet, la Cour aurait pu valablement constater que la différence entre les défendeurs dans les différentes requêtes ne tient pas à la volonté des requérants, mais aux mécanismes existants; qu'en conséquence, les conditions tenant à l'identité des parties et à la similitude des requêtes peuvent être remplies.

Guidée par son interprétation trop stricte de l'article 56(7) de la Charte, la Cour s'est focalisée sur les procédures internes ivoiriennes,[37] sans véritablement s'intéresser aux décisions rendues en France, au Pays-Bas et au Royaume-Uni.[38] Ce choix de ne pas assimiler les procédures internes et internationales de l'affaire du *Probo Koala* conduit logiquement la Cour à affirmer qu'il n'existait pas au préalable une décision internationale sur le fond. Cette assertion de la Cour peut elle-aussi être relativisée.

35 Dans *LIDHO* (n 1) para 115, la Cour elle-même note que la cause principale des requérants dans l'arrêt est relative au défaut de recours (…) en faveur des victimes. Or les recours en faveur des victimes ivoiriennes n'ont pas été observées uniquement par les juridictions ivoiriennes. Ils ont existé au Royaume-Uni et au Pays-Bas. Bien que les causes exactes des différentes requêtes dans l'ensemble ne soient pas les mêmes, la cause des requérants en l'espèce constate une continuité de celles des requérants devant les juridictions étrangères européennes, ce qui fonde d'ailleurs la complémentarité des requêtes, toutes soutenant la 'cause commune' des victimes des déchets toxiques en Côte d'Ivoire.

36 Pour preuve, dans leur requête conjointe, les ONG requérantes indexent *Trafigura* en demandant la révision du Code pénal ivoirien pour y inclure la responsabilité pénale des personnes morales, voir *LIDHO* (n 1) para 22.

37 *LIDHO* (n 1) paras 10-13.

38 La seule mention à ces décisions intervient lorsque la Cour rappelle l'argument de la défense, dans l'examen préliminaire de la recevabilité; voir *LIDHO* (n 1) paras 109 et suivants.

2.2 De l'existence d'une décision internationale préalable sur le fond

En ce qui concerne la condition tenant à l'existence préalable d'une décision internationale sur le fond, la Cour conclut, sans s'y étendre longuement, que les affaires portées devant les juridictions étrangères n'ont pas été conduites conformément aux principes de la Charte et des autres instruments pertinents visés à l'article 56(7) de la Charte.[39] Il ressort de cette troisième condition que soit les procédures internationales doivent avoir été menées conformément aux principes de la Charte et des autres instruments pertinents visés à l'article 56(7) de la Charte, soit ces procédures doivent avoir rempli ces conditions, qu'en plus, elles entrent dans le sens de l'article 56(7). Cette deuxième hypothèse impliquerait de rechercher l'esprit du texte de l'article 56(7), tout au mieux son commentaire.[40]

S'il faut s'en tenir uniquement à la première hypothèse, il est effectivement défendable de dire que le contentieux porté devant la Cour fut «véritablement international»[41] du fait de l'existence des procédures menées devant les juridictions étrangères. Les ONG requérantes, elles-mêmes, produisent en 2011 une documentation bien fournie qui tient compte de la chronologie du contentieux et qui met un point d'orgue sur le règlement [en tout ou partie] de l'affaire par les juridictions française, néerlandaise et britannique. Ces décisions rendues par les juridictions étrangères présentent deux facettes: d'une part elles ont été rendues dans un ordre interne étatique, d'autre part elles sont internationales par rapport à la Côte d'Ivoire. S'il est clair qu'elles ne peuvent pas servir pour l'analyse de l'épuisement des voies de recours internes,[42] il est en revanche possible de raisonnablement affirmer que ces décisions constituent un règlement international de l'affaire. Cette interprétation semble tenable si l'on se réfère à la «théorie des effets»[43] ou encore à «la compétence universelle» des Etats. Ici, l'exigence d'une décision par une [quasi] juridiction purement internationale (créée par les soins de deux ou plusieurs Etats) n'est pas absolue. De plus, les investigations menées par la

39 *LIDHO* (n 1) para 116.

40 A cet égard, F Ouguergouz 'Article 56' *in* M Kamto (dir) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme et des peuples: commentaire article par article* (2011) 1044: 'Cette condition est formulée de manière plus satisfaisante [...] dans la mesure où elle ne fait pas de référence au règlement par des "Etats" [...], ce qui paraît logique dans le cadre d'une procédure concernant un Etat et une entité non-étatique'.

41 *LIDHO* (opinion dissidente du juge Blaise Tchikaya) para 7.

42 La règle de l'épuisement des voies de recours internes ne concernant que les recours au sein de l'Etat défendeur, voir A K Diop 'La règle de l'épuisement des voies de recours internes devant les juridictions internationales: le cas de la Cour africaine des droits de l'homme et des peuples' (2021) 62 *Les cahiers de droit* 8-35.

43 F Marrella 'Protection internationale des droits de l'homme et activités des sociétés transnationales' (2017) 385 *Recueil des cours de l'Académie de droit international de la Haye* 104.

Commission *Hulshof* et par le Rapporteur spécial des Nations unies sur les effets des déchets toxiques[44] peuvent par analogie soutenir l'interprétation selon laquelle l'affaire internationalement réglée l'a été «conformément aux buts et principes des Nations Unies».

La seconde hypothèse, qui peut sembler plus *droits-de-l'hommiste*,[45] rencontre favorablement la position de la Cour. S'il faut s'en tenir à cette hypothèse, il est impossible que la Cour tienne compte des décisions rendues par les juridictions étrangères comme entrant dans le sens de l'article 56(7) de la Charte, même si ces décisions ont été prises conformément aux buts et aux principes des Nations unies. On en vient à imaginer que les victimes des déchets toxiques saisissent la Cour européenne des droits de l'homme d'une requête contre les Pays-Bas. Théoriquement, cette Cour peut statuer sur l'affaire au fond, nonobstant l'existence des décisions ivoiriennes qui alors paraîtraient comme «internationales». C'est également ce qu'aurait pu conclure un Comité onusien s'il avait été saisi par les victimes. De ce point de vue, les décisions rendues par les juridictions dites étrangères ne relèvent que du droit international des faits. Pour ces raisons, la lecture que la Cour donne de l'article 56(7) de la Charte, en exigeant une décision au fond d'un organe [quasi] juridictionnel purement international, paraît justifiée.

Cependant, dans l'ensemble, les doutes quant à la recevabilité de la requête demeurent pertinents puisqu'il existe de motifs sérieux d'affirmer que les deux premières conditions jurisprudentielles confirmant l'existence d'un règlement international préalable de l'affaire peuvent être remplies. Devant dire le droit applicable, la Cour a fait le choix de raisonner autrement, en arrivant à un jugement sur le fond de l'affaire, faisant ainsi interagir les droits de l'homme et le droit de l'environnement.

3 LES INTERACTIONS ENTRE LES DROITS DE L'HOMME ET LE DROIT DE L'ENVIRONNEMENT

L'arrêt au fond permet de mesurer l'ampleur de la complexité du contentieux *Trafigura* porté devant la Cour, dans la mesure où ce contentieux soulève des réflexions aussi bien sur les droits de l'homme que sur le droit de l'environnement. Principalement, la Cour est-elle juge des droits de l'homme ou juge du droit de l'environnement? Les instruments prévoyant la création et le fonctionnement de la Cour sont bien précis: bien que compétente pour se prononcer sur la violation du droit à un environnement sain, la Cour africaine des droits de l'homme et des peuples est une juridiction de protection des droits de l'homme. Le droit à un environnement sain, lui-même, fait partie des droits de

44 Amnesty (n 2) 41 et suivants ; FIDH (n 2) 6 et suivants ; la Cour utilise d'ailleurs ce rapport dans le fond de l'arrêt.

45 Du néologisme 'droits-de-l'hommisme' inventé par A Pellet. La vocation *pro victima* de la Cour sied effectivement avec cette hypothèse droits-de-l'hommiste.

l'homme. Mais on ne peut nier que dans le cadre du contentieux environnemental *Trafigura*, les droits de l'homme et le droit de l'environnement s'entremêlent. De sorte que, face au dommage environnemental intervenu du fait de l'implication de l'Etat et de l'entreprise, il importe de s'interroger sur l'entité que la Cour peut effectivement identifier comme responsable. L'arrêt révèle, à raison, que la responsabilité est entièrement celle de l'Etat (3.1). Il est toutefois souhaité que le processus actuel de responsabilisation des entreprises atteigne prochainement le résultat espéré de la hard law (3.2).

3.1 L'entité étatique: l'entière responsabilité

Même si l'on peut reprocher à la Cour d'avoir été sommaire[46] sur l'implication effective de l'Etat ivoirien dans la commission matérielle du dommage environnemental, la responsabilité de l'Etat est évidemment établie. La mise en œuvre de la responsabilité étatique étant à la fois prévue par les droits de l'homme et le droit de l'environnement, la Cour avait en main toutes les cartes pour désigner l'Etat ivoirien responsable du dommage environnemental, surtout lorsque les faits de l'espèce le requièrent. Tout bien considéré, l'Etat de Côte d'Ivoire a manqué à son obligation de protéger, ensuite il s'est comporté en coauteur ou en complice du dommage, enfin il n'a pas été capable d'assurer la bonne répartition des sommes allouées aux réparations.

Relativement au manquement à l'obligation de protéger, le principe est bien établi, les États territoriaux ont la responsabilité de protéger leurs populations respectives des dommages graves à l'environnement.[47] En l'espèce les autorités ivoiriennes n'ont pas été capables d'empêcher *Trafigura* et les autres entreprises de commettre le dommage. D'autant plus que la réalisation du dommage ne fut pas instantanée. Les entreprises avaient eu le temps de faire stationner le *Probo Koala* au port d'Abidjan, de faire décharger les déchets toxiques dans des camions, puis de faire circuler les camions dans la ville d'Abidjan jusqu'à ce qu'ils déversent les déchets dans plusieurs sites de la capitale. L'Etat, souverain, est censé disposer d'un contrôle sur son territoire;[48] l'entité privée ne peut faire un tel déversement à son insu, d'où le manquement par la Côte d'Ivoire à sa responsabilité de protéger.

Il est donc difficile d'imaginer que les agents de l'Etat n'avaient pas connaissance de tout ce parcours. Dès lors, il est difficile de prétendre qu'ils n'y avaient pas participé, ou encore que le dommage ait été commis sans eux ou sans qu'ils ne le sachent. Ainsi à défaut de formuler

46 Le même reproche avait été formulé par Sarah Cassella pour qui les décisions de la Cour sont parfois 'peu développées', voir S Cassella 'L'apport de la jurisprudence de la Cour africaine des droits de l'homme et des peuples au droit international général' in G Le Floch (n 24) 263.

47 Marrella (n 43) 105-143.

48 Certes, la Côte d'Ivoire est victime en 2006 d'une crise militaro-politique qui dure depuis 2002, mais la zone d'Abidjan où a eu lieu le déversement était sous contrôle étatique.

la «thèse de la coaction»[49] qui engage la responsabilité de l'Etat pour les faits commis par ses agents,[50] on peut affirmer que l'Etat s'est montré complice du dommage. Le comportement des plus hautes autorités politiques ivoiriennes juste après le déversement des déchets (laisser partir le navire, réintégrer au sein du gouvernement les ministres préalablement renvoyés, conclure un protocole d'accord dont les dispositions excluent toute poursuite des responsables de *Trafigura*) est une preuve difficilement contestable de la complicité de l'Etat ivoirien. En droit international des droits de l'homme, la *doctrine de la complicité*[51] prévoit que lorsqu'il y a acquiescement, tolérance ou collaboration de l'Etat dans les actes constituant la violation, la responsabilité de l'Etat peut être établie. Cette doctrine est soutenue par le système interaméricain des droits de l'homme qui à travers sa Cour pose la condition selon qu'«il est nécessaire que dans le cas concret il y ait acquiescement ou collaboration de l'Etat dans les circonstances de l'affaire».[52] Bien plus:

> Lorsque l'Etat a connaissance d'actes imputables à une entreprise relevant de sa juridiction qui menacent ou violent les droits de l'homme, et qu'en retour il y a une violation soutenue et prolongée de ses obligations de garantie dans le cadre de ses actes, l'omission constitutive de la responsabilité indirecte prend la forme d'une tolérance et d'un acquiescement et devient donc observable au regard du devoir de respect.[53]

La Cour africaine des droits de l'homme et des peuples aurait pu dans l'arrêt *LIDHO* élaborer cette doctrine de la complicité, notamment en illustrant son propos[54] et en présentant de façon plus détaillée les éléments constitutifs de l'obligation étatique de «diligence absolue» attendue. Sauf à dire vaguement que l'Etat défendeur a «autorisé le déversement des déchets avec l'implication de ses fonctionnaires»,[55] la Cour n'a pas été davantage plus précise; ce qui est regrettable, toutefois n'écarte pas l'affirmation de la complicité évidente de l'État ivoirien dans la réalisation du dommage ayant causé des atteintes graves à l'environnement et à la santé des populations. L'arrêt relève que dès le 20 août 2006, au lendemain du déversement des déchets dans la capitale ivoirienne, des milliers de riverains ont afflué vers les centres de santé, manifestant des symptômes alarmants. Officiellement, 17 personnes sont décédées des suites d'inhalation de gaz toxiques. Des

49 Tchikaya (n 41) para 19.

50 M Forteau, A Miron & A Pellet *Droit international public* (2022) 1082.

51 RM Quintero 'L'encadrement supranational des puissances privées en droit interaméricain des droits de l'homme: l'extraterritorialité et l'efficacité horizontale du droit international des droits de l'homme' *in* J Andriantsimbazovina Puissances privées et droits de l'homme (2024) 148.

52 Cour interaméricaine des droits de l'homme, *Yarce et autres c. Colombie*, exception préliminaire, fond, dommages-intérêts compensatoires, arrêt du 22 novembre 2016, série C, n° 325, para 180.

53 Commission interaméricaine des droits de l'homme- Rapporteur spécial sur les droits économiques, sociaux, culturels et environnementaux (REDESCA) [Rapport sur les entreprises et les droits de l'homme: normes interaméricaines] 1er novembre 2019 para 79.

54 Pour le constater, voir *LIDHO* (n 1) para 139.

55 *LIDHO* (n 1) para 210.

centaines de milliers d'autres ont été infectées et des experts environnementaux ont signalé une grave contamination de la nappe phréatique.[56] Il semble que douze ans après leur déversement à Abidjan, les déchets continuaient à impacter la vie quotidienne des riverains les plus proches des sites pollués.[57] En l'absence de mécanismes pouvant engager la responsabilité des entreprises en matière de droits de l'homme, la complicité de l'Etat ivoirien traduit de fait son entière responsabilité.

Au vu de ce qui précède, la Cour a valablement déclaré l'Etat de Côte d'Ivoire responsable pour avoir violé le droit à la vie, le droit à la santé et le droit à un environnement sain des victimes.

Enfin, il existe des motifs raisonnables[58] de croire que l'Etat de Côte d'Ivoire a failli à son devoir de répartir équitablement les fonds en faveur des victimes. Ces manquements confortent l'idée d'une responsabilité effective attribuable à la Côte d'Ivoire en ce qui concerne les droits, en l'espèce connexes, au recours effectif et à l'information. Le programme d'indemnisation des victimes était assurément marqué par «un manque de transparence et d'information»,[59] ce qui empêchait d'une certaine manière les victimes, particulièrement mal informées, d'user des recours adéquats. Le silence de l'Etat défendeur, sur ces points, est manifeste.[60] Comme la Cour a maintes fois eu à la rappeler, pour être effectif, le recours doit être *a minima* disponible, efficace et satisfaisant.[61] De fait, le faible champ d'appréciation des juridictions nationales ivoiriennes quant à la prise en compte exigée de toutes les victimes[62] témoigne d'une violation indéniable du droit au recours effectif (et accessoirement à l'information) par l'Etat. C'est pourquoi en guise de réparation la Cour ordonne à l'Etat de répartir équitablement les fonds remis par *Trafigura* pour l'indemnisation des victimes,[63] mieux, elle ordonne à l'Etat de prévoir des ressources additionnelles suffisantes à cet effet.[64]

Dans l'interaction des droits de l'homme et du droit de l'environnement, la Cour, seulement juge des droits de l'homme, ne peut en théorie statuer qu'en prenant en compte les normes africaines en vigueur en matière de droits de l'homme. Au demeurant, elle ne peut sur aucun fondement normatif agir *ultra petita* en engageant la responsabilité de l'entreprise. Elle ne peut non plus la contraindre à indemniser les victimes. Limitée par sa compétence d'attribution, celle

56 *LIDHO* (n 1) para 4.

57 Cf un reportage vidéo de la chaîne nationale de télévision ivoirienne, disponible sur https://www.youtube.com/watch?v=1jELAVcLYhI&t=77s (consulté 15 septembre 2024).

58 Voir *LIDHO* (n 1) paras 211-214.

59 *LIDHO* (n 1) para 187.

60 *LIDHO* (n 1) paras 149 et 189.

61 *LIDHO* (n 1) para 153 ; *Diakité c. Mali*, (recevabilité et compétence) (28 septembre 2017), 2 RJCA 122, para 41 ; *Lohé Issa Konaté c. Burkina Faso*, (fond) (5 décembre 2014), 1 RJCA 324, para 41.

62 *LIDHO* (n 1) para 157.

63 *LIDHO* (n 1) para 265.

64 *LIDHO* (n 1) para 265.

d'engager la responsabilité des Etats, la Cour ne disposait donc d'aucun moyen pour engager la responsabilité de *Trafigura*. Cela étant, on peut reprocher aux juges majoritaires de n'avoir pas exigé que l'Etat ivoirien engage les moyens de droit interne de mise en œuvre de la responsabilité des personnes morales. Cela figurait pourtant au nombre des demandes des requérants.[65] De cet unique point de vue, la décision de la Cour peut sembler inefficace puisqu'elle n'empêche pas que d'autres dommages environnementaux du même ordre se reproduisent en Côte d'Ivoire. Aussi la Cour a-t-elle manqué là l'occasion de faire naître une jurisprudence relative à l'obligation étatique africaine de prévoir une législation de mise en œuvre de la responsabilité des entreprises. Prévue par le Protocole de Malabo[66] applicable sur le plan régional africain, mais non encore en vigueur, la responsabilité [pénale] des entreprises aurait déjà pu le cas échéant s'affirmer progressivement comme une «norme» étatique africaine. Ce manquement dégrade le rayonnement des dispositifs nationaux proclamant le droit à l'environnement sous l'influence des instruments régionaux.[67] Pis, la décision de la Cour freine les espoirs au sujet de l'achèvement du mouvement de responsabilisation des entreprises,[68] en tout cas en ce qui concerne les droits de l'homme.

3.2 La responsabilité de l'entité privée: au stade de l'espoir

Dans son opinion dissidente formulée en marge de l'arrêt, l'honorable juge Blaise Tchikaya appelle de ses vœux à l'affirmation effective de la responsabilité des puissances privées débitrices de la protection des droits de l'homme.[69] *L'horizontalisation,*[70] dérivée de la doctrine allemande de la *Drittwirkung* des droits fondamentaux,[71] permet effectivement de faire naître à la charge des entreprises des obligations en matière environnementale et des droits de l'homme.

65 *LIDHO* (n 1) para 22.

66 Protocole portant amendements au Protocole portant Statut de la Cour africaine de justice, des droits de l'homme et des peuples, art 46 C.

67 Bien illustré par MA Mekouar 'Le droit à l'environnement dans le système régional africain de protection des droits humains' *in* L Robert (dir) *L'environnement et la Convention européenne des droits de l'homme* (2012) 160.

68 Pour des aspects plus discutés et plus approfondis, voir H Savadogo *La responsabilité de l'entreprise transnationale en droit international: de la soft law à la hard law* (2024) Thèse de doctorat de droit public, Université de Genève, 1-421; voir aussi L Boisson de chazournes 'Changes in the balance of rights and obligations: towards investor responsabilization' *in* TE Ghadban, C-M Mazuy & A Senegacnik (dir.) *La protection des investissements étrangers: vers une réaffirmation de l'Etat?* (2018) 83-95.

69 Tchikaya (n 41) paras 34-54.

70 Tchikaya (n 41) paras 43-50 ; voir aussi MMM Salah 'Conclusions' *in* Andriantsimbazovina (n 51) 303: '(…) un arbitrage juridictionnel est quelquefois rendu nécessaire en raison de ce que les droits fondamentaux peuvent également être mobilisés par les puissances privées à leur profit'.

71 M-O Hamrouni 'La contribution des puissances privées à la protection des droits: approche théorique' *in* Andriantsimbazovina (n 51) 108.

Malheureusement, en l'état actuel du droit, cette responsabilité des entreprises pour violation des droits de l'homme n'est que *lege ferenda*. L'arrêt rendu par la Cour le confirme. Le processus engagé de responsabilisation des entreprises, très vaste, mériterait cependant d'atteindre son achèvement.

La responsabilisation des entreprises est un sujet d'actualité important en droit international de l'environnement et des droits de l'homme.[72] Les entreprises ont par ce fait l'obligation de se conformer au droit international et au droit interne.[73] Il est davantage requis un principe de précaution qui demande aux entreprises «de prévenir et réduire les menaces graves pour l'environnement, la santé et la sécurité (…)».[74] Son applicabilité aux contentieux similaires à l'affaire du *Probo Koala* est à l'avenir fortement souhaitée.

Les puissantes multinationales, ainsi contraintes, auront sûrement à mettre en œuvre des moyens solides de prévention des incidents causant des dommages graves à l'environnement et aux droits de l'homme. Pour l'instant, nombreuses d'entre elles se servent des règles des droits de l'homme «inhérentes à l'Etat» pour commettre des violations massives et graves des droits de l'homme en toute impunité. Dans le cas d'espèce, les éléments bien connus du contentieux montrent que, à l'origine, *Trafigura* avait été informée de la dangerosité de la soude caustique par le fournisseur américain *Univar*.[75] Elle a ensuite acheté la soude caustique auprès de la société néerlandaise *WRT* qui a pris soin de lui indiquer les précautions à prendre pour éviter de nuire à l'environnement.[76] La multinationale avait donc connaissance des risques potentiels du lavage et des déchets que ce lavage aurait pu produire. C'est ce que constate le Tribunal du district d'Amsterdam dans sa décision du 23 juillet 2010.[77] Il aurait fallu que *Trafigura* procède au traitement spécial et adapté des déchets avant leur déversement. Abidjan ne disposant pas de structure adaptée à ce traitement spécial, *Trafigura* a manqué à son devoir de précaution en y déversant les déchets. En cela, la Commission nationale ivoirienne d'enquête avait identifié que *Tommy* était en incapacité technique de traiter les déchets et que la filiale ivoirienne de *Trafigura*, *Puma Energy CI,* avait conscience de cette incapacité.[78] De manière implicite, la Cour a, au paragraphe 139 de l'arrêt, relevé cette incapacité de *Tommy* à traiter les produits concernés. Il relevait, d'ailleurs, du

72 E Decaux 'Présentation' *in* E Decaux (dir) *La responsabilité des entreprises multinationales en matière de droits de l'homme* (2010) 11.

73 I Daugareilh & O Maurel 'Les droits de l'homme, socle de la responsabilité des entreprises' *in* Commission nationale consultative des droits de l'homme (CNCDH) *La responsabilité des entreprises en matière de droits de l'homme: nouveaux enjeux, nouveaux rôles* (2009) 143.

74 Marrella (n 43) 234-235.

75 Amnesty (n 2) 82.

76 Amnesty (n 2) 82.

77 Tribunal du district d'Amsterdam, *Affaire Trafigura Beheer BV,* 23 juillet 2010, Extraits de la traduction anglaise réalisée par Amnesty international, paras 8.3.3.12.

78 Amnesty (n 2) 141. Il est de plus en plus admis que la responsabilité des entreprises mères puisse être engagée du fait des violations commises par leurs

contrat de *Trafigura* avec la société *Tommy* que son objet consistait purement au déversement des déchets sans traitement préalable.[79] Le constat est déplorable: l'attitude des entreprises affiche clairement une *action de groupe*,[80] planifiée et organisée avant, pendant et après l'arrivée du *Probo Koala* à Abidjan. L'intention perfide et bien élaborée de *Trafigura* avait pour seul but la recherche du gain, contrevenant au bien-être des populations et à la nécessité de préserver l'environnement.

De plus, en concluant les termes du protocole d'accord avec l'Etat ivoirien, *Trafigura* a elle-même mis en œuvre le principe pollueur-payeur complémentaire au principe de précaution,[81] dans une forme de réparation du préjudice «causé aux victimes et à l'Etat de Côte d'Ivoire».[82] En conséquence l'entreprise a d'une certaine manière reconnu la responsabilité du collectif d'entreprises qu'elle mène.[83] Compte tenu des circonstances, le contrat conclu entre *Trafigura* et *Tommy* a eu pour effets d'accorder aux parties des avantages économiques frauduleux logiquement inscrits dans les manœuvres frauduleuses effectuées depuis les Pays-Bas.[84] Par ailleurs, habituellement l'auteur du dommage est celui qui le répare: «Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer».[85] Inversement, si une personne répare un dommage, elle a causé ce dommage. *Trafigura* ayant réparé le dommage, ce fait constaté par la Cour,[86] elle est véritablement l'auteure principale du dommage. La prépondérance de l'implication de *Trafigura* par rapport à l'Etat de Côte d'Ivoire, dans ce qui concerne la commission matérielle du dommage, est sans aucun

filiales, voir C Nicolas 'La responsabilité des société mères du fait de leurs filiales: éléments de droit positif et de droit prospectif' (2009) 2 *Revue de la recherche juridique* 657-683; voir aussi Y Queinnec, M-C Caillet 'Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?' *in* Daugareilh (dir) *Responsabilité de l'entreprise transnationale et globalisation de l'économie* (2010).

79 Amnesty (n 2) 141.

80 C H Hermida *La notion d'action de groupe: étude de droit comparé* (2013) Thèse de doctorat de droit public, Université Paris Nanterre, 1-521.

81 A De Raulin, G Saad 'Introduction' *in* A de Raulin, G Saad (dir.) *Droits fondamentaux et droit de l'environnement* (2010) 9 ; Les principes de précaution et pollueur-payeur font partie des principes directeurs de l'Organisation de coopération et de développement économiques (OCDE) à laquelle font partie les Pays-Bas, la France et le Royaume-Uni, Etats 'd'accueil' de la multinationale *Trafigura*.

82 *LIDHO* (n 1) paras 6 et 213.

83 Tchikaya (n 41) para 38.

84 Le Tribunal d'Amsterdam avait en 2010 reconnu *Trafigura* et le capitaine du *Probo Koala* 'coupables de complicité de livraisons de marchandises dont ils savaient qu'elles étaient dangereuses pour la santé des personnes et dont ils ont dissimulé la nature préjudiciable (...)'. A Abidjan, la Commission nationale d'enquête avait constaté que les deux hauts dirigeants de *Trafigura* 'ne pouvaient ignorer l'incapacité technique de la compagnie Tommy' à traiter les déchets. Amnesty international et Greenpeace ont identifié que des cadres de *Trafigura* avaient demandé à *Tommy* de falsifier sa facture (...), voir Amnesty (n 2) 83 et 132.

85 Art 1382 (1240 nouveau) du code civil français.

86 *LIDHO* (n 1) paras 6 et 213.

doute établie. Seulement, il n'existe aucun mécanisme qui permette à la Cour d'imputer les violations des droits de l'homme aux entreprises et par lequel on tiendrait compte d'une quotité de responsabilité de l'entreprise dans une éventuelle modulation de la responsabilité de l'État défendeur, même si ce mécanisme est espéré:

> Fait essentiel depuis dix ans, les entreprises reconnaissent désormais largement la validité des normes internationales comme référentiel à leurs activités: le débat entre volontaristes et normativistes semble heureusement dépassé, et il importe de s'accorder sur quelques notions essentielles qui permettront de circonscrire précisément le champ des responsabilités respectives et concomitantes des Etats et des entreprises.[87]

Si un tel mécanisme est fort souhaitable, la réticence des Etats et leur complicité avec les entreprises risquent de maintenir l'état actuel du droit au *statut quo*.

4 CONCLUSION

Reconnaissant certes les entreprises comme entités commettantes principales du dommage environnemental, la Cour conçoit que «la responsabilité des entreprises en matière de respect des droits de l'homme est indépendante des capacités ou de la détermination des États de remplir leur obligation de protéger les droits de l'homme».[88] Pour l'instant, la responsabilité des entreprises en matière de droits de l'homme est essentiellement de la *soft law*. Le processus de responsabilisation des entreprises n'a malencontreuse-ment pas encore abouti à les soumettre, par de la *hard law,* au respect des droits de l'homme. Il aurait certainement pu, s'il existait, permettre à la Cour d'envoyer un message fort aux entreprises, en refusant d'imputer systématiquement leurs dommages environnementaux uniquement aux Etats complices.

En définitive, même s'il ressort de l'arrêt que la République de Côte d'Ivoire est seule tenue de réparer le dommage causé aux victimes, le contentieux demeure celui qui, né en 2006, s'est produit à cause de l'action commettante du dommage, principalement par *Trafigura* (y compris toutes les entreprises impliquées), accessoirement par l'Etat ivoirien.

87 Discours de Souhayr Belhassen, présidente de la FIDH au séminaire 'Entreprises et droits de l'homme' des 4 et 5 décembre 2008 à Paris ; Propos extraits de Daugareilh (n 73) 134.

88 *LIDHO* (n 1) para 142 ; la Cour se réfère aux principes directeurs des Nations unies relatifs aux entreprises et aux droits de l'homme.

Tanzania and the African Court spar over the mandatory death penalty and hanging: *Kambole v Attorney General* (Tanzania Court of Appeal, 2022), *Ally Rajabu v Tanzania* and fourteen other African Court decisions

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ABSTRACT: In *Ally Rajabu v Tanzania*, the African Court on Human and Peoples' Rights in 2019 found that the mandatory imposition of the death penalty and hanging as a method of execution violate articles 4 and 5 of the African Charter on Human and Peoples' Rights. In 2022, the Tanzania Court of Appeal in *Kambole v Attorney General* upheld the constitutionality of the mandatory death penalty, a shoddily reasoned decision that misinterpreted the doctrine of *res judicata* to find the constitutional claims to be barred. In the meantime, *Ally Rajabu* generated numerous follow-up complaints against Tanzania at the African Court. Although Tanzania in 2020 withdrew its acceptance of the Court's jurisdiction over individual complaints submitted directly to the Court, cases filed by death row prisoners before that date continued to be heard. This case comment analyses both the *Kambole* decision by the Tanzanian Court of Appeal and the fourteen subsequent cases decided by the African Court, which all confirmed the holding in *Ally Rajabu* that the mandatory death penalty and hanging were Charter violations.

TITRE ET RÉSUMÉ EN FRANÇAIS

La Tanzanie face à la Cour africaine des droits de l'homme et des peuples : divergence sur la peine de mort obligatoire et la méthode d'exécution par pendaison: *Kambole c. Procureur général* (Cour d'appel de Tanzanie, 2022), *Ally Rajabu c. Tanzanie* et quatorze autres décisions de la Cour africaine

RÉSUMÉ: Dans l'arrêt *Ally Rajabu c. Tanzanie* (2019), la Cour africaine des droits de l'homme et des peuples a déclaré que l'imposition de la peine de mort obligatoire et la pendaison comme méthode d'exécution constituaient des violations des articles 4 et 5 de la Charte africaine des droits de l'homme et des peuples. Ces dispositions protègent respectivement le droit à la vie et l'intégrité physique et morale des individus. Toutefois, en 2022, la Cour d'appel de Tanzanie, dans l'affaire *Kambole c. Procureur général*, a confirmé la constitutionnalité de la peine de mort obligatoire en Tanzanie, s'appuyant sur une interprétation controversée de la doctrine de l'autorité de la chose jugée. Cette décision a exclu tout recours constitutionnel au motif que les revendications soulevées avaient déjà été traitées. Parallèlement, l'affaire Ally Rajabu a suscité une série de plaintes déposées contre la Tanzanie auprès de la Cour africaine. Bien que la Tanzanie ait, en 2020, retiré sa déclaration reconnaissant la compétence

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A Novak 'Tanzania and the African Court spar over the mandatory death penalty and hanging: *Kambole v Attorney General* (Tanzania Court of Appeal, 2022), *Ally Rajabu v Tanzania* and fourteen other African Court decisions' (2024) 8 *African Human Rights Yearbook* 540-553
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de la Cour pour les requêtes individuelles, les affaires initiées avant cette date ont poursuivi leur cours. Parmi celles-ci, quatorze affaires impliquant des condamnés à mort ont confirmé la position de la Cour africaine, qui considère que la peine de mort obligatoire et la méthode d'exécution par pendaison sont incompatibles avec les principes fondamentaux de la Charte africaine. Ce commentaire examine les implications des décisions divergentes entre la Cour d'appel tanzanienne et la Cour africaine. Il analyse les fondements juridiques et institutionnels de ces arrêts, en mettant en lumière les défis posés par l'interprétation et la mise en œuvre des normes internationales des droits de l'homme dans le cadre des systèmes juridiques nationaux. Cette étude souligne également les tensions croissantes entre la souveraineté des États et leurs obligations internationales, tout en proposant des pistes pour harmoniser les approches juridiques afin de garantir une meilleure protection des droits humains en Afrique.

KEY WORDS: Tanzania; mandatory death penalty; hanging; African Charter; African Court of Human and Peoples' Rights; *Kambole v Attorney General;* Tanzania Court of Appeal

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1 INTRODUCTION

Tanzania is a slippery target for advocates challenging the constitutionality of the mandatory death penalty. In 2019, the African Court on Human and Peoples' Rights (African Court) ruled in *Ally Rajabu and Others v Tanzania* that the imposition of the mandatory death penalty violated the rights to life and human dignity at articles 4 and 5 of the African Charter on Human and Peoples' Rights (African Charter).[1] In that decision, the African Court additionally ruled that hanging as a method of execution violated article 5, a surprising holding that found hanging to be inherently degrading because it caused undue suffering.[2] A residue of British colonial penal codes, the mandatory death penalty has been widely rejected by many national courts and regional tribunals owing to its arbitrary nature in sentencing all persons convicted of murder to death regardless of the circumstances of their offenses.[3] In *Ally Rajabu*, the African Court's determination that the mandatory death penalty was inconsistent with the African Charter accorded with decisions of the Inter-American Commission on

1 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Judgment (28 November 2019); *Rajabu and others v Tanzania (merits and reparations)* (2019) 3 AfCLR 539.

2 *Rajabu* (n 1) para 115.

3 A Novak *The global decline of the mandatory death penalty: constitutional jurisprudence and legislative reform in Africa, Asia, and the Caribbean* (2014) 3-4.

Human Rights and United Nations Human Rights Committee, which found automatic death sentences incompatible with other international human rights instruments.[4] The decision in *Ally Rajabu* was the subject of an earlier case comment in the *African Human Rights Yearbook*.[5]

At first glance, Tanzania should be receptive to a challenge to the mandatory death penalty. In East Africa alone, the Supreme Courts of Kenya and Uganda and the Constitutional Court of Malawi had previously found the mandatory death penalty incompatible with their constitutions in coordinated challenges based on similar penal codes.[6] In addition, Tanzania has a more modern constitutional framework than those countries. When the Union of Tanzania was formed in 1964, its Constitution did not originally contain a bill of rights. A bill of rights was added by a constitutional amendment enacted in 1985.[7] For this reason, the Tanzanian Constitution, as amended, contains a more progressive right to life provision, without an explicit savings clause that allows for the death penalty. The Constitution provides simply that '[e]very person has the right to live and to the protection of his life by the society in accordance with law'.[8] Yet, in 1993, the Tanzanian Court of Appeal upheld the constitutionality of the death penalty *per se* in *Mbushuu v Republic*, finding that notwithstanding the expansive right to life provision, article 30 of the Tanzanian Constitution contains a broad limitations clause that allows the government to pass laws that promote or preserve 'the national interest in general'.[9] Over the following three decades, this decision has been roundly criticised because its reasoning was circular, arguing that the existence of the death penalty was the justification for retaining it, and because the Court of Appeal read a right narrowly and a limitation broadly contrary to ordinary principles of constitutional interpretation.[10]

On 15 June 2022, the Tanzania Court of Appeal upheld the mandatory death penalty in *Kambole v Attorney General.*[11] This decision cursorily dismissed the comparative jurisprudence from Kenya, Uganda, and Malawi, among other jurisdictions, and neglected

4 *Thompson v Saint Vincent & the Grenadines* Communication 806/1998, UNHR Committee, UN Doc CCPR/C/70/D/806/1998 (2000); *Edwards v Bahamas* case 12.067, Inter-American Commission on Human Rights, Report No 48/01, OEA/SerL/V/II.111, doc 20 (2000).

5 A Novak, 'Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania*' (2021) 5 *African Human Rights Yearbook* 401-419.

6 *Kafantayeni v Attorney General* [2007] MWHC 1 (Malawi); *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda SC); *Muruatetu v Republic* (14 December 2017) Petitions 15/2015 and 16/2015 (Kenya SC).

7 CM Peter 'Civil and political rights in Tanzania: the bill of rights of 1985' (1995) 22 *African Review* 45-72.

8 Tanzania Constitution art 14.

9 Tanzania Constitution art 30(2)(f); *Mbushuu alias Dominic Mnyaroje and Kalai Sangula v Republic*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal 142 of 1994; [1995] LRC 216.

10 A Gaitan & B Kuschnik 'Tanzania's death penalty debate: an epilogue on *Republic v Mbushuu*' (2009) 9(2) *African Human Rights Law Journal* 459 at 474-75.

11 *Kambole v Attorney General* [2022] TZCA 377 (15 June 2022).

to interpret the Tanzanian Constitution consistently with the African Charter. Rather, the decision relied exclusively on the faulty reasoning of *Mbushuu v Republic* and misapplied the doctrine of *res judicata* to find that the constitutionality of the mandatory death penalty had been previously determined to be in the national interest. This is true even though *Mbushuu* was a challenge to the death penalty per se, not a challenge to the mandatory nature of the death penalty, and therefore was easily distinguishable from the appellants' arguments in *Kambole*. The decision in *Kambole* was shoddily reasoned and ultimately incompatible with Tanzania's international obligations.

Shortly after *Ally Rajabu* was decided, Tanzania ousted jurisdiction of the African Court to hear individual complaints by withdrawing the Declaration it had filed in terms of article 34(6) of the African Court Protocol.[12] Tanzania's withdrawal became effective on 22 November 2020, one year after it deposited notice of its intention to withdraw.[13] However, the African Court may still hear complaints filed against Tanzania before its withdrawal became effective, which included numerous similar challenges to Tanzania's mandatory death penalty. The African Court has repeatedly reinforced its decision in *Ally Rajabu* in its follow-up jurisprudence. In fourteen separate decisions since *Ally Rajabu* was decided, the Court confirmed violations of articles 4 and 5 of the African Charter for the mandatory nature of the death penalty and hanging as a method of execution, respectively. These cases were all brought by death row prisoners who received automatic death sentences upon conviction for murder, although the facts and prayers varied slightly.[14]

This case comment will briefly summarise these decisions, emphasising the aspects that go beyond the African Court's decision in *Ally Rajabu* and contribute to the Court's death penalty jurisprudence. Several other applications against Tanzania alleging similar violations remain pending. As a result of Tanzania's withdrawal from the individual complaints mechanism, however, the significant line of jurisprudence that the African Court has generated on this question in respect of Tanzania is coming to an end. Hopefully, the African Court's

12 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

13 V Mtavangu & A Mbilinyi 'Tanzania's "withdrawal" from the African Court and its effects on the enforcement of human rights' (2023) 1(2) *Journal of Contemporary African Legal Studies* 19-36.

14 *Amini Juma v Tanzania*, Application 24/2016 (30 September 2021); *Gozbert Henerico v Tanzania*, Application 56/2016 (10 January 2022); *Ghati Mwita v Tanzania*, Application 12/2019 (1 December 2022); *Marthine Christian Msuguri v Tanzania*, Application 52/2016 (1 December 2022); *Chrizant John v Tanzania*, Application 49/2016 (7 November 2023); *Makungu Misalaba v Tanzania*, Application 33/2016 (7 November 2023); *John Lazaro v Tanzania*, Application 3/2016 (7 November 2023); *Ibrahim Yusuf Calist Bonge & Ors v Tanzania*, Application 36/2016 (4 December 2023); *Kachukura Nshekanabo Kakobeka v Tanzania*, Application 29/2016 (4 December 2023); *Deogratius Nicholaus Jeshi v Tanzania*, Application 17/2016 (13 February 2024); *Crospery Gabriel & Ernest Mutakyawa*, Application 50/2016 (13 February 2024); *Romward William v Tanzania*, Application 30/2016 (13 February 2024); *Nzigiymana Zabron v Tanzania*, Application 51/2016 (4 June 2024); *Dominick Damian v Tanzania*, Application 48/2016 (4 June 2024).

strong and repeated statements that the mandatory death penalty violates the African Charter will increase pressure on Tanzania to resolve the conflict between its domestic law and its international obligations.

2 THE TANZANIA COURT OF APPEAL UPHOLDS THE MANDATORY DEATH PENALTY IN *KAMBOLE V ATTORNEY GENERAL* (2022)

In *Kambole*, the appellants challenged the mandatory nature of the death penalty on several constitutional grounds including right to a fair trial in article 13(6)(a) of Tanzania's Constitution, non-discrimination in article 13(1), human dignity in article 12(2) and article 13(6)(d), freedom from inhuman or degrading treatment or punishment in article 13(6)(e), and life in article 14.[15] As these provisions suggest, the appellants' arguments against the mandatory death penalty included (a) that it is arbitrary since it does not distinguish between more serious and less serious murders, hence the grounds of non-discrimination and right to human dignity; (b) that it potentially over-punishes and does not accord with the worst of the worst, and therefore is inhuman and degrading; and (c) that it deprives death row inmates of a sentencing hearing to present mitigating evidence, which is a fair trial violation.

The respondents argued that the death penalty per se had been upheld previously in *Mbushuu*. The state's attorney argued that there was 'no line of distinction between challenging the constitutionality of the death penalty and challenging the mandatory imposition of the death penalty'.[16] This line of argument was accepted by the lower court decision in *Kambole* in 2019, which found the constitutionality of the death penalty had been settled in *Mbushuu* and the challenge to the mandatory death penalty presented 'nothing new'.[17] The High Court in that decision found the matter was *res judicata* since it had already been pleaded and affirmed by the Court of Appeal in *Mbushuu*, writing that the petitioners were 'at liberty to move the Court of Appeal through review if he strongly feels that Mbushuu's case was determined wrongly'.[18]

At the Court of Appeal, the appellants in *Kambole* insisted that a challenge to the mandatory death penalty was distinct from a challenge to the death penalty per se as in *Mbushuu*. The constitutional questions were different. The appellants also argued that Tanzania's bill of rights and international human rights instruments had evolved since 1993 on the permissibility of the mandatory death penalty.[19] This included the

15 *Kambole* (CA) (n 10) at 5-6.
16 *Kambole* (CA) (n 10) at 6.
17 *Kambole v Attorney General*, [2019] TZHC 6 (18 July 2019), at 17.
18 *Kambole* (HC) (n 13) at 17.
19 *Kambole* (CA) (n 10) at 8-10.

African Court's decision in *Ally Rajabu*, as well as Commonwealth jurisprudence from India, Uganda, Kenya, and Malawi, among others, which post dated *Mbushuu*. Placing special emphasis on the Ugandan Supreme Court's decision in *Attorney General v Kigula*, the appellants clarified that replacing a mandatory death penalty with a discretionary system was not tantamount to entirely striking down the death penalty. The Court of Appeal simply needed to replace 'shall' with 'may' in the Penal Code.[20]

In rejecting the appellants' contentions, the Court of Appeal used a strange avoidance strategy: it found that the challenge to the mandatory death penalty was *res judicata*. According to the Court, Tanzania's Code of Criminal Procedure was designed to bar repeated lawsuits on the same matter or claims that should have been raised in earlier litigation.[21] The appellants objected that the purpose of *res judicata* and collateral estoppel was to prohibit the re-litigation of settled cases where the parties and issues were substantially similar, not to prevent a final court of appeal from revisiting precedents after thirty years had passed in a case of substantial public interest.[22]

The appellants were objectively correct on this point: the Court of Appeal misunderstood the doctrine of *res judicata* and did violence to its core purpose. According to one particularly authoritative text, the *Restatement (Second) of Judgments* (1982) published by the American Law Institute, even if the issues at stake in *Mbushuu* and *Kambole* were substantially similar, an exception to the rule of preclusion applies when '[t]he issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context'.[23] An additional and even more liberal exception applies when the parties are entirely different. *In casu,* 'the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based'.[24] In this case, the Court of Appeal foreclosed the possibility of revisiting a much-maligned precedent in a case involving different parties and raising different issues, despite *three decades* of monumental legal changes in comparable common law jurisdictions and at international tribunals. And this, even though the issues at stake are among the most important individual rights including life and dignity.

20 *Kambole* (CA) (n 10) at 15.

21 *Kambole* (CA) (n 10) at 28-29.

22 *Kambole* (CA) (n 10) at 16.

23 American Law Institute, *Restatement (Second) of Judgments* (1982), para 28(2). See also G Hazard 'Preclusion as to issues of law: the legal system's interest' (1984) 70 *Iowa Law Review* 81-94.

24 American Law Institute, *Restatement (Second) of Judgments* (1982) para 29(7).

The Court gives away the ballgame in a reference to another, unreported lower court decision: *Tete Mwamtenga Kafunja*.[25] In that case, Kafunja had raised the possibility that the mandatory death penalty was unconstitutional, and the lower court dismissed the argument based on *Mbushuu*. However, *Kafunja* was never appealed because the defendant in that case won at the lower court level on other grounds and was released after 18 years in prison for a murder he did not commit.[26] The Court of Appeal was essentially saying that *res judicata* should apply because of 'the fact that the counsel in that case was the same counsel ... in the present appeal'.[27] To state this in different words, the Court of Appeal found the claims in *Kambole res judicata* because the lawyer for Kambole failed to appeal an earlier decision that they could have used to bar the claims in *Kambole*. The implication here is astonishing: the Court found that the claims in *Kambole* were barred because of a case that the Court never decided but wished it had. To sum up, *Kambole* was an all-around judicial disaster. It does not withstand the most superficial scrutiny.

3 THE AFRICAN COURT'S TURN: FOURTEEN JUDGMENTS AGAINST TANZANIA ON THE MANDATORY DEATH PENALTY AND HANGING

Although the Tanzanian Court of Appeal upheld the mandatory death penalty, the African Court has repeatedly reinforced its decision in *Ally Rajabu* of finding the sentence a violation of the African Charter. Since *Ally Rajabu* was decided in 2019, the African Court has issued fourteen judgments confirming that the mandatory death penalty violates article 4 of the African Charter (right to life) and hanging as a method of execution violates article 5 (right to dignity). This does not include several additional decisions, some of which are cited below, in which the Court mentioned the *Ally Rajabu* holding in *dicta*. Of the fourteen decisions, most raise other claims as well, usually alleged violations of other components of the right to a fair trial. However, they all contain the core claims of *Ally Rajabu*: first, that the mandatory death penalty arbitrarily fails to separate the worst murders from the rest and denies defendants a sentencing hearing; and additionally, that hanging as a method of execution causes excessive pain, and, therefore, constitutes cruel and degrading punishment.

25 This decision is apparently unreported and cannot be found. See *Tete Mwamtenga Kafunja & 2 Ors v Republic*, CAT Criminal Appeal No. 102 of 2005, cited in *Republic v Malimi Elisha*, Case 164/2015 (Tanzania High Court, 8 June 2020).

26 'Former death row inmate shares story of pain, horror and miracles' (9 October 2022) *Daily News*, https://dailynews.co.tz/former-death-row-inmate-shares-story-of-pain-horror-and-miracles.

27 *Kambole* (CA) (n 10) at 31.

One common approach in these decisions is the reliance on international and comparative law, for the purpose of showing a growing consensus to move away from the mandatory death penalty in favor of a capital sentencing system with guided discretion. In *Amini Juma v Tanzania*, the Court explained that the arbitrariness of the mandatory death penalty and the denial of fair trial rights were 'affirmed by relevant international case law,' citing the Judicial Committee of the Privy Council in cases from the Commonwealth Caribbean.[28] The Court went further to observe that 'domestic courts in some African countries have adopted the same interpretation in finding the mandatory imposition of the death penalty arbitrary and in violation of due process', specifically quoting the Supreme Court of Kenya at length.[29] In a later case, *Chrizant John v Tanzania*, the African Court made reference to the decisions and resolutions of the United Nations Human Rights Committee and statements from the UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions.[30] The comparative aspects became more sophisticated over time, going beyond a counting of heads of other jurisdictions. In a 2024 case, *Nzigiyimana Zabron v Tanzania*, the African Court cited decisions of the Inter-American Court of Human Rights, Constitutional Courts of Malawi and South Africa, Supreme Court of Uganda, and Eastern Caribbean Court of Appeal to make comparative reference at each stage of its analysis.[31]

Most of the discussions on the mandatory death penalty and hanging in these fourteen cases were brief and nearly boilerplate copies of each other. In several cases, the Court even raised the issues of mandatory capital sentencing and hanging *sua sponte*. For instance, in *Kachukura Nshekanabo Kakobeka v Tanzania*, the Court observed as follows: 'While the Applicant did not make any submissions on the right to dignity, the Court notes from the record that the Applicant was sentenced to death by hanging.'[32] It, therefore, found a violation of article 5 of the African Charter. This also occurred in *Deogratius Nicholaus Jeshi v Tanzania*, where the applicant did not make any

28 *Amini Juma v Tanzania*, Application 24/2016, African Court of Human and Peoples' Rights (30 September 2021) at 30, citing *Hughes v Queen*, [2002] UKPC 12 (appeal arising from Saint Lucia).

29 *Amini Juma* (n 28) at 31, citing *Muruatetu v Republic*, Petitions 15/2015 and 16/2015, Kenya Supreme Court, 14 December 2017.

30 *Chrizant John v Tanzania*, Application 49/2016, African Court of Human and Peoples' Rights (7 November 2023) para 129.

31 *Nzigiyimana Zabron v Tanzania*, Application 51/2016, African Court of Human and Peoples' Rights (4 June 2024) paras 138-142, citing, inter alia, *Attorney General v Kigula*, [2009] 2 EALR 1 (Uganda SC); *State v Makwanyane*, 1995 (3) S.A. 391 (CC); *Mitcham v Director of Public Prosecutions*, Crim App Nos 10/2002, 11/2002, 12/2002 (3 November 2003) (E Carib Ct App); *Kafantayeni v Attorney General*, [2007] MWHC 1; *Boyce v Barbados*, Inter-Am Ct HR (ser C) No 1969 (20 November 2007). This analysis was substantially identical to another decision dated the same day and raising the same claims, *Dominick Damian v Tanzania*, Application 48/2016, African Court of Human and Peoples' Rights (4 June 2024).

32 *Kachukura Nshekanabo Kakobeka v Tanzania*, Application 29/2016, African Court of Human and Peoples' Rights (4 December 2023) para 79.

submissions on either the mandatory death penalty or hanging. Again, the Court found violations of articles 4 and 5.[33]

Occasionally in these decisions, the African Court elaborated on its reasoning. In *Romward William v Tanzania*, the Court reiterated that the mandatory death penalty was an arbitrary deprivation of life under article 4 but added an extensive analysis that sentencing a defendant to death without consideration of mitigating factors caused 'psychological and emotional distress which constitute[d] a violation of his right to dignity'.[34] Even more importantly, the African Court extended *Ally Rajabu* to apply to prisoners who were originally sentenced to death but had their sentences subsequently commuted to life imprisonment. In *Nzigiyimana Zabron*, the Court rejected the state's contention that the commutation rectified the defect of the original mandatory death sentence. The Court explained that the problem with a mandatory death sentence was not the sentence itself but the lack of opportunity for a defendant to submit evidence in mitigation, which was not satisfied by a commutation to life.[35]

In the fourteen 'post-*Rajabu*' decisions finding violations against Tanzania, the African Court took care not to cast doubt on the lawfulness of the death penalty per se, but rather only collateral aspects of it. In *Ibrahim Yusuf Calist Bonge & Others v Tanzania*, the Court observed both 'global trends' and 'continent-wide developments' that have resulted in progressive abolition of the death penalty. The Court explained that the death penalty 'should, exceptionally, be reserved only for the most heinous of offences committed in seriously aggravating circumstances', but added that the circumstances in which the death penalty is appropriate 'must be left to domestic courts on a case-by-case basis'.[36] This statement is consistent with the view that the death penalty is permissible currently in international law, but increasingly subject to constraint and with a view toward long-term abolition. Conceptually, this would not prevent the Court from taking a stronger position against the death penalty in a future case. Indeed, this line of jurisprudence contains nuggets that eventually could be useful in a frontal assault on the death penalty per se. One example is this statement tying together the human dignity arguments against the mandatory death penalty, hanging, and conditions of death row into a single analysis:[37]

> The Court observes that the concept of human dignity is of profound significance in the realm of individual rights. It serves as an essential foundation upon which the edifice of human rights is constructed. The right to dignity captures the very essence of the inherent worth and value that resides within every individual, irrespective of their circumstances,

33 *Deogratius Nicholaus Jeshi v Tanzania*, Application 17/2016, African Court of Human and Peoples' Rights (13 February 2024).

34 *Romward William v Tanzania*, Application 30/2016, African Court of Human and Peoples' Rights (13 February 2024).

35 *Nzigiyimana Zabron* (n 31) paras 144-146.

36 *Ibrahim Yusuf Calist Bonge & Ors v Tanzania*, Application 36/2016, African Court of Human and Peoples' Rights (4 December 2023).

37 *Romward William* (n 34) paras 69-71.

> background, or choices. At its core, it embodies and upholds the principle of respect for the intrinsic humanity of each person and forms the bedrock of what it means to be truly human. It is in this sense that Article 5 absolutely prohibits all forms of treatment that undermines the inherent dignity of an individual.
>
> The Court recalls its judgment that the time spent awaiting execution can distress persons sentenced to death particularly when the duration is long. The Court emphasises that detention on death row is inherently inhuman and encroaches upon human dignity. This Court reiterates that the distress associated with detention awaiting execution of the death sentence stems from the natural fear of death and the uncertainty that a condemned prisoner has to live with. In such a case, States such as the Respondent are encouraged to determine appropriate sentences that remove the constant possibility of the enforcement of the death penalty for persons originally sentenced to death.
>
> The Court notes, in the present case, that the situation is exacerbated by the fact that the Applicant was sentenced to death without consideration of mitigating circumstances including an alternative sentence, as the domestic court's discretion was removed by law, in contravention of the Charter. Given these circumstances, the Applicant invariably suffered psychological and emotional distress which constitutes a violation of his right to dignity.

This decision, in *Romward William*, is notable because it transforms *Ally Rajabu*'s emphasis that the mandatory death penalty violated the right to a fair trial into an analysis centred on human dignity under article 5. This could be a signal for future death penalty challenges that dignity, even more than life, is foundational to the Court's reasoning.

Just as the African Court was careful to distinguish between a challenge to mandatory death penalty or hanging and death penalty per se, it also drew a line between the death penalty and life imprisonment without the possibility of parole. The Court rejected the contention that life was tantamount to death. In *Makungu Misalaba v Tanzania*, the Court found a violation of the right to life and right to dignity due to the mandatory death sentence imposed on the Applicant and delays in executing the death penalty. However, the Court rejected the contention that the commutation of his sentence to life imprisonment without parole was also a violation of the African Charter on the same grounds, noting that nothing in Tanzanian law prevented him from receiving further commutations.[38] According to the Court, 'the imposition of life imprisonment for the most serious offences, on its own, may not necessarily constitute inhuman or degrading treatment, especially where there is a possibility of parole'.[39] The African Court is not closing the door here; hopefully, it will revisit the question of life imprisonment in the future as international legal developments evolve. For instance, the European Court of Human Rights has ruled that the

38 *Makungu Misalaba v Tanzania*, Application 33/2016, African Court on Human and Peoples' Rights (7 November 2023) paras 156, 174-175.

39 *Makungu Misalaba* (n 38) para 173.

possibility of executive clemency does not provide a sufficient possibility of release for an inmate sentenced to life without parole.[40]

4 DISSENTING OPINIONS BY JUSTICES BLAISE TCHIKAYA AND DUMISA BUHLE NTSEBEZA: A MINORITY VIEW THAT THE AFRICAN CHARTER PROHIBITS THE DEATH PENALTY

In *Ally Rajabu* in 2019, Justice Blaise Tchikaya had issued a concurrence that cast doubt on the permissibility of the death penalty altogether under the African Charter.[41] In the fourteen subsequent cases at the African Court concerning section 197 of Tanzania's Penal Code, Justice Tchikaya again issued a series of declarations, concurrences, and dissenting opinions that elaborated on his view that the death penalty was not permissible in international law. In most of these cases, he was joined by Justice Dumisa Buhle Ntsebeza of South Africa. Justice Ntsebeza's view was relatively straightforward. In a series of brief and nearly identical opinions, he explained that the death penalty was inherently cruel, degrading, and inhuman, with too great a potential for error and discriminatory application.[42]

The declarations and dissenting opinions by Justice Tchikaya were much more comprehensive and provide a far-reaching roadmap for a future challenge to the death penalty. In his declaration in *Gozbert Henrico v Tanzania*, Justice Tchikaya called the decision of the African Court 'partial' when it 'could have taken this reasoning to its logical conclusion by purely and simply banishing this punishment in all its forms from the African legal order'.[43] He argued that the death penalty had the same defect regardless of whether it was discretionary or mandatory.

Justice Tchikaya issued a consolidated dissenting opinion to the cases of *John Lazaro*, *Makungu Misalaba*, and *Chrizrant John*, which were decided 7 November 2023. He explained that the African Court had 'confined itself to a minimalist approach' and missed an

40 *Hutchinson v United Kingdom*, Application 57592/08, [2016] ECHR 021 (January 2017).

41 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Concurring Opinion of Blaise Tchikaya (28 November 2019).

42 *Crospery Gabriel & Ernest Mutakyawa v Tanzania*, Application 50/2016, African Court on Human and Peoples' Rights, Declaration of Justice Dumisa Buhle Ntsebeza (13 February 2024); *Nzigiyimana Zabron* (n 30), Declaration of Justice Dumisa Buhle Ntsebeza (4 June 2024); *Romward William* (n 34), Declaration of Justice Dumisa Buhle Ntsebeza (13 February 2024); *Kachukura Nshekanabo Kakobeka* (n 31), Declaration of Justice Dumisa Buhle Ntsebeza (4 December 2023 2024); *Ibrahim Yusuf Calist Bonge & Ors* (n 36), Declaration of Justice Dumisa Buhle Ntsebeza (4 December 2023).

43 *Gozbert Henrico v Tanzania*, Application 56/2016, African Court of Human and Peoples' Rights, Declaration of Justice Blaise Tchikaya (10 January 2022) at para 3.

opportunity to confirm a solidifying consensus in international law prohibiting the death penalty.[44] And again, on 13 February 2024, he wrote a consolidated dissenting opinion in the cases of *Romward William*, *Deogratius Nicholaus Jeshi*, and *Crospery Gabriel and Ernest Mutakyawa*. The purpose of his dissenting opinion, he wrote, 'is to denounce, first, the inadequacy and inhumanity of the death penalty and second, the wait-and-see attitude of this Court'. He observed that 'the death penalty is incompatible with the right to life, and the sanctity and protection thereof,' and described the Court's position validating the lawfulness of the death penalty in principle as 'paradoxical'.[45] He made a similar argument against the Court's limited holding on hanging when he held that 'all methods of enforcing the death penalty, without exception, are cruel: the bullet to the head, stoning, the electric chair, lethal injection, asphyxiation, and hanging'.[46] His consolidated dissenting opinion on 4 December 2023 in the cases of *Ibrahim Yusuf Calist Bonge* and *Kachukura Nshekanabo Kakobeka* was similar, citing, among other sources, a 2022 decision of the UN Committee Against Torture finding that hanging in Botswana was inhumane.[47]

In the cases decided on 4 June 2024, *Nzigiyimana Zabron* and *Dominick Damian*, Justice Tchikaya dissented again. These cases involved significant questions of delay on death row in addition to the usual mandatory death penalty and hanging challenges. Justice Tchikaya reiterated his view that the African Court was taking 'positions which tend not towards abolishing the death penalty but rather towards relativising' it, as if to say that international law and domestic law existed in separate spheres and domestic legal systems could ignore international law.[48] It is worth mentioning that this argument has appeared in the academic literature on the death penalty as well. On this theory, striking down the most objectionable aspects of the death penalty in incremental challenges makes death penalty abolition harder because it validates the death penalty per se and pushes courts to confirm the punishment's lawfulness.[49]

Notably, Justice Tchikaya dissented from other cases filed against Tanzania involving the death penalty even when the African Court did

44 *John Lazaro v Tanzania*, Application 3/2016, *Makungu Misalaba v Tanzania*, Application 33/2016, *Chrizant John v Tanzania*, Application 49/2016, Consolidated Declaration of Justice Blaise Tchikaya (7 November 2023).

45 *Romward William v Tanzania*, Application 30/2016, *Deogratius Nicholaus Jeshi*, Application 17/2016, *Crospery Gabriel and Ernest Mutakyawa*, Application 50/2016, Consolidated Declaration of Justice Blaise Tchikaya (13 February 2024) para 8.

46 *Romward William, Deogratius Nicholaus Jeshi,* and *Crospery Gabriel and Ernest Mutakyawa*, Consolidated Declaration of Justice Tchikaya (n 43) para 18.

47 *Ibrahim Yusuf Calist Bonge v Tanzania*, Application 36/2016, *Kachukura Nshekanabo Kakobeka*, Application 29/2016, Consolidated Declaration of Justice Blaise Tchikaya (4 December 2023).

48 *Nzigiyimana Zabron v Tanzania,* Application 51/2016, *Dominick Damian v Tanzania*, Application 48/2016, Consolidated Declaration of Justice Blaise Tchikaya (4 June 2024) paras 41-42.

49 KA Akers & P Hodgkinson 'A critique of litigation and abolition strategies: a glass half empty' in P Hodgkinson (ed) *Capital punishment: new perspectives* (2013) 29-62 at 40.

not find a Charter violation.[50] In the case of *Igola Iguna v Tanzania*, the Court did not find a violation of the African Charter owing to lack of substantiation of the allegations, but did reiterate with caution 'its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State'.[51] Justice Tchikaya wrote a dissenting opinion to this case, consolidated a dissent to two others decided the same day that did find violations, *Ghati Mwita v Tanzania* and *Marthine Christian Msuguri v Tanzania*. He again deplored the African Court's reluctance to find that the death penalty violates the African Charter. Singling out hanging as an inhumane method of execution suggests that other methods were more humane; similarly, condemning only the length and conditions of confinement on death row 'indirectly validated' the death penalty, which by its very nature involved confinement on death row.[52]

In another case alleging violations of the right to a fair trial, Justices Tchikaya and Ntsebeza took the African Court to task for not finding Charter violations due to the mandatory nature of the death penalty and hanging. This was *Mulokozi Anatory v Tanzania*, decided 5 September 2023. In this case, the Court did not find violations of articles 4 or 5 but mentioned in *dicta* its prior jurisprudence on the mandatory death penalty and hanging.[53] A brief dissenting opinion by Justice Bensaoula Chafika argued that the Court should have found violations of the Charter based on the *Ally Rajabu* criteria.[54] The dissent by Justices Tchikaya and Ntsebeza was more comprehensive. In an opinion steeped in international legal theory, the authors argued generally that the abolition of the death penalty was a peremptory norm in international law and binding even on states that had not ratified the Second Optional Protocol of the International Covenant on Civil and Political Rights.[55]

5 CONCLUSION

The 2019 African Court decision in *Ally Rajabu v Tanzania* confirmed the global trend moving away from the mandatory death penalty and, in a novel holding, reasoned that hanging as a method of execution was

50 In addition to those cited below, see *Thomas Mgira v Tanzania*, Application 3/2019, *Umalo Masso v Tanzania*, Application 31/2016, Consolidated Declaration of Justice Blaise Tchikaya (13 June 2023).

51 *Igola Iguna v Tanzania*, Application 20/2017, African Court of Human and Peoples' Rights (1 December 2022).

52 *Marthine Christian Msuguri v Tanzania*, Application 52/2016, *Ghati Mwita v Tanzania*, Application 12/2019, *Igola Iguna v Tanzania*, Application 20/2017, Consolidated Declaration of Justice Blaise Tchikaya (1 December 2022).

53 *Mulokozo Anatory v Tanzania*, Application 57/2016, African Court of Human and Peoples' Rights (5 September 2023).

54 *Mulokozo Anatory* (n 53), Declaration of Justice Bensaoula Chafika (5 September 2023).

55 *Mulokozo Anatory* (n 53), Declaration of Justices Blaise Tchikaya and Dumisa Buhle Ntsebeza (5 September 2023).

an affront to human dignity. This was the first time the African Court had joined the chorus of international, regional, and domestic court decisions against the mandatory nature of capital punishment. Partly as a result of the decision, Tanzania withdrew from the African Court's individual complaints mechanism, but not before nearly two dozen other complaints from death row inmates were filed at the Court. Domestically, Tanzania refused to comply with *Ally Rajabu* and has so far avoided reconciling the protective terms of Tanzania's Constitution with the widely accepted flaws of a mandatory capital sentencing regime. As noted above, in 1993 the Tanzanian Court of Appeal upheld the country's death penalty statute in a much-criticised case, *Mbushuu v Republic*, which found that the Constitution's expansive right to life was modified by a broad limitations clause that allowed the government to restrict the right if in the 'national interest'. The refusal of the Tanzania Court of Appeal to revisit this holding is overly deferential to a poorly reasoned precedent and out of sync with the trend away from the death penalty in East Africa and the rest of the continent. The 2022 decision in *Kambole v Attorney General* missed an opportunity to read the right to life provision in Tanzania's Constitution consistently with international human rights law. That it did so by misinterpreting the legal concept of *res judicata* to a situation that does not fall within the ordinary understanding of issue or claim preclusion reveals that the Court of Appeal used motivated reasoning to come to its decision.

The African Court has responded to Tanzania's challenge by reinforcing and expanding its earlier decision in *Ally Rajabu*. Including *Ally Rajabu*, the African Court has now found Tanzania's mandatory death penalty law in violation of articles 4 and 5 of the African Charter in at least fifteen separate cases. Although many of these are copycat challenges, they elaborated on the reasoning in *Ally Rajabu* and, to the extent that they develop the African Court's human dignity jurisprudence, may provide a roadmap for a future challenge to the death penalty per se under the African Charter. Although we might expect that Tanzania will continue to resist the global trend toward death penalty abolition, recent experience from other countries in Sub-Saharan Africa shows that a political consensus in favor of capital punishment can quickly change. Possibly, the African Court's decisions will increase pressure on Tanzania to recognise the conflict between its domestic law and the African Charter on the issue of the death penalty.

Finally, to make a normative claim, Tanzania *should* abolish the death penalty. Its Constitution contains an unqualified right to life, which as a foundational right should be interpreted broadly. The country has not carried out an execution in nearly thirty years and likely never will again. The harms of death row generally, both physical and non-physical, are widely documented, as is the risk of wrongful convictions. By inevitably creating a large death row that must be controlled through periodic commutations of sentence, the mandatory death penalty exaggerates these harms and intolerably increases the risk of error. Luckily, the African Court has recognised these concerns and amplified them.

Hazardous waste and the right to a healthy environment: reflections on the *LIDHO* decision of the African Court on Human and Peoples' Rights

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ABSTRACT: The illicit transboundary movement of hazardous waste remains a serious global challenge and Africa remains a prime destination for hazardous waste generated in the Global North. This situation obtains despite the existence of international and regional legal frameworks regulating the transboundary movement of hazardous waste. Hazardous waste poses a serious threat to the enjoyment of human rights and specifically, the right to a healthy environment. Although not captured in a global treaty, the right to a healthy environment is provided for in the African Charter on Human and Peoples' Rights, the domestic constitutions of numerous African states and it was also recognised by the United Nations General Assembly in 2022. This case commentary interrogates the nexus between the illicit transboundary movement of hazardous waste and the enjoyment of the right to a healthy environment in the African context, focusing on the case of *Ligue Ivoirienne des Droits de l'Homme and Others v Côte d'Ivoire (LIDHO* case), decided by the African Court on Human and Peoples' Rights (African Court). Prior to the *LIDHO* decision neither the African Court nor the African Commission had considered the right to a healthy environment in the context of harm caused by hazardous waste. Taking a doctrinal legal approach, this case commentary considers how this decision contributes to the jurisprudential growth of the right to a healthy environment and the obligations of states and private entities in upholding this right, especially in the face of harm caused by hazardous waste. This commentary concludes that the *LIDHO* decision significantly expanded the jurisprudence on the right to a healthy environment inter alia by laying the foundation for extending the obligation to respect the right to a healthy environment to non-state entities and ordering far-reaching national legal and regulatory reforms.

TITRE ET RÉSUMÉ EN FRANÇAIS

Les déchets dangereux et le droit à un environnement sain : analyse de l'arrêt lidho de la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: Les mouvements transfrontaliers illicites de déchets dangereux représentent une problématique mondiale persistante, l'Afrique demeurant une destination privilégiée pour les déchets dangereux en provenance des pays du Nord. Cette situation perdure malgré l'existence de cadres juridiques internationaux et régionaux régissant ces flux. Les déchets dangereux constituent une menace significative pour la jouissance des droits de l'homme, en particulier du droit à un environnement sain. Bien que ce droit ne soit pas explicitement inscrit dans un traité international, il figure dans la Charte africaine des droits de l'homme et des peuples, dans les constitutions de nombreux États africains, et a été reconnu par l'Assemblée générale des Nations unies en 2022. Ce commentaire d'arrêt explore le lien entre les mouvements

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transfrontaliers illicites de déchets dangereux et l'effectivité du droit à un environnement sain dans le contexte africain, en s'appuyant sur l'arrêt rendu dans l'affaire *Ligue Ivoirienne des Droits de l'Homme et autres c. Côte d'Ivoire* (affaire *LIDHO*) par la Cour africaine des droits de l'homme et des peuples. Avant cet arrêt, ni la Cour africaine ni la Commission africaine des droits de l'homme et des peuples n'avaient abordé ce droit sous l'angle des dommages causés par les déchets dangereux. En adoptant une approche du positivisme juridique, ce commentaire examine comment cette décision enrichit la jurisprudence sur le droit à un environnement sain, tout en précisant les obligations des États et des entités privées. L'arrêt *LIDHO* se distingue par son rôle pionnier dans l'élargissement de l'interprétation de ce droit, notamment en envisageant son application aux entités non étatiques. De plus, il ordonne des réformes juridiques et réglementaires d'envergure aux niveaux nationaux, consolidant ainsi le rôle de l'Afrique dans la lutte contre les préjudices environnementaux causés par les déchets dangereux. Cette analyse conclut que l'arrêt *LIDHO* constitue une avancée majeure dans le développement jurisprudentiel du droit à un environnement sain, renforçant tant la responsabilité des États que celle des acteurs privés.

KEY WORDS: hazardous waste; right to a healthy environment; African Charter on Human and Peoples' Rights; Côte d'Ivoire; *LIDHO* case; African Court on Human and Peoples' Rights

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1 INTRODUCTION

The transboundary movement of hazardous waste is well-regulated.[1] Historically, hazardous waste was generated in the Global North and then shipped to the Global South for eventual disposal.[2] Arrangements between states and transnational corporations governed waste

1 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 22 March 1989, reprinted in 28 I.L.M. 649 (1989) (Basel Convention); Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes (1991) 30 ILM 773 (Bamako Convention).

2 P-M Dupuy & JE Viñuales *International environmental law* (2018) 273. The Global North is hereinafter referred to as 'the North' and the Global South as 'the South'.

shipments.[3] The adoption of international legal instruments streamlined regulation of the transboundary movement of hazardous waste but has not eradicated the illicit movement of hazardous waste.[4] The tracking of the exact amount of hazardous waste that is illicitly shipped to developing countries also remains a challenge as the movements are conducted furtively and go unreported.[5] This state of affairs has been accentuated by the high cost of sound waste disposal in the North and weak laws in the South.[6] Countries in the South where hazardous waste is usually shipped often lack capacity to dispose of it in an environmentally sound manner. As a result, such waste poses a significant risk to human health and the environment in those jurisdictions.[7] By extension, damage to the environment and human health has direct negative implications for the enjoyment of human rights.[8] Hence, the relevance of the discourse on the right to a healthy environment. Although on the global stage, the right to a healthy environment only finds expression in 'soft law' instruments, in Africa the right is entrenched and justiciable as such under the African Charter.[9]

The illicit transboundary movement of hazardous waste infringes the right to a healthy environment. Given the recurrence of incidents of

3 United Nations Human Rights Council, Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Okechukwu Ibeanu, UN Doc. A/HRC/9/22 (13 August 2008) para 16.

4 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 3) para 15. See also, CA Anyinam 'Transboundary movements of hazardous wastes: the case of toxic waste dumping in Africa' (1991) 21(4) *International Journal of Health Services* 759-777.

5 Ieva Rucevska, Christian Nellemann, Nancy Isarin, Wanhua Yang, Ning Liu, Keili Yu, Siv Sandnæs, Katie Olley, Howard McCann, Leila Devia, Lieselot Bisschop, Denise Soesilo, Tina Schoolmeester, Rune Henriksen, Rannveig Nilsen, 2015. Waste Crime – Waste Risks: Gaps in Meeting the Global Waste Challenge. A UNEP Rapid Response Assessment. https://wedocs.unep.org/bitstream/handle/20.500.11822/9648/Waste_crime_RRA.pdf (accessed 19 December 2023).

6 Dupuy & Viñuales (n 2). See also Kaustubh Thapa & others 'Transboundary movement of waste review: from binary towards a contextual framing' (2023) 41(1) *Waste Management and Research* 52-67.

7 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 3) para 16.

8 Case Concerning the Gabčíkovo-Nagymaros Project [Hungary/Slovakia] 25 September 1997 (Judge Weeramantry). Retrieved on November 24, 2023, from https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf

9 See; UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022) https://digitallibrary.un.org/record/3983329/files/A_RES_76_300-EN.pdf?ln=en accessed on 8 October 2024; UNGA, HRC, A/HRC/RES/48/13 (18 October 2021). https://undocs.org/A/HRC/RES/48/13 and 'Declaration of the United Nations Conference on the Human Environment', Stockholm, UN Doc. A/ CONF 48/14/Rev.1 (Stockholm Declaration), principle 1. Cf. the African Charter on Human and Peoples' rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986) (African Charter) art 24.

dumping of hazardous waste from the North in African states, the *Ligue Ivoirienne des Droits de l'Homme and Others v Republic of Côte d'Ivoire (LIDHO* case)[10] presented a seminal opportunity for the African Court on Human and Peoples' Rights to pronounce itself on the effect of the illicit transboundary movement of hazardous waste on the right to a healthy environment and other rights, in general. As will be demonstrated herein, the Court broke new ground in its interpretation of the right to a healthy environment and the attendant obligations.

The paper is divided into six parts with the introduction as part 1. Part 2 discusses the concept of hazardous waste through a theoretical framework. This part also frames toxic waste dumping as a human rights issue. Part 3 gives a comparative analysis of the international and regional (African) legal regime on hazardous waste. Part 4 delves into a discussion on the right to a healthy environment giving an analysis of the procedural and substantive dimensions of the right and its status under international human rights law, regionally (Africa), and nationally (focusing on Côte d'Ivoire). Part 5 focuses on the decision in the *LIDHO* case to evaluate and expound on how the illicit transboundary movement of hazardous waste impacts on the right to a healthy environment through the lens of the African Court. This part also evaluates the implications this decision has for further substantive and normative development of the right to a healthy environment, as well as the corresponding obligations of the state and private actors in the event of environmental harm caused by the dumping of hazardous waste. Part 6 is the conclusion.

2 THEORETICAL FRAMEWORK

2.1 Hazardous waste and 'the toxic trade'

The term 'hazardous waste' is defined under both the Basel Convention and the Bamako Convention.[11] The Bamako Convention's definition is however more elaborate and to that extent, preferable to that of the Basel Convention. According to the Bamako Convention, hazardous wastes include not only wastes listed under Annex I thereof and wastes defined as hazardous under domestic legislation of the state of export, import or transit, but also wastes with the characteristics listed under Annex II of the Convention; as well as hazardous substances which have been banned, cancelled or refused registration or voluntarily

10 Application 041/2016. The acronym 'ACtHPR' is used interchangeably in this paper to refer to the African Court on Human and Peoples' Rights.

11 Art 1(1)(a) & (b) of the Basel Convention provides: 'The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention:

(a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.' See also arts 2(1)(a)-(d) of the Bamako Convention.'

withdrawn from registration in the country of manufacture for *human health and environmental reasons*.[12]

Although the 'toxic trade' predates both the Basel and Bamako Conventions, it should be (legally) understood as trade in hazardous waste as defined thereunder. The inception of the international toxic waste trade is traceable to the late 1970s and grew through the 1980s onwards.[13]

Some scholars argue that international trade in hazardous waste among developed nations with the technical and technological know-how on handling such waste is a legitimate business venture.[14] However, the same cannot be said where hazardous waste is 'traded' or dumped in African countries which tend to lack the facilities to dispose of such waste in an environmentally sound manner.[15] The international trade in toxic or hazardous wastes in so far as it relates to and/or results into dumping of those wastes in (West) African countries has been presented as a question of morality.[16] However, I argue below, toxic waste is not merely a moral but also a human rights issue.

2.2 Toxic waste dumping: a human rights issue?

The nexus between hazardous wastes and their transboundary movement, and harm to human health and the environment has been acknowledged already in international and regional legal instruments.[17]

Although the dumping of hazardous waste in Africa (developing countries) had started as early as the 1970s, it only received much public attention in the 1980s.[18] Toxic waste dumping has been equated to *environmental racism*[19] and decried as a form of *toxic waste colonialism*.[20] According to Pratt, toxic waste colonialism occurs where 'underdeveloped states are used as inexpensive alternatives for the

12 As above (emphasis added).

13 J Clapp 'The toxic waste trade with less-industrialised countries: economic linkages and political alliances' (1994) 15(3) *Third World Quarterly* 505-18, 506.

14 SO Atteh 'The political economy of environmental degradation: the dumping of toxic wastes in West Africa' (1993) 20(1/2) *The African Review: A Journal of African Politics, Development and International Affairs* 19–38, 25.

15 Atteh (n 14) 20. This is further expounded on in Part 3.

16 As above, 19.

17 See Basel Convention (n 1) preamble, paragraph 1, the Bamako Convention (n 1), preamble and art 4(3(t) and the Commission on Human Rights, Resolution 1995/81 on 'the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights'

18 See KI Ajibo 'Transboundary hazardous wastes and environmental justice: implications for economically developing countries' (2016) 18(4) *Environmental Law Review* 267-283; Clapp (n 13).

19 P Mohai, D Pellow & JT Roberts 'Environmental justice' (2009) 34 *Annual Review Environment and Resources* 405–30.

20 LA Pratt 'Decreasing dirty dumping? a reevaluation of toxic waste colonialism and the global management of transboundary hazardous waste' (2011) 35 (2) *William & Mary Environmental Law & Policy Rev*iew 581

export or disposal of hazardous waste pollution by developed states'.[21] However, it is important to note that present day 'toxic waste colonialism' is predominantly perpetrated by multinational corporations from the North rather than states in concert with some corrupt officials and individual or corporate entities in the country where the waste is to be dumped.[22]

Toxic waste dumping negatively infringes the collective and individual human rights and fundamental freedoms of the residents of the areas where the waste is dumped. Hazardous waste invariably degrades and pollutes the environment of the places where it is dumped in addition to causing health problems and even death to the people in the affected areas.[23] Deductively, it is not difficult to see the direct correlation of hazardous waste and its contravention of a flurry of rights such as the right to a clean, healthy and sustainable environment, the right to life and the right to health.[24]

2.3 Hazardous waste and environmental justice

It is estimated that about 90 per cent of hazardous waste is generated in the North and much of this ends up in the South in Africa, Asia, and Latin America for elimination or disposal.[25] Previously, the hazardous waste 'trade' was justified on the premise that the Countries in the South where the waste was being sent had the spatial capacity to accommodate the waste and that they benefited economically.[26] However, the absurdity of this argument was that it ignored the fact that these countries lacked the capacity to handle this waste in an

21 Pratt (n 20) 583.

22 This is clearly demonstrated by the *LIDHO* case under discussion in this paper. The main culprit was a multinational corporation and not a state.

23 For an illustration of this assertion see, 'Ivory Coast: Victory at the African Court for victims of the TRAFIGURA toxic waste dump' (FIDH, 12 October 2023) https://www.fidh.org/en/issues/business-human-rights-environment/business-and-human-rights/ivory-coast-victory-at-the-african-court-for-victims-of-the-trafigura (accessed 9 October 2024).

24 These human rights are already recognised internationally under the art 6 (right to life) of International Covenant on Civil and Political Rights adopted on 16 December 1966 (ICCPR) and art 12 (right to health) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966 and UNGA resolution on the right to a healthy environment (n 9). Regionally, art 24 (right to a general satisfactory environment), art 4 (right to life), art 16 (right to health) of the African Charter on Human and Peoples' Rights, 21 ILM 58 (1982) (African Charter), adopted on 1 June 1981.

25 KI Ajibo 'Transboundary hazardous wastes and environmental justice: implications for economically developing countries' (2016) 18(4) *Environmental Law Review* 267-283.

26 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 7). According to the Special Rapporteur: 'The information on the contracts showed that transnational corporations based in developed countries were selling toxic wastes and hazardous products to states in the South, in particular in Africa, where small payments could secure ample land on which to dump such wastes.'

environmentally sound manner.[27] Nonetheless, this economic argument was entrenched and found support in the high echelons of power in international institutions like the World Bank.[28] Sadly, this cynicism has continued to pervade the discussions on the transboundary movement of hazardous waste from the North to the South.[29]

The perception of hazardous waste as an environmental (in)justice and legal problem and not merely an economic venture is traceable to the period of the environmental justice movement which emerged from the times of the Civil Rights Movement in the US.[30] It sprang up in response to the discriminatory practice at the time, of dumping hazardous waste in landfills near the homes of ethnic minorities.[31] A practice that came to be known as environmental racism.[32] A cardinal precept of environmental justice is that all people are equally entitled to the right to live in a healthy environment and that environmental harm should be shared equitably among social groups.[33] Fundamentally, the concept of environmental justice 'is premised on the right to a healthy and safe environment, equitable share of resources, the right not to suffer unfairly from environmental policies, laws and regulations including a reasonable access to justice, information and participation in decision making'.[34]

Besides the evolution of the environmental justice movement, the adoption of stricter environmental legal and regulatory regimes in the North and the high cost of disposing of waste in an environmentally sound manner incentivised corporations to look for dumping sites in the South with less stringent laws.[35] Some scholars argue that the treatment of the problem of the transboundary movement of hazardous waste as binary, focusing on the Global North (rich countries) dumping waste in the Global South (poor countries), is a generalised and simplistic approach.[36] However, the statistics suggest otherwise and overwhelmingly point to the fact that much of the toxic waste dumped in the South and particularly Africa originates from the Global North.[37] The several incidents of hazardous waste being dumped in countries in

27 As above.

28 JA Swaney 'So what's wrong with dumping on Africa?' (1994) 28(2) *Journal of Economic Issues* 367–377. The logic cited was that the Global South poor countries would obtain economic benefits since the rich countries were willing to pay to export pollution.

29 Ajibo (n 25), generally. Thapa and others (n 35) generally.

30 R Walters & MA Fuentes Loureiro 'Waste crime and the global transference of hazardous substances: A southern green perspective' (2020) 28 *Critical Criminology* 463-480, 464.

31 As above.

32 As above.

33 Ajibo (n 25) 269.

34 As above.

35 K Thapa & others 'Transboundary movement of waste review: from binary towards a contextual framing' (2023) 41(1) *Waste Management & Research* 52-67, 55.

36 As above, 61.

37 Ajibo (n 25).

the South from the North are self-evident.[38] The Koko dumping incident in Nigeria is one such incident and it catapulted the issue of dumping of hazardous waste in Africa to global publicity in the 1980s and highlighted the need for appropriate regulation.[39]

3 REGULATION OF HAZARDOUS WASTE AND ITS TRANSBOUNDARY MOVEMENTS IN AFRICA

Whereas there might be other international environmental agreements (IEAs) potentially applicable to the transboundary movements of hazardous waste in Africa, this paper limits its discussion to the Basel Convention because of its overarching applicability to the subject of hazardous waste and its fairly similar (albeit weaker) provisions to those of the Bamako Convention.[40] Regionally, the discussion will be centred around the Bamako Convention.

3.1 The Basel Convention: a historical perspective

In the 1980s Africa was fast becoming a dumpsite for hazardous waste from industrialised nations.[41] To address this illicit transboundary movement and dumping of hazardous waste from the North and in effect protect the South which had weak legal and regulatory frameworks, the Basel Convention was adopted.[42] The Basel Convention was adopted as an international legal framework to tackle the problem of dumping hazardous waste from the Organisation for Economic Co-operation and Development (OECD) countries to non-OECD countries.[43] However, preceding the adoption of the Basel Convention, the United Nations Environment Programme (UNEP) had earlier in 1981 already highlighted the 'Transport, handling and disposal of toxic and dangerous wastes' as one of the three areas that required global action in the form of guidelines, principles, or agreements.[44] Furthermore, after the first Montevideo Programme but

38 Thapa, and others (n 35) 56. See also, L Kone, 'The Illicit Trade of Toxic Waste in Africa: The Human Rights Implications of the New Toxic Colonialism' (2014), https://ssrn.com/abstract=2474629 (accessed 19 December 2023). Arguably, these incidents make the concept of environmental justice more relevant to the toxic waste dumping in Africa.

39 Ajibo (n 25) 271.

40 See foot note 67 below.

41 S Matemilola, O Fadeyi 'Bamako Convention' in SO Idowu and others (eds) *Encyclopedia of sustainable management* (2020) 1.

42 The Basel Convention (n 1).

43 Thapa (n 35) 52.

44 United Nations Environment Programme, Montevideo Programme for the Development and Periodic Review of Environmental Law I, Decision 10/21 of the Governing Council of UNEP, 31 May 1982. http://wedocs.unep.org/bitstream/handle/20.500.11822/20587/Montevideo-Programme-I.pdf?sequence=1&isAllowed=y (accessed 19 December 2023).

before the adoption of the Basel Convention, the UNEP governing council adopted the Cairo Guidelines in 1987 to serve as a point of reference for states in the process of developing policies for the environmentally sound management of hazardous wastes.[45] The Basel Convention was therefore predicated on these earlier developments.

The Basel Convention is hailed for having garnered international consensus to regulate the transboundary movement of hazardous waste.[46] It has provided a foundation for subsequent international, regional, and national legal instruments, guidelines, and protocols adopted on the subject of hazardous waste.[47] It is seen as the global regulatory yardstick for the international transboundary movement of hazardous waste.[48] Although praised for its spearheading role in the regulation of hazardous waste, the Basel Convention can be equally castigated for the apparent inadequacy in its definition of the term 'waste'. The Convention defines 'wastes' as 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'.[49]

Without a clear definition of waste, policy and regulatory gaps are likely to arise since waste might mean different things to different people in different countries with different socio-cultural, political, and economic connotations.[50] For instance, what might be waste in one country, might only be second-hand goods in another.[51] However, although this criticism of the Basel Convention might hold some truth, the Convention sets clear parameters of what constitutes 'hazardous waste' which is the primary subject of the discourse in this commentary.

The Basel Convention adopts what is called the *list technique* or *approach*. It lists the various substances under Annexes. It goes on to distinguish 'hazardous waste' from 'other waste' (Annex II).[52] Hazardous waste is that which belongs to the category in Annex I unless it lacks any of the features in Annex III and it also includes waste designated as hazardous under domestic legislation of the state of export, import, or transit.[53] As for 'other waste' is that which falls under the category listed in Annex II.[54] Further clarification on the terms

45 Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes: Decision 14/30 of the Governing Council of UNEP of 17 June 1987.

46 AA Agbor 'The ineffectiveness and inadequacies of international instruments in combatting and ending the transboundary movement of hazardous wastes and environmental degradation in Africa' (2016) 9 *African Journal of Legal Studies* 235-267, 239.

47 As above.

48 Walters & Fuentes Loureiro (n 30) 467.

49 Basel Convention (n 1) art 2(1).

50 Thapa (n 35) 53.

51 As above.

52 Basel Convention (n 1) art 1(1) & (2).

53 Art 1(1)(a) & (b).

54 Art 1(2).

'hazardous waste' and 'other waste' was attained at the 1998 Conference of the Parties with the adoption of Annexes VIII and IX.[55] Annex VIII contains waste qualified as hazardous under article 1(1)(a) of the Convention and Annex IX lists waste not deemed hazardous and thus outside the Convention's purview unless it contains any of the substances listed in Annex I, in a quantity sufficient to exhibit any of the hazardous characteristics under Annex III. Therefore, by studying the different Annexes, one can ascertain which substances are 'hazardous waste'.

The following precepts are identifiable as the cardinal building blocks of the Basel Convention namely; the reduction of the generation of hazardous waste to a minimum;[56] the environmentally sound disposal of waste as close to the source of generation as possible;[57] absolute prohibition of exports of hazardous waste to non-parties[58] and to other parties in certain cases i.e. to states which have prohibited imports[59] or lack capacity for appropriate disposal, or from an OECD state to a non-OECD state;[60] compliance with the prior informed consent (PIC) procedure established under the Convention when exporting hazardous waste;[61] reimport of hazardous waste.[62]

The Basel Convention obliges parties to designate relevant competent authorities for the purposes of implementing the provisions of the treaty.[63] These competent authorities are very instrumental to the PIC procedure under the Convention. It is the competent authorities of the respective states of import and export of hazardous waste that have to share correspondences and information before a waste consignment is approved for movement, when the competent authority of the state of export or the intending exporter has to notify the competent authority of the state of import about the intended waste consignment.[64] The notification has to be accompanied by all the relevant information and documentation concerning the waste consignment. It is after the competent authority of the state of import gives a green light to the consignment that the competent authority can then approve the intended export.[65]

This PIC procedure established under the Basel Convention ensures transparency and allows developing countries the opportunity to scrutinise hazardous waste before it can be shipped to their

55 Dupuy and Viñuales (n 2) 275.
56 Basel Convention (n 1) art 4(2)(a).
57 Art 4(2)(b)-(c).
58 Art 4(5).
59 Art 4(1)(b).
60 Art 4(2)(e) & (g).
61 Art 6.
62 Art 8.
63 Art 5(1).
64 Art 6(1).
65 Art 6(3)(a).

territories. Non-compliance with the PIC procedure has consequences.[66] Although beyond the scope of this essay, it is apt to note that hazardous chemicals may qualify as hazardous waste if they meet the elements listed under Annex I and Annex III of the Basel Convention. Hence, there's now synergy between the Basel Convention and the international legal regimes on hazardous chemicals.[67] In fact, the Basel Convention, the Rotterdam PIC Convention, and the Stockholm POPs Convention now have a single Secretariat serving the three conventions.[68]

3.2 The Bamako Convention: a comparison with the Basel Convention

As a flexibility tool, the Basel Convention allows for the adoption of bilateral, multilateral and regional agreements on the transboundary movement of waste provided such agreements do not stipulate less stringent measures.[69] In that case, the Basel Convention becomes the *lex generalis* while the other Agreement becomes the *lex specialis*.[70] This is what gave legal premise to the adoption of the Bamako Convention[71] which was intended to ban the import of hazardous waste into Africa. At the time, most African states felt that the Basel Convention did not go far enough, its primary objective being regulation rather than outright prohibition and reduction of generation rather than elimination of the transboundary movement of hazardous waste.[72] Although it gave discretion to states to adopt preventive and punitive measures against the illegal trafficking of hazardous waste,[73] the Basel Convention was chided for the lack of a robust enforcement

66 Art 9(1). Hazardous waste shipped in violation of the PIC procedure is deemed illegal traffic and may attract repercussions including but not limited to the reimport of the waste. However, the provisions of art 9 are watered down by the fact that implementation under art 9(5) is left to national authorities through legislation. This might lead to large disparities in implementation between countries with robust national legal frameworks and those with weak laws.

67 https://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx (accessed 9 October 2024). Hazardous chemicals are regulated under, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 2244 UNTS 337 (the Rotterdam PIC Convention) and the 2001 Stockholm Convention on Persistent Organic Pollutants, 40 ILM 532 (the Stockholm POPs Convention). The Stockholm POPs Convention in its preamble, directly alludes to the pertinence of the provisions of the Basel Convention.

68 https://www.brsmeas.org/Secretariat/Overview/tabid/3609/language/en-US/Default.aspx#:~:text=The%20Secretariats%20of%20the%20Basel,the%20United%20Nations%20(FAO) (accessed 9 October 2024).

69 Basel Convention (n 1) art 11.

70 Dupuy & Viñuales (n 2) 277.

71 Bamako Convention (n 1), para 11 of the Preamble.

72 Ajibo (n 35) 276. This was ostensibly the factual motivation for adopting the Bamako Convention.

73 Basel Convention (n 1) art 9(5).

mechanism to hold the 'dumpers' accountable for the harm resulting from their dumping activities.[74] The transboundary movement of hazardous waste is usually conducted clandestinely and hazardous waste is at times misrepresented as harmless items like fertiliser.[75] Therefore, the general feeling among African nations was that the Convention's regulatory objective left a lacuna which could be exploited by potential 'dumpers'.

UNEP has more succinctly described the inspiration for the Bamako Convention thus:[76]

> The impetus for the Bamako Convention arose also from the failure of the Basel Convention to prohibit trade of hazardous waste to less developed countries (LDCs); and [T]he realisation that many developed nations were exporting toxic wastes to Africa (*Koko* case in Nigeria, *Probo Koala* case in Ivory Coast).

The most distinctive stipulation of the Bamako Convention is the idea of banning the import of hazardous waste into Africa.[77] It obliges parties to take necessary legal, administrative, and other measures to ban or prohibit the import of hazardous waste from non-party states.[78] Where a party fails to comply with this obligation then it might be held responsible for any resulting human rights violations.[79] Imports of hazardous waste are *prima facie* deemed illegal and criminal.[80] The Bamako Convention also explicitly prohibits dumping of hazardous waste at sea or in the internal waters.[81] The Basel Convention has no equivalent provision. The Bamako Convention goes a notch higher than the Basel Convention not only recognising in its preamble but also its substantive provisions, the negative impact which the transboundary movement of hazardous waste movement potentially poses to both human health and the environment.[82]

The Bamako Convention provides for unrestricted joint and several liability against the generators of hazardous waste.[83] This provision permits the imposition of whatever damages are considered proper in the circumstances, including punitive damages.[84] This disincentivises

74 Ajibo (n 25) 275.

75 Agbor (n 46) 242.

76 UNEP, 'The Bamako Convention'. Accessed on 8 December 2023 from https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/meeting-international-environmental (accessed 19 December 2023).

77 Bamako Convention (n 1) art 4(1). Additionally, the definition of hazardous waste in the Bamako Convention is more elaborate compared to that in the Basel Convention. See the discussion on this in Part 2.1.

78 As above. As such all African countries that are signatory to the Convention are duty-bound to enact laws giving effect to the provisions of the Convention, not least implementing a ban on the import of hazardous waste.

79 *LIDHO* case (n 10) para 137.

80 Bamako Convention (n 1) art 4(1).

81 Bamako Convention (n 1) art 4(2). Art 1 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter proscribes dumping of waste at sea.

82 Bamako Convention (n 1) art 4(3)(u).

83 Art 4(3)(a).

84 Ajibo (n 25) 278.

the generation of hazardous waste thereby nipping the hazardous waste problem at source. The Convention also sets higher standards by stipulating the application of preventive and precautionary approaches in the generation and management of hazardous wastes.[85] This means that even without scientific evidence of harm to the environment, states and other stakeholders are nonetheless obliged to pay due regard to potential dangers posed by hazardous waste. Similar to the Basel Convention, the Bamako Convention has an equally elaborate PIC procedure as a condition precedent for any potential transboundary movement of hazardous waste.[86] However, the Bamako Convention is more stringent than the Basel Convention on the PIC procedural requirements. Whereas the latter Convention allows for the state of export to sanction the transboundary movement of hazardous waste if the state of transit does not respond to a notification within 60 days, the former (Bamako) convention, explicitly obliges the state of export to not allow [under any circumstances] the transboundary movement to commence until it has received the written consent of the state of transit.[87]

The stringency of the Bamako Convention's provisions and its overall objective of banning the transboundary movement or import of hazardous waste into Africa has been criticised as a hindrance to the economic activities associated with the trade in hazardous waste.[88] As opposed to a total ban, it has been proposed that minimal waste trade should be allowed where a developing country certifies the required competence backed by the presence of the requisite disposal facilities.[89] However, this argument is inherently problematic. It seems to ignore the fact that the economics on which it is predicated was the genesis of the problem of dumping in the first place i.e. developed countries dishing out monetary incentives in exchange for the developing countries agreeing to the dumping of hazardous waste.[90] The criticism also ignores the fact that most African states have not developed sufficient capacity to deal with hazardous waste.[91] Therefore, it would be disingenuous to wave the economic incentives card as if a magical wand to trump the environmental and human health cost attendant to the dumping of hazardous waste.[92] In the African context, the Bamako Convention, banning the transboundary movement of hazardous waste into Africa, though not a panacea, is a more appropriate legal solution to the dumping problem.

In light of the foregoing, it can be deduced that the African (regional) legal framework regulating the transboundary movement of

85 Bamako Convention (n 1) art 4(3)(f).

86 Art 6.

87 Art 6(4). See also art 6(4) of the Basel Convention.

88 Ajibo (n 25) 279.

89 As above.

90 Agbor (n 46) 242.

91 Agbor (n 46) 239.

92 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 7) para 18.

hazardous waste is more stringent than the international framework. However, the recurrence of the illicit transboundary movement of hazardous waste raises questions as to the effectiveness of both legal regimes.[93]

4 THE RIGHT TO A HEALTHY ENVIRONMENT: ITS COMPOSITION AND STATUS INTERNATIONALLY, REGIONALLY (AFRICA), AND NATIONALLY (IN CÔTE D'IVOIRE)

4.1 International legal status

Presently, there are two opposing views under international human rights law about the right to a healthy environment.[94] One view is that the right to a healthy environment as a stand-alone right does not exist.[95] On the other hand, it is argued that the right does exist.[96] The former view is premised on the absence of any stipulation of the right in the main international human rights instruments.[97] The latter view associates itself with the fact that the right to a healthy environment already finds expression in national constitutions, regional treaties, and international 'soft law' instruments.[98] This view seems more tenable because although the right to a healthy environment only finds expression in 'soft' international legal instruments, this does not whittle down its normative weight and justiciability. Moreover, the non-binding nature of soft law instruments does not mean they are legally irrelevant.[99] On the contrary, these soft law instruments like United Nations General Assembly resolutions and Declarations often crystallise into hard law and even Customary international law.[100]

93 The 2006 Probo Koala incident is the most recent incident to be registered. It gave rise to the case study under review in this commentary i.e., the *LIDHO* case. Prior to that, there was the Nigerian Koko toxic waste incident of 1988. See SG Ogbodo 'Environmental protection in Nigeria: two decades after the Koko incident' (2009) 15(1) *Annual Survey of International & Comparative Law* 1.

94 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 1 *African Human Rights Law Journal* 149-166, 149-151.

95 As above.

96 As above.

97 The ICESCR (n 24) and ICCPR (n 24).

98 Agbor (n 46) 151.

99 J Ebbesson 'International participatory rights and environment protection in Africa – powerful tools or "sleeping rights"?' in J-CN Ashukem & SM Sama (eds) *Human rights and the environment in Africa: a research companion* (2023) 99.

100 UNGA Resolution A/RES/76/300 (n 9). For further elucidation of this argument see, YT Chekera & VO Nmehielle 'The international law principle of permanent sovereignty over natural resources as an instrument for development: the case of Zimbabwean diamond' (2013) 6 *African Journal of Legal Studies* 69-101, 80.

However, the need to have the right to a healthy environment captured in a binding international legal instrument is equally important. Much as the existing Economic and Social Rights (ESRs) like the right to water and sanitation, the right to adequate housing, right to health and others help guarantee some of the cardinal attributes of a decent environment, the stipulation of the right to a healthy environment in an internationally binding treaty would make a positive addition to the corpus of ESRs i.e., a more explicit focus on environmental protection.[101] Otherwise, if the right to a healthy environment lacks legally binding status then it may easily be eclipsed by other more normative considerations like economic development and natural resource exploitation.[102]

There is no universal definition of the right to a healthy environment. However, UNEP and OHCHR have explained that the right to a healthy environment has both substantive and procedural dimensions or components.[103] The substantive elements of the right to a healthy environment include clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food.[104] On the other hand, the procedural elements of the right to a healthy environment comprise what is collectively termed 'procedural environmental rights' or 'participatory rights' namely, access to information, the right to participate in decision-making, and access to justice and effective remedies, including the secure exercise of these rights free from reprisals.[105]

The ultimate objective of the right to a healthy environment as with most other rights seems to be more anthropocentric than anything else. This is deducible from this observation by the UN Special Rapporteur on Human Rights and the Environment:[106]

> All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations. We may not have access to even the minimum standards of human dignity.

101 A Boyle 'Human rights and the environment; what next?' in B Boer (ed) *Environmental law dimensions of human rights* (2015) 221. This is a revised version of an article published in (2012) 23 *EJIL* 613-642.

102 As above.

103 Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP), and the United Nations Development Programme (UNDP)}, 'What is the Right to a Healthy Environment?', 9. https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf (accessed 22 November 2023).

104 As above.

105 As above.

106 United Nations Human Rights Office of the High Commissioner, 'About human rights and the environment'. https://www.ohchr.org/en/special-procedures/sr-environment/about-human-rights-and-environment#:~:text=All%20human%20beings%20depend%20on,unable%20to%20fulfil%20our%20aspirations (accessed 7 December 2023).

Although the concept of the right to a clean and healthy environment, as we know it today, was non-existent and undeveloped on the international stage before 1972, other rights linked to the environment and its protection such as the right to life, health, and others existed under international human rights law.[107] However, it was at the 1972 United Nations Conference on the Human Environment in Stockholm that the right to a healthy environment first received formal enunciation.[108]

However, save for spurring developments at the regional level, the events at the 1972 Conference did little to influence the crystallization of the right to a healthy environment under international human rights law.[109] Even the subsequent 1992 United Nations Conference on Environment and Development at Rio de Janeiro made a more procedural rather than substantive contribution to the right to a healthy environment.[110] Principle 1 of the Rio Declaration merely provided that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[111]

On the international stage, further substantive impetus was given to the right to a clean, healthy and sustainable environment in 2021 when it was recognised by the UN Human Rights Council as a human right.[112] This recognition of the right to a healthy environment has been optimistically touted as a reflection of UN member states' strong political commitment to such a right and that it could be a catalyst for further substantive development of the right, internationally.[113] Perhaps more significant was the subsequent recognition of the right to a clean, healthy and sustainable development by the United Nations General Assembly in 2022.[114] Given the symbolic, political, and relative legal weight of the UN General Assembly resolutions, it is expected that

107 J Ebbesson 'Getting it right: advances of human rights and the environment from Stockholm 1972 to Stockholm 2022' (2022) 52 *Environmental Policy and Law* 79-92, 80.

108 Stockholm Declaration (n 10) Principle 1. See also, DR Boyd *The environmental rights revolution: a global study of constitutions, human rights, and the environment* (2011) 13 and Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP), and the United Nations Development Programme (UNDP), 'What is the Right to a Healthy Environment?', 8. https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf (accessed on 22 November 2023).

109 In Africa, the fruits of the 1972 Conference are exemplified by the adoption of the African Charter, particularly art 24. There is no equivalent internationally binding treaty of the right to a healthy environment.

110 Ebbesson (n 107) 82.

111 Rio Declaration on Environment and Development, found in the Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26/Rev.1 (Vol I), 13 June 1992 (Rio Declaration).

112 UNGA, HRC, A/HRC/RES/48/13 (n 9).

113 European Parliament, 'A universal right to a healthy environment', https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf (accessed 7 December 2023).

114 UNGA, A/RES/76/300 (n 9)

this recognition of the right to a healthy environment is bound to have catalytic effects and has great potential to nudge states and other stakeholders into action to give effect to the right.[115] This resolution could even serve as an authority for both the litigants and the courts in environmental litigation.[116]

4.2 Regional legal framework

The Aarhus Convention

As already noted, the Rio Declaration spawned the procedural constituents of the right to a healthy environment.[117] Principle 10 of the Rio Declaration provided the legal blueprint for the subsequent adoption of regional Multilateral Environmental Agreements (MEAs) on participatory rights in environmental matters.[118] Most notable is the 1998 Aarhus Convention.[119] It was tailored along the contours of Principle 10 of the Rio Declaration. It has three cardinal pillars namely, access to information, public participation, and access to justice in environmental matters.[120] Under the Aarhus Convention's implementation mechanism, the Compliance Committee,[121] concerned citizens including Non-Governmental organizations are empowered to complain against states that are not observing their obligations in ensuring participatory rights for all in environmental matters, without discrimination.[122]

115 Office of the United Nations High Commissioner for Human Rights et al (n 103) 6-7.

116 Ebbesson (n 107) 90.

117 Principle 10 of the Rio Declaration provides: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

118 Ebbesson (n 107) 83.

119 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447, adopted on 25 June 1998 'Aarhus Convention'. Although adopted under the auspices of the United Nations Economic Commission for Europe and covers Europe, the Caucasus, and Central Asia, it allows for any member state of the UN to accede to it; see art 19(3). This significantly means that even African countries can ratify the Convention. In fact Guinea-Bissau acceded to the Convention on 4 April 2023. See https://unece.org/climate-change/press/guinea-bissau-accedes-aarhus-convention-opening-new-horizons-environmental (accessed 18 October 2024).

120 S Kingston & others *European environmental law* (2017) 169.

121 Aarhus Convention (n 119) art 15.

122 Aarhus Convention Compliance Committee, Findings and recommendations concerning Germany, ACCC/C/2016/137, 23 July 2023; Aarhus Convention Compliance Committee, Findings and recommendations concerning Belarus, ACCC/C/2014/102, 18 June 2017. Both these communications were initiated by NGOs and they had significant implications for the state parties concerned.

The African Charter and the Algiers Convention

In the African context, besides the substantive provision for the right to a general satisfactory environment in the African Charter,[123] procedural environmental rights are provided for in the African Nature Conservation Convention as revised in 2003. State parties are obliged to adopt appropriate legislative and regulatory measures to ensure the timely and appropriate dissemination of environmental information, access of the public to environmental information, public participation in environmental matters, and access to justice.[124] Although not as detailed as the Aarhus Convention, the provisions of the Algiers Convention on procedural rights are couched in terms bold enough to ensure sufficient protection of those rights.[125]

In confirmation of the procedural dimension of the right to a healthy environment under the African Charter, the African Commission on Human Rights in the *SERAC* case, acknowledged that the right to a healthy environment entails obligations for states to ensure the enjoyment of procedural environmental rights for those affected by environmental decisions.[126] The Commission found that upholding the right to a satisfactory environment inter alia requires carrying out environmental and social impact studies and publicizing information from such studies before carrying out major industrial developments.[127] The right to a healthy environment is thus well entrenched in the African human rights instruments and is perhaps only paralleled by the most recent MEA for the Americas, the Escazú Agreement.[128]

4.3 National legal framework: Côte d'Ivoire

Apart from the highlighted international and regional developments, nationally, it is estimated that the right to a healthy environment finds some form of expression or formulation in the domestic constitutions

2 For instance, in the case involving Belarus, the state faced a lot of political pressure emanating from the Committee's ruling and it eventually found itself opting to withdraw from the Aarhus Convention.

123 African Charter (n 24) art 24.

124 Revised African Convention on the Conservation of Nature and Natural Resources, adopted on 11 July 2003 and entered into force on 23 July 2016, art 16(1)(a)-(d) (Algiers Convention). https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version (accessed 7 December 2023).

125 Ebbesson (n 99) 102.

126 African Commission on Human Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, App. No. 155/96, 27 October 2001, para 53 (*SERAC* case).

127 As above.

128 The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean' (4 March 2018, Escazú, Costa Rica). 'Escazu Agreement' It provides for the substantive right to a healthy environment under art 4(1) and the procedural (participatory rights) under arts 5, 6, 7 & 8.

of over 110 countries.[129] Over 35 African countries recognise a right to a healthy environment in their national constitutions.[130] The significance of the stipulation of the right to a healthy environment in National Constitutions cannot be over-emphasised. As noted by the UN Special Rapporteur on Human Rights and the Environment:

> Constitutional protection for human rights is essential, because the constitution represents the highest and strongest law in a domestic legal system. Furthermore, the constitution plays an important cultural role, reflecting a society's values and aspirations.[131]

Contextually, the right to a general satisfactory environment provided for in the African Charter enjoins states to adopt legislative and other measures to give effect to it.[132] The states' obligation is four-fold namely, respect, protect, promote and fulfill the right to a satisfactory environment.[133] In the *SERAC* case the African Commission held:[134]

> [T]he State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences.

The Commission further held:[135]

> The right to a general satisfactory environment under article 24 of the Charter, (…) imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

Côte d'Ivoire: Laws on the right to a healthy environment

Both the African Charter and the Bamako Convention obligate Côte d'Ivoire to establish the relevant legislative and institutional framework to protect the human rights (more specifically the right to a healthy

129 United Nations General Assembly, HRC, 'Right to a healthy environment: good practices', Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/43/53, 4.

130 The Road to Realizing Environmental Rights in Africa: Moving from Principles to Practice. https://accessinitiative.org/wp-content/uploads/2022/10/22.01_rep_access_initiative_v583-4.pdf (accessed 7 December 2023).

131 As above.

132 L Chenwi 'The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system' in JH Knox & Pejan (eds) *The human right to a healthy environment* (2018) 70.

133 As above.

134 The *SERAC* case (n 126) para 46. Therefore, a state is obliged to protect its citizens' rights from third party violations by putting in place the requisite legal and institutional measures. Short of this, the state will be culpable for the violations, if any.

135 The *SERAC* case (n 126) paras 52-53. However, the duty to respect the right to a healthy environment has since been interpreted by the African Court to extend to private non-state actors/entities. See also the discussion in part 5.

environment) of its citizenry from the adverse impacts of hazardous waste.[136]

However, it goes without saying that the aforesaid obligation goes hand in hand with the effective enforcement of the laws enacted by the relevant national institutions. The right to a healthy environment finds expression in both the country's national Constitution, the Environmental Code and the different Decrees which constitute subsidiary legislation.

Constitution of the Republic of Côte d'Ivoire of 8 November 2016

In its Preamble, the state expresses commitment to inter alia maintaining a healthy environment for future generations. Chapter one of the Constitution specifically provides for the Bill of Rights.

The right to a healthy environment is not couched as a right in the Constitution but rather as both a communal and individual duty for both natural and legal persons to protect the environment. To this end article 40 provides as follows: 'The protection of the environment and the promotion of the quality of life are a duty for the community and for each natural or legal person …'

The Environment Code, Law 96-766 of 3 October 1996 was the principal legislation giving effect to the Constitutional provisions on environmental protection. However, in the wake of the *LIDHO* decision, that Law was repealed by a new law namely, Law 2023-900 of 23 November 2023 relating to the Environmental Code hereinafter called 'the new Law'.

The new Law is more exhaustive and offers better environmental protection. It goes a notch higher than the previous Environmental Code in several respects. Particularly noteworthy is its definition of 'hazardous waste' as 'any waste that presents a serious threat or particular risks to the health, safety and security of living beings and the quality of the environment.'[137] This definition is a major development in so far as it domesticates the Bamako Convention (through a national definition of hazardous waste).

Article 3 sets out the new Law's stated objectives, which includes to guarantee all citizens an ecologically healthy and balanced living environment.[138] Article 11 proclaims that the right to a healthy environment is recognised throughout the national territory. This substantive right has to be read together with the procedural right of access to environmental information provided for under article 13.

136 See art 24 of the African Charter and art 4 of the Bamako Convention. Côte d'Ivoire's obligation to protect the fundamental rights of its citizens also flows from its membership to the Economic Community of West African States (ECOWAS). See The Revised Treaty of Economic Community of West African States (1993), Preamble, para 5 and art 4(g) https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf (accessed 9 October 2024).

137 Art 1.

138 Art 3(8).

Relatedly, the Law under article 215 provides broad access to justice rights in case of claims for ecological damage to include environmental protection associations.

Article 22 sets out the obligation of the state to ensure compliance with its obligations under international environmental conventions by taking the requisite legal, administrative, economic and political measures. In line with the dictates of the Bamako Convention, article 160 criminalises the transit, importation, transport, storage and dumping of hazardous waste on the territory of Côte d'Ivoire.

The new law sets very stern penal sanctions both imprisonment terms and fines for both natural and legal persons who unlawfully engage in or cause the transit, importation, transportation, storage and dumping or otherwise deal in hazardous waste on national territory of Côte d'Ivoire.[139] The stringency of this Law illustrates that the fruits of the *LIDHO* decision are already being witnessed. However, it remains to be seen if its implementation will result in better protection of the right to a healthy environment.

Therefore, although not encompassed in an internationally binding treaty, the right to a healthy environment has normative weight and is justiciable at the (African) regional and national levels as explicated above and further demonstrated by the *LIDHO* case.

5 THE *LIDHO* CASE

The African Commission, established under the African Charter,[140] and the African Court, established under the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol),[141] had in other contexts ruled on the right to a healthy environment and attendant state obligations.[142] However, in the *LIDHO* case, the Court for the first time had the opportunity to interpret the right in relation to illicit transboundary movement and dumping of hazardous waste in Africa.

The case concerns a 2006 incident involving a cargo ship, *MV Probo Koala*, chartered by Trafigura Ltd (a Singaporean-based oil and commodity shipping multinational corporation) which docked at the port of Abidjan with tons of toxic waste. The ship discharged the waste and dumped it at several sites in Abidjan. Consequently, air pollution ensued and a stench spread causing thousands of people to fall ill and

139 The prison sentences range from ten to twenty years while the fines range from ten (10.000.000.000) billion francs to one trillion (1.000.000.000.000) francs. See arts 248 -251.

140 Arts 30 and 45 of the African Charter.

141 Art 1 of the Court Protocol, which came into force on 25 January 2004.

142 As for the Commission, see the *SERAC* case (n 126) (the most notable case handled by the African Commission concerning the right to a healthy environment); and Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, November 2009. As for the Court, see Appl 6/2012, *African Commission on Human and Peoples' Rights v Kenya*, 26 May 2017.

resulting in 17 deaths.[143] Trafigura's three corporate officers were criminally tried and convicted but they were set free after the government executed a Memorandum of Understanding (MoU) with Trafigura in terms of which the latter paid 95 billion CFA.[144] Only a handful of claims were allowed in the subsequent civil proceedings brought on behalf of the victims.[145] Even when the state set up a compensation programme, most of the victims did not receive any compensation. The applicants thereafter brought an application before the African Court on behalf of the victims alleging that Côte d'Ivoire violated the right to respect for life and physical and moral integrity under article 4 of the Charter, the right to an effective remedy, and to adequate compensation for damages under article 7(1)(a) of the Charter, the right to physical and mental health in article 16 of the Charter, and the right to a general satisfactory environment under article 24 of the Charter. They further alleged that Côte d'Ivoire violated the right to information under article 9(1) of the Charter.

Resolving the case and building on its earlier jurisprudence, the Court found that Côte d'Ivoire had violated all the rights of the victims as alleged. It affirmed that the state has a fourfold obligation, namely, to respect, protect, promote, and implement the right to a satisfactory environment.[146] It found that the state not only had a duty to prevent the dumping of hazardous waste but also to ensure full and effective decontamination once the waste had been dumped.[147] The Court concluded that by failing to put in place appropriate measures to prohibit the importation of hazardous waste on its territory and further failure to ensure that the dumping of waste was conducted in such a way as not to harm the environment, the respondent state had contravened both the provisions of the Bamako Convention and the right to a general satisfactory environment under article 24 of the Charter.[148]

The Court held that Côte d'Ivoire's obligation to guarantee and protect the environment was not lessened by the non-compliance of the entities charged with the dumping and treatment of the waste.[149] While recognizing the consequences of toxic waste on people and the environment, the Court broadly interpreted the right to information under the African Charter as imposing a duty on the state to provide persons affected or likely to be affected by the dumping of toxic waste with available, accessible, and practical information on an equal and non-discriminatory basis.[150] This duty was held to exist before, during,

143 *LIDHO* case (n 10) para 3.

144 Para 3-5.

145 Para 5-6.

146 Paras 131 & 183.

147 Para 183.

148 Paras 184-185.

149 As above.

150 Para 193. Providing information perfunctorily will not suffice, the information provided must be accurate and meaningful in the circumstances. See, paras 194-198. It must be observed here that dissemination and access to information is one of the procedural elements of the right to a healthy environment.

and after the dumping of toxic waste.[151]

Besides a finding of inadequate compensation for the victims,[152] the Court importantly extended the obligation to respect and observe human rights, and particularly the right to a healthy environment, to non-state entities.[153] Referring to the United Nations Guiding Principles on Business and Human Rights, the Court held as follows:[154]

> The responsibility of enterprises in the respect for human rights is independent of the capacity or the determination of states to protect human rights. Such a responsibility requires enterprises to commit themselves to public policies in prevention and reparation, due diligence in continuous identification of the consequences of their activities and lastly, setting up procedures aimed at solving problems caused by their action.

However, the Court cautiously concluded that Côte d'Ivoire bore the ultimate responsibility for the human rights violations resulting from the dumping.[155]

5.1 Significance of the Court's orders

The Court's reparative orders are far-reaching. They aimed to not only provide justice for the victims but also cause comprehensive structural, and institutional shifts to ensure that such an incident would never recur. The orders are expounded on below. Interestingly, Côte d'Ivoire attempted to evade the Court's jurisdiction by withdrawing its instrument deposited under article 34(6) of the Court Protocol.[156]

Having found that Côte d'Ivoire had violated the rights of the victims by authorising the dumping of hazardous waste and failing in its due diligence obligation to check the toxicity of the waste and also failing to ensure that a proper clean-up was made, the Court found the state liable to provide compensation to the victims for the prejudice they had suffered as a result.[157] The Court ordered the state to set up a compensation fund in consultation with the victims.[158] It extended the pool of those to benefit from the fund to 'all victims without

151 As above.

152 Para 213.

153 Para 142.

154 As above. This was a very bold statement by the Court in so far as it, for the first time, propounded that the duty to respect the right to a healthy environment extends to multinational corporations. This was a significant development because neither the Court nor the African Commission had in their earlier jurisprudence expansively interpreted this duty as enjoining private entities.

155 Para 143.

156 Para 2. It had lodged the instrument with the Chairperson of the African Union Commission on 29 April 2020 withdrawing from the Protocol to the African Charter on the Establishment of an African Court. However, the Court stood its ground holding that the withdrawal had no effect on this case which was filed before the entry into force of the withdrawal.

157 Para 52.

158 Para 212.

exception'.[159] The significance of this holding is inherent in the fact that it enables those victims who were or could have been denied compensation on the technical ground of having never participated in the court proceedings at the national level. For the Court, the basis for compensation had to be the *prejudice suffered*.[160]

The Court ordered the state to pay the ninety five billion francs received from Trafigura into the compensation fund and this obligation extended to supplementing the fund with resources from the state itself 'in case the money received from Trafigura is insufficient'.[161]

The Court's order concerning the compensation fund tightens the loopholes which would have otherwise enabled the state to wash itself clean of the obligation to compensate the victims after injecting the Trafigura monies in the compensation fund. By the order of the Court, the state had an extensive duty to ensure that *all* the victims received compensation even if this meant digging into state coffers. Such an order is not only equitable but also serves as a cautionary tale to all state parties to the African Charter that dereliction of the duty to respect, protect and fulfil the rights of their citizens will have repercussions, including economic ones.

Besides the foregoing orders on compensation, the applicants also requested the Court for non-pecuniary compensation. These included orders for an independent investigation into the alleged facts aimed at establishing individual criminal liability and prosecution of the perpetrators, the implementation of legislative and regulatory reforms outlawing the import and dumping of hazardous waste and stationing an official of the Ministry of the Environment at all ports with power to inspect waste on board ships.[162]

The Court observed that to ensure the non-repetition of the violations enumerated in this particular case it was pertinent to address the 'structural causes'.[163] The Court therefore ordered Côte d'Ivoire to implement legislative and regulatory reforms prohibiting the import and dumping of hazardous waste in its territory as obligated under the Bamako Convention.[164] The Court went further to order the respondent state, within one year, to amend its national laws to ensure that corporate entities including multinationals like Trafigura can be held liable both under civil and criminal law for their harmful acts to the

159 As above. This went beyond just the victims who were party to proceedings in the domestic courts.

160 As above.

161 Paras 214 and 215. The Court also awarded the victims a nominal award of one CFA to symbolically compensate them for the moral prejudice suffered as a result of the state's actions and omissions. See paras 220 and 221 of the judgment. According to the Court, the state could not be allowed to retain the said monies since they were proceeds of violation of the victims' rights. See paras 213-214.

162 Paras 58-60.

163 Para 244.

164 Para 245. This order had to be complied with within one year from the date of notification of the Judgment. See para xvii, 65.

environment and the handling of toxic waste.[165] It is fair to observe with a measure of optimism that with these legal reforms, if fully implemented, comes stronger legal empowerment of the victims of similar human rights violations (in Côte d'Ivoire). It also becomes harder if not impossible (in the future) for the state to undermine the victims' pursuit for justice by entering into questionable compromises with the culprits of environmental crimes and human rights violations.

The state was further ordered to station at least a representative at all its ports with power to monitor waste removal from ships.[166] However, stationing inspectors at each port is one thing and them executing their duties incorruptibly is another. But again, this perhaps goes back to both the Court's orders for legislative and regulatory reforms and organising training for civil servants.[167] The Court directed Côte d'Ivoire to submit a report every six months until the Court is satisfied that full implementation of its decision has been achieved.[168] This measure aims to protect against the potential of noncompliance.

Taken as a whole, the Court's dictum on the obligation of private business entities to respect human rights significantly lends normative (legal) weight to the 2011 United Nations Guiding Principles on Business and Human Rights as an accountability tool for human rights violations. It also sets a seminal precedent with the potential to spur further accountability actions against multinational business entities that infringe on the right to a healthy environment and other rights. Although the Court did not itself explicitly declare or hold Trafigura responsible for the human rights violations suffered by the victims of its hazardous waste, ordering Côte d'Ivoire to amend its laws to ensure that victims can both civilly and criminally hold corporate entities liable is a significant development. This development is also a clear signal to other African state parties to the Bamako Convention and the African Charter to overhaul their legal and regulatory frameworks lest they find themselves in the undesirable situation in which Côte d'Ivoire found itself.

Furthermore, the Court's far-reaching orders on both pecuniary and non-pecuniary reparation demonstrate the gravitas which it accords to protection of human rights. The extensive manner in which it ordered Côte d'Ivoire to effect systemic legal, institutional and regulatory reforms is commendable as it does not only superficially solve the case at hand but ensures the non-repetition of the impugned violations.

165 Para 247. This order had to be complied with within one year from the date of notification of the Judgment para xviii, 65.

166 Para 255.

167 *LIDHO* case paras 225 & 249.

168 Paras 260 & 261.

6 CONCLUSION

While a global legal framework regulating transboundary movement of hazardous waste is in place, Africa has an even more stringent regional treaty which outrightly bans the importation of hazardous waste. These legal frameworks notwithstanding, the transboundary movement of hazardous waste into Africa from the Global North has persisted, albeit furtively. This has resulted mainly from a lack of adequate domestic legal and regulatory safeguards, and lacklustre implementation. Hazardous waste has caused unspeakable damage to both human health and the environment and with negative implications for the enjoyment of the right to a healthy environment and a flurry of other rights as exemplified by the Probo Koala incident. Although the right to a healthy environment is not encapsulated in any internationally binding treaty, it is recognised in several international 'soft law' instruments, the African Charter, and national constitutions. In Africa, the right to a general satisfactory environment as it is called under the African Charter has been applied and upheld by both the African Commission and the African Court.

However, the *LIDHO* case presented the first opportunity for the African Court to pronounce itself on the nexus between the illicit transboundary movement of hazardous waste and the right to a healthy environment. The Court generously interpreted the state's obligation to respect, protect, promote, and fulfill the right to a clean and healthy environment vis-à-vis the obligation to ensure that hazardous waste is not dumped in its territory. Marking a remarkable development from earlier jurisprudence, the Court seminally interpreted and extended (albeit cautiously) the duty to respect human rights to private entities, particularly, multinational companies. This decision not only contributes to the jurisprudential growth of the right to a healthy environment but the extensive reparative orders issued against Côte d'Ivoire also serve as a cautionary tale for African states that were hitherto neglecting their obligations under the Bamako Convention. It remains to be seen, however, how this decision will be applied or adopted in causing more accountability for multinational companies and states that indulge in or facilitate the illicit transboundary movement of hazardous waste and other activities with harmful repercussions for the environment. On a more promising note, Côte d'Ivoire repealed its Environmental Code and replaced it with a more comprehensive new one as ordered by the Court.

Vers une approche intégrée des droits à la santé et à l'éducation des populations autochtones: perspectives de l'affaire *Batwa c. RDC* devant la Commission africaine

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RÉSUMÉ: Le présent commentaire examine la décision de la Commission africaine des droits de l'homme et des peuples (Commission africaine) dans l'affaire *Minority Rights Group International et Environnement Ressources Naturelles et Développement (au nom des Batwa du Parc national de Kahuzi-Biega, RDC) c. République démocratique du Congo* (*Affaire Batwa c. RDC*). Devant un contexte de léthargie judiciaire au niveau interne, les plaignants ont saisi la Commission africaine en 2015, après cinq années de lutte en vain pour obtenir justice et réparation dans le système juridique national. Devant la Commission africaine, ils ont dénoncé les expulsions violentes et les violations des droits de l'homme subies par la communauté Batwa, une communauté de chasseurs-cueilleurs vivant depuis des siècles dans les forêts des monts Kahuzi desquelles dépendent leur mode de vie et leur subsistance. En se focalisant sur la constatation de la violation par le gouvernement congolais des droits à la santé et à l'éducation des populations autochtones, ce commentaire révèle le recours par la Commission africaine au discours sur les droits de l'homme comme un impératif juridique et moral pour améliorer la jouissance des droits précités. Dans l'interprétation desdits droits, la Commission africaine recours à une approche intégrée en tenant compte des déterminants sociaux et structurels de la santé et de l'éducation des populations autochtones. Ces déterminants méritent d'être maintenus à l'ordre du jour dans le débat politico-juridique sur les droits des populations autochtones ainsi que dans le processus décisionnel en matière de politiques publiques. Si ces déterminants spécifiques aux populations autochtones ne sont pas mis en évidence, la vulnérabilité et la marginalisation particulières qui découlent de leur statut de groupes extrêmement marginalisés seront noyées dans les préoccupations générales relatives à la situation des droits de l'homme.

TITLE AND ABSTRACT IN ENGLISH

Towards an integrated approach to indigenous peoples' rights to health and education: insights from *Batwa v DRC* before the African Commission

ABSTRACT: This commentary analyses the African Commission on Human and Peoples' Rights' decision in *Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of Batwa from*

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JK Sindani 'Vers une approche intégrée des droits à la santé et à l'éducation des populations autochtones: perspectives de l'affaire *Batwa c. RDC* devant la Commission africaine' (2024) 8 *Annuaire africain des droits de l'homme* 580-601
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the Parc national de Kahuzi-Biega, RDC) v République démocratique du Congo (*Batwa v DRC*). After five years of unsuccessful attempts to secure justice and reparations domestically, the plaintiffs brought their case to the African Commission in 2015. They alleged violent evictions and human rights violations against the Batwa community, a hunter-gatherer group with deep ancestral ties to the Kahuzi mountain forests, which are central to their way of life and livelihood. The commentary highlights the African Commission's findings on the Congolese government's failure to uphold the Batwa's rights to health and education. It underscores the Commission's integrated approach, which contextualises these rights within the broader social and structural determinants affecting indigenous peoples. This legal reasoning positions human rights not only as a legal obligation but also as a moral imperative to address the Batwa's historical marginalisation and systemic inequalities. The analysis emphasises the importance of maintaining a focus on these specific determinants in legal, political, and public policy debates concerning indigenous peoples' rights. Neglecting these factors risks obscuring the unique vulnerabilities and marginalisation faced by indigenous groups, reducing their struggles to general human rights issues detached from the realities of their lived experiences.

MOTS-CLÉS: affaire *Batwa v DRC* ; santé ; éducation ; Parc National de Kahuzi-Biega ; peuples autochtones ; aires protégées ; expropriation

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1 INTRODUCTION

Les impératifs de la conservation de l'environnement ont conduit les Etats, y compris la République démocratique du Congo (RDC), à lever l'option de la création des aires protégées[1] comme outil de préservation de la biodiversité. Plusieurs de ces aires protégées ont été érigées sur des terres habitées jadis par des populations autochtones pygmées. Considérant les activités humaines comme principal facteur de la destruction de l'environnement, le gouvernement congolais a mis en place un modèle de conservation fondé sur l'exclusion des populations

1 Le réseau des aires protégées en RDC couvre environ 13% du territoire national. Il se compose de sept parcs nationaux, de réserves naturelles, de réserves de gibier et d'autres types d'aires protégées (voir WWF, Faune sauvage et aires protégées https://www.wwfdrc.org/nos_themes/vie_sauvage_et_aires_protegees/ (consulté le 17 septembre 2024). Voir aussi Mouvement Mondial pour les forêts tropicales, Les Batwa et le Parc National de Kahuzi-Biega en RDC: La nouvelle loi sur les Peuples Autochtones aidera-t-elle les Batwa à récupérer leurs terres?, 25 Octobre 2023, https://www.wrm.org.uy/fr/articles-du-bulletin/les-batwa-et-le-parc-national-de-kahuzi-biega-en-rdc-la-nouvelle-loi-sur-les-peuples-autochtones-aidera-t-elle-les-batwa-a-recuperer-leurs-terres (consulté le 10 septembre 2023).

autochtones de leurs terres ancestrales[2] allant jusqu'à pénaliser, sous certaines conditions, l'accès humain dans ces espaces.[3] Ainsi, les populations qui occupaient ces espaces à savoir les Pygmées,[4] sont dépossédées de leurs terres, le plus souvent sans une indemnisation juste, équitable et proportionnelle.[5] Elles se retrouvent dépossédées de leurs milieux naturels de vie et par conséquent détachées de leur culture.[6] Cette dépossession enfonce les populations autochtones dans un déséquilibre social récusable.[7] Une telle dépossession est également à l'origine des contestations communautaires et judiciaires de la part des populations pygmées en vue d'obtenir la reconnaissance et la jouissance de leurs droits d'accès à la terre et aux ressources naturelles.[8]

2 JP Mushagalusa, S Smis & W Busane 'Le statut juridique et mesure de sécurisation des terres octroyées aux populations autochtones pygmées expulsées du parc national de Kahuzi biega' (2022) *Conjonctures de l'Afrique Centrale* 182. Voir aussi PL Mirindi 'Le droit saisi d'en-bas: les frémissements des droits des Pygmées sur leurs forêts ancestrales en République démocratique du Congo' (2020) 4 *Annuaire africain des droits de l'homme* 122-143 ; C Shalukoma 'La participation des populations Pygmées à la conservation dans le parc national de Kahuzi-Biega (République démocratique du Congo)' in A Fournier et autres (dirs) *Quelles aires protégées pour l'Afrique de l'Ouest? Conservation de la biodiversité et développement* (2007) 438 ; E Mudinga, S Ngendakumana & A Ansoms 'Analyse critique du processus de cogestion du Parc National de Kahuzi-Biega en République Démocratique du Congo' in P Sanginga et al (dir) *Vers une bonne gouvernance des ressources naturelles dans les sociétés post-conflits: concepts, expériences et leçons de la r*égion des Grands Lacs en Afrique (2013) 294-318.

3 Si l'ancien cadre juridique, porté essentiellement par l'ordonnance-loi No. 69-041 du 22 août 1969 relative à la conservation de la nature, était dépourvu des dispositions pénales, la loi n° 14/003 du 11 février 2014 relative à la conservation de la nature revendique ouvertement dans son exposé des motifs la prévision des mesures comme le *leitmotif* de sa mise en place et le présente comme une innovation majeure en vue d'assurer une protection efficace des espèces, des écosystèmes et des habitats naturels.

4 Lorsque ces groupes ont commencé à réclamer reconnaissance et réparation, ils l'ont fait au nom de la revendication moralement impérieuse d'être les 'premiers' peuples ou les habitants originels (ou de posséder le statut d'"aborigène') (voir F Viljoen 'Reflections on legal protection of indigenous people's rights in Africa' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 75).

5 Exposé des motifs de la Loi No 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées.

6 L'attachement particulier des populations autochtones à la terre est une caractéristique couramment citée et il a été dit qu'il s'agissait désormais d'un 'principe largement accepté de la préoccupation internationale contemporaine à l'égard des populations autochtones' (GM Wachira 'Indigenous peoples' rights to land and natural resources' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) ; SJ Anaya 'International human rights and indigenous peoples: the move towards the multicultural state' (2004) 21 *Arizona Journal of International and Comparative Law* 13-15).

7 Exposé des motifs de la Loi No 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées.

8 Voir Tribunal militaire de garnison de Bukavu, *Ministère public et Parties civiles Munganga Nakulire et Mawazo Muna c. Prévenu Bahati Pilipili Nelly* RP1213/017 (jugement du 24 juillet 2018) (Affaire RP1213/017) ; Tribunal de grande instance d'Uvira siège secondaire de Kavumu, *JPKM et consorts c. La RDC représentée par le Gouverneur de province du Sud-Kivu et l'Institut congolais pour la conservation de la nature* (ICCN) RC4058 (jugement du 28 février 2011)

La Communication 588/15 *Minority Rights Group International et Environnement Ressources Naturelles et Développement (au nom des Batwa du Parc national de Kahuzi-Biega, RDC) c. République démocratique du Congo* (*Affaire Batwa c. RDC*) devant la Commission africaine des droits de l'homme et des peuples (Commission africaine) s'inscrit dans le cadre de ces revendications judiciaires. Elle dénonce les violations des droits de l'homme subies par la communauté Batwa, une communauté de chasseurs-cueilleurs vivant depuis des siècles dans les forêts des monts Kahuzi, à la suite de leur expulsion violente de ces forêts dont dépend leur mode de vie et leur subsistance.[9] Les plaignants se sont appuyés sur de nombreuses dispositions du droit international, notamment la Charte africaine des droits de l'homme et des peuples (Charte africaine) pour revendiquer des droits spécifiques dont le droit à la vie, le droit de pratiquer leur culture et leur religion, le droit de disposer librement de leurs richesses et ressources naturelles, le droit de ne pas subir de discrimination, ainsi que le droit à la santé et à l'éducation.[10]

Le présent commentaire se focalise essentiellement sur la constatation par la Commission africaine de la violation par la RDC des droits à l'éducation et à la santé des populations autochtones, à la suite d'une interprétation intégrée des droits des populations autochtones. Par approche «intégrée», le présent commentaire attend celle qui interprète les droits humains dans leur unicité et leur interdépendance. Une telle approche tient également compte des différences socio-culturelles, de la diversité ethnique et des déterminants socio-culturels et structurels de la santé et de l'éducation des populations autochtones. L'intérêt accordé à l'analyse de ces deux droits de l'homme pour les populations autochtones tient, ainsi que nous le verrons plus tard, de par leur interdépendance[11] et surtout leur caractère de passerelle

(Affaire RC4058) ; Cour d'appel de Bukavu *JPKM et consorts c. La RDC représentée par le Gouverneur de province du Sud-Kivu et l'Institut congolais pour la conservation de la nature* (ICCN) RCA4570 (arrêt du 11 décembre 2012) (Affaire RCA4570) ; Tribunal de Paix de Goma, *Ministère public et PC Institut Congolais pour la Conservation de la Nature (ICCN) c. BIGORORANDE Roland*, RP 2873, 28 décembre 2023 ; Tribunal de Paix de Goma, *Ministère publique et PC ICCN c. NEZEHOSE KAMARANDE et Csrt*, RP 2905, 14 février 2024 ; Tribunal de Paix de Goma, RP 2783, 20 Mai 2024, *R. MANGO LUKAMBA c/MAOMBI MWAKA et Csrt*., etc.

9 Communication 588/15 *Minority Rights Group International et Environnement Ressources Naturelles et Développement (au nom des Batwa du Parc national de Kahuzi-Biega, RDC) contre République démocratique du Congo* ACHPR (2022), para 3 (*Batwa*).

10 *Batwa* (n 9) para 9. Même si la Charte africaine n'inclut pas expressément les populations autochtones dans son champ d'application, il n'y a aucune raison pour que les membres de ces groupes ne bénéficient pas des garanties de la Charte, que ce soit en tant qu'individus ou, plus important encore, en tant que membres d'une collectivité (Viljoen (n 4) 85).

11 A titre d'exemple, selon le Comité des droits économiques, sociaux et culturels, le droit à la santé sexuelle et reproductive, qui est un aspect du droit à la santé, est lié au droit à l'éducation (Comité des droits économiques, sociaux et culturels, Observation générale 22 (2016) sur le droit à la santé sexuelle et reproductive (art 12 du Pacte international relatif aux droits économiques, sociaux et culturels, para 9).

(*enabler*)[12] dans la jouissance des autres droits de l'homme d'une part ; et d'autre part, de par leurs contenus larges pouvant contenir d'autres droits humains.[13]

En vue de mettre en exergue les constatations de la Commission africaine dans la présente communication, un premier point est consacré à la présentation de l'affaire en lien avec les droits sous analyse (2). Un deuxième point est consacré à l'analyse du contenu et de la spécificité du droit à la santé et du droit à l'éducation des peuples autochtones, tels qu'ils ressortent de l'argumentaire de la Commission africaine (3). Un troisième point enfin se concentre sur l'appréciation critique des constatations de la Commission africaine en termes de précision des obligations spécifiques de l'Etat et sur les pistes de réflexion pour leur mise en œuvre (4).

2 PRÉSENTATION DE L'AFFAIRE *BATWA c. RDC*

Ce point est consacré au résumé succinct des faits de l'affaire en question, aux prétentions et demandes des parties (2.1) ainsi qu'aux constatations et recommandations de la Commission africaine (2.2).

12 Voir Communication 323/06, *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* ACHPR (2021), par exemple, la Commission africaine a déclaré que le droit à la santé est une condition préalable à tous les autres droits de l'homme reconnus par la Charte africaine (para 261). Quant au droit à l'éducation, la Commission africaine en souligne l'importance dans la promotion des droits de l'homme et de la démocratie et la protection de l'environnement ainsi que dans la croissance, le développement et le bien-être des êtres humains, en particulier des enfants et des jeunes» (Principes et lignes directrices sur la mise en œuvre des droits économiques, sociaux et culturels dans la charte africaine des droits de l'homme et des peuples, ACHPR para 69)

13 Selon la Commission africaine, le droit à la santé ne se limite pas à un 'droit aux soins de santé, mais englobe tous les aspects sous-jacents de la santé' (Résolution sur l'accès à la santé et aux médicaments nécessaires en Afrique, ACHPR/Res.141, 2008.) et comprend 'l'accès à l'eau potable et à des installations sanitaires adéquates, un approvisionnement suffisant en aliments sains, la nutrition et le logement, des conditions de travail et environnementales saines' (Principes et lignes directrices sur la mise en œuvre des droits économiques, sociaux et culturels dans la charte africaine des droits de l'homme et des peuples, ACHPR, para 63.) Quant au droit à l'éducation, dans les lignes directrices de soumission des rapports périodiques, la Commission africaine établit un lien entre le droit à l'éducation et avec la dignité de l'individu ainsi qu'avec l'impact sur la société dans son ensemble. Elle estime dès lors que les mesures prises pour favoriser le plein exercice du droit de toute personne à l'éducation, doivent viser à atteindre les objectifs suivants : (a) le plein épanouissement de la personnalité humaine et du sens de sa dignité ; (b) le renforcement du respect des droits de l'homme et des libertés fondamentales ; (c) le développement de l'enseignement des droits de l'homme ; (d) la participation effective de tous à une société libre ; (e) la promotion de la compréhension, de la tolérance et de l'amitié entre toutes les nations et tous les groupes raciaux, ethniques ou religieux. (Lignes directrices relatives aux rapports parallèles à la commission africaine des droits de l'homme et des peuples, ACHPR (2016), para 46).

2.1 Résumé des faits et prétentions des parties

En novembre 1970, la création du Parc National de Kahuzi-Biega (PNKB) en RDC par la loi portant le No. 70-316 a transformé la zone d'habitation des Batwa en parc national, avec comme conséquence: l'interdiction de la présence humaine dans le parc et l'expulsion des Batwa sans consultation ni indemnisation pour l'expropriation de leurs terres acquises conformément à la coutume. En 1975, la nouvelle loi No. 75-238 a élargi la superficie du PNKB de 60 000 à 600 000 hectares, empiétant encore sur les terres ancestrales des communautés Batwa et occasionnant ainsi, une augmentation des expulsions, ce qui porta le nombre des familles expulsées depuis 1970, à environ 6000, toujours sans aucune indemnisation ni consultation préalable.[14]

Ces expulsions ont rompu l'harmonie dans laquelle vivaient les Batwa avec la nature, détériorant ainsi leurs conditions de vie. Actuellement ils vivent dans une extrême pauvreté dans des camps de fortune à la lisière des forêts en marge des autres villages Bantous. Ils sont privés de leurs terres et ne peuvent, ni mener leur mode de vie traditionnel, ni avoir accès aux services sociaux de base.[15] Par ailleurs, ils souffrent d'un taux élevé de malnutrition, de mortalité ainsi que de diverses maladies.[16] De plus, ils vivent parmi d'autres groupes majoritaires n'ayant pas la même culture ni le même mode de vie, faisant d'eux des victimes d'une discrimination très ancrée dans les comportements et les attitudes.[17] C'est dans ce contexte de vulnérabilité, qu'avec l'appui du Environnement Ressources Naturelles et Développement (ERND), les Batwa ont tenté de «récupérer» leurs terres en intentant une action en justice contre le gouvernement congolais et l'Institut Congolais pour la Conservation de la Nature (ICCN) pour expropriation illégale et violation de leurs droits constitutionnels prévues à l'article 34(1), (2) et (4) de la Constitution de la RDC.[18]

Le Tribunal de grande instance d'Uvira saisi en premier ressort et la Cour d'appel de Bukavu saisie en appel se sont successivement déclarés incompétents au motif que la question soulevée par les plaignants les appelait plutôt à se prononcer sur la constitutionnalité de la loi congolaise No. 77-001 du 22 février 1977 régissant l'expropriation pour cause d'utilité publique.[19] Déboutés d'un moyen (question préjudicielle d'inconstitutionnalité) qui n'était pas contenue dans la

14 *Batwa* (n 9) paras 5-6.

15 *Batwa* (n 9) para 7.

16 *Batwa* (n 9) para 7.

17 *Batwa* (n 9) para 7.

18 *Batwa* (n 9) para 8.

19 Tribunal de grande instance d'Uvira, *JPKM et consorts c. La RDC représentée par le Gouverneur de province du Sud-Kivu et l'Institut congolais pour la conservation de la nature* (ICCN) RC4058 (jugement du 28 février 2011) (Affaire RC4058), 13 ; Cour d'appel de Bukavu, *JPKM et consorts c. La RDC représentée par le Gouverneur de province du Sud-Kivu et l'Institut congolais pour la conservation de la nature* (ICCN) RCA4570 (arrêt du 11 décembre 2012) (Affaire RCA4570) 3,5.

requête introductive d'instance, les plaignants se sont pourvus en cassation en décembre 2013, devant la Cour Suprême à Kinshasa en relevant *inter alia,* que les juges des deux instances inférieures, avaient détourné le sens de l'invocation de l'article 34 de la Constitution congolaise qui garantit le droit «sacré» à la propriété privée. Deux années plus tard, l'affaire se trouvait toujours pendante devant la Cour Suprême et aucune audience n'avait été communiquée jusqu'au jour de la saisine de la Commission africaine en 2015.

C'est dans ce contexte de léthargie judiciaire au niveau interne que les plaignants ont saisi la Commission africaine après cinq années de lutte en vain pour obtenir justice et réparation dans le système juridique national. Devant la Commission africaine, ils ont allégué la violation par l'Etat défendeur des articles suivants de la Charte africaine: 1 (Obligations des Etats envers les droits, devoirs et libertés contenues dans la Charte africaine), 2 (droit à la non-discrimination), 4 (droit à la vie et à l'intégrité de la personne), 8 (liberté de conscience et de religion), 14 (droit à la propriété), 16 (droit à la santé), 17 (droit à l'éducation et à la libre participation à la vie culturelle de la Communauté), 21 (droit de jouir et de disposer des ressources naturelles), 22 (droit au développement et 24 (droit à un environnement sain).

2.2 Constatations de la Commission africaine

A l'issue de la procédure par défaut, l'Etat congolais n'ayant pas transmis ses observations,[20] la Commission africaine a constaté la violation des dispositions des articles 1, 2, 3, 4, 8, 14, 16, 17(1)-(3), 21, 22 et 24 de la Charte africaine. Additionnellement à la constatation de ces violations, la Commission africaine a, entre autres, déclaré que l'occupation de cette forêt par le peuple Batwa est primordiale pour leur survie et le maintien de leur identité culturelle ;[21] et que l'occupation de la forêt de Kahuzi-Biega ne constituait aucun danger pour la biodiversité.[22] Selon ladite Commission, les modèles de conservation des forteresses fondés sur l'exclusion des populations autochtones de leurs terres ancestrales sans leur consentement libre et préalable ne sont plus d'actualité et que, dans des cas où ces conservations sont nécessaires, leur impact sur les populations autochtones doit être minutieusement analysé et remédié.[23]

Forte de ces constatations, la Commission africaine a, entre autres, recommandé à la RDC d'adopter dans les meilleurs délais, en consultation avec les Batwa, des mesures législatives, administratives et autres jugées nécessaires pour mettre en place un mécanisme de démarcation et d'octroi de titres de propriété du territoire ancestral de Batwa ainsi que les droits y relatives dans le respect de leurs valeurs,

20 *Batwa* (n 9) paras 15-20.
21 *Batwa* (n 9) para 228.
22 *Batwa* (n 9) para 229.
23 *Batwa* (n 9) para 230.

coutumes et croyances ;[24] de réintégrer les Batwa, jugés être de «bons gardiens de l'environnement» étant donné leur bilan historique positif de conservation de la forêt de Kahuzi-Biega,[25] leur territoire ancestral ;[26] d'annuler toutes les lois, ordonnances ou autres mesures interdisant la présence des Batwa sur leurs terres ancestrales ainsi que leur utilisation traditionnelle et leur jouissance ; et de ratifier la Convention No. 169 de l'Organisation Internationale du Travail (OIT) de 1989 relative aux populations aborigènes et tribales.[27]

3 CONTENU ET SPÉCIFICITÉS DES DROITS À LA SANTE ET À L'ÉDUCATION DES POPULATIONS AUTOCHTONES

Une des questions centrales abordées par la Commission africaine dans la décision sous commentaire est celle de la préservation des particularités culturelles et identitaires des populations autochtones comme mécanisme adéquat de protection contre la discrimination. De ce fait, la Commission africaine interprète le contenu du droit à la santé (3.1) des populations autochtones en accordant de l'importance à l'accès aux soins respectant leur mode de vie traditionnel, leurs savoirs médicinaux et leur lien profond avec leur environnement naturel ; tandis que celui du droit à l'éducation (3.2) met l'accent sur la préservation de leur savoir traditionnel, leur langue, et les obstacles rencontrés pour accéder à une éducation adaptée à leurs besoins.

3.1 L'accès aux soins respectant le mode de vie traditionnel

Le droit de l'homme à la santé est garanti dans les différents instruments juridiques internationaux. La première expression de ce droit a été faite à l'article 25(1) de la Déclaration universelle des droits de l'homme (DUDH) qui a servi de base à l'articulation de nombreux droits de l'homme qui ont été repris dans des traités internationaux ultérieurs tant au niveau onusien[28] qu'africain.[29] La ratification par la RDC de ces instruments internationaux impose au gouvernement

24 *Batwa* (n 9) para 233.

25 *Batwa* (n 9) para 231.

26 *Batwa* (n 9) para 233 (iv).

27 *Batwa* (n 9) para 233(ii), voir le Corrigendum '*In paragraph 219(i) where it reads "Convention No. C07', it should read 'Convention No. C169'; where it read '1957', it should read "1989". Therefore, the paragraph should read as follows: Ratify the International Labour Organisation Convention No. C169 concerning Indigenous and Tribal Peoples, 1989*'.

28 Voir Pacte international relatif aux droits économiques, sociaux et culturels (art 12(1)) ; Convention internationale sur l'élimination de toutes les formes de discrimination raciale (art 5(e)(iv)) ; Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (arts 11(1)(f) et 12) ; Convention relative aux droits de l'enfant (art 24), etc.

congolais un impératif juridique et moral de veiller à ce que sa population, y compris les populations autochtones, ait accès à la santé. Au niveau national, la Constitution congolaise garantit le droit à la santé[30] à tous les Congolais, sans discrimination, brimade ou toute autre forme d'humiliation ou de privation en raison des considérations tribale, ethnique, religieuse, raciale, professionnelle, sociale, philosophique, politique ou de sexe.[31] Les soins de santé doivent être administrés selon les exigences de l'état de santé du malade, dans le respect de sa dignité et, dans la mesure du possible, dans son cadre de vie habituel.[32] La loi No. 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées garantit explicitement aux populations autochtones pygmées l'accès aux soins de santé de qualité, sans aucune forme de discrimination.[33] Cette loi contient également un engagement de l'Etat à promouvoir la pharmacopée traditionnelle des populations autochtones pygmées et leur garantir le droit de conserver et de préserver leurs pratiques médicinales ainsi que leurs rituels thérapeutiques, qui ne nuisent pas à la santé.[34]

Dans la décision sous commentaire, la Commission africaine relève qu'il existe un lien étroit entre le droit à la santé et le milieu de vie des populations autochtones, étant donné qu'ils y trouvent les ressources nécessaires à leur épanouissement et leur développement en termes de santé physique et mentale.[35] A cet effet, la Commission africaine est d'avis que la forêt de Kahuzi-Biega est la seule source des plantes médicinales nécessaires aux pratiques de la santé traditionnelle des Batwa et que ces plantes faisaient partie des ressources dont ils disposent pour traiter diverses maladies dont ils souffrent.[36] Les expulsions forcées comme dans le cas d'espèce, tout en violant d'autres droits prévus dans la Charte africaine, sont considérées par la Commission africaine comme ayant un impact sur la santé physique et mentale des individus et violant donc le droit au logement.[37] Elles provoquent une détresse physique, psychologique et émotionnelle ;

29 Voir Charte africaine des droits de l'homme et des peuples (Article 16) ; Charte africaine des droits et du bien-être de l'enfant (Article 14) ; Le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (art 14) ; etc.

30 Art 47 de la Constitution de la RDC, 18 février 2006.

31 Art 16 de la loi No 18/035 du 13 décembre 2018 fixant les principes fondamentaux relatifs à l'organisation de la Santé publique.

32 Art 18 de la loi No 18/035 du 13 décembre 2018 fixant les principes fondamentaux relatifs à l'organisation de la Santé publique.

33 Art 25 de la loi No 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées.

34 Art 26 loi No 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées.

35 *Batwa* (n 9) para 164.

36 *Batwa* (n 9) para 165.

37 Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, ACHPR (2001) para 63.

elles entraînent la perte de moyens de subsistance économique et accentuent la pauvreté.[38] Elles provoquent également des blessures physiques et, dans certains cas, des décès sporadiques[39] résultant des conditions de vie inhumaines et dégradantes.[40] Ces facteurs ne permettent pas aux populations autochtones d'atteindre l'objectif de l'Organisation mondiale de la santé (OMS), lorsqu'il définit la santé comme un «état complet de bien-être physique, mental et social».[41] Ainsi, faire sortir les populations autochtones de leur milieu naturel comme c'est le cas dans la présente affaire, sans leur procurer un environnement semblable, à défaut identique, constitue indéniablement une atteinte à leur droit à la santé.[42]

En outre, l'interprétation du droit à la santé dans la décision sous commentaire suppose l'existence des soins, services et conditions de santé, leur accessibilité, leur acceptabilité et leur qualité.[43] Dans la Résolution sur l'accès à la santé et aux médicaments nécessaires en Afrique, la Commission africaine note l'obligation de disponibilité en quantités suffisantes des médicaments nécessaires, y compris les médicaments existants et la mise au point de nouveaux médicaments nécessaires pour atteindre le niveau de santé le plus élevé possible.[44] Les médicaments nécessaires doivent être accessibles et fournis sans discrimination, l'accessibilité étant interprétée comme physique, économique/abordable.[45] L'acceptabilité quant à elle doit être «respectueuse des normes culturelles et de l'éthique médicale» ; [46] alors que la question de la qualité, renvoie à l'aptitude de savoir que les médicaments sont «sûrs, efficaces et médicalement appropriés».[47]

Ces quatre éléments appliqués au cas des populations autochtones permettent d'interpréter le droit à la santé de manière intégrée, c'est-à-dire en tenant compte des déterminants socio-culturels et structurels de la santé pour les populations autochtones. En effet, ce droit va au-delà des seuls soins médicaux modernes. Il inclut les savoirs et pratiques médicinaux traditionnels, qui constituent des piliers fondamentaux de leur bien-être. De ce fait, la notion de disponibilité doit impliquer que les Batwa aient un accès suffisant aux plantes médicinales et aux remèdes traditionnels issus de la forêt de Kahuzi-Biega, qui sont au cœur de leur approche de la santé. Leur expulsion a non seulement coupé cet accès vital, mais a également ignoré la

38 Résolution sur le droit à un logement décent et la protection contre les expulsions forcées, ACHPR/Res.231 (2012).

39 *SERAC* (n 36) para 63.

40 *Batwa* (n 9) para 233(xvi).

41 Voir Préambule de la Constitution de l'OMS, https://www.who.int/fr/about/frequently-asked-questions, consulté le 8 septembre 2022.

42 *Batwa* (n 9) para 35.

43 Batwa (n 9) para 163. Voir aussi Communication 323/06, *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, ACHPR(2011), para 263.

44 Résolution sur l'accès à la santé et aux médicaments essentiels en Afrique - CADHP/Res.141(XXXXIV) (2008), point 1.

45 As above, point 2.

46 As above, point 3.

47 As above, point 4.

nécessité de garantir des soins de santé qui respectent et intègrent ces connaissances traditionnelles, en témoignent des Batwa expulsés du parc de Kahuzi-Biega.[48] En outre, l'État n'a pas mis en œuvre de mesures positives pour pallier cette perte, compromettant ainsi la disponibilité des soins de santé adaptés aux Batwa, essentiels pour atteindre un niveau de santé adéquat. En ce qui concerne les Batwa, l'accessibilité physique aux soins de santé a été drastiquement réduite par leur déplacement forcé, les éloignant de leurs ressources médicinales traditionnelles. Elle est également réduite par la pénalisation de l'accès à ces aires protégées.[49] Cette inaccessibilité est exacerbée par leur marginalisation économique, qui les prive de moyens financiers pour accéder à des soins de santé modernes,[50] en témoignent les propos des plaignants repris par la Commission africaine.[51] Par ailleurs, l'acceptabilité des soins suppose leur conformité aux croyances et au mode de vie des populations autochtones, en intégrant leurs pratiques médicinales au lieu de les exclure. Enfin, la qualité des soins offerts aux Batwa ne peut être assurée que si ces soins sont adaptés à leurs besoins spécifiques, sécurisés, et respectent à la fois leurs connaissances traditionnelles et l'éthique médicale traditionnelle.

3.2 L'éducation intégrée comme outil de préservation des savoirs traditionnels

Le droit à l'éducation repose sur des normes juridiques internationales solides auxquels la RDC est partie. Ces normes prévoient une interdiction générale de la discrimination. La DUDH par exemple établit un droit à l'éducation et précise que l'éducation, en partie, doit viser à «renforcer le respect des droits de l'homme et des libertés fondamentales».[52] Le PIDESC contient une disposition sur l'éducation aux droits de l'homme très similaire aux dispositions de la DUDH, à l'exception de l'ajout des groupes «ethniques» à la liste des groupes méritant «la compréhension, la tolérance et l'amitié».[53] Sur le droit à l'éducation en faveur des enfants autochtones, la Convention des Nations unies relative aux droits de l'enfant, reconnaît l'importance du maintien des langues et des cultures autochtones et garantit, à l'article

48 *Batwa* (n 9) para 165 (M. M., une des Batwa expulsés du parc de Kahuzi- Biega qui déclare : 'je regarde impatiemment comment nos petits fils meurent souvent des maladies qui auraient pu trouver du remède dans le PNKB à travers nos plantes médicinales').

49 Voir arts 71 à 84 de la loi 11/009 du 9 juillet 2011 portant principes fondamentaux relatifs à la protection de l'environnement en RDC. Voir aussi loi n°14/003 du 11 février 2014 relative à la conservation de la nature, Titre IV.

50 *Batwa* (n 9) para 166.

51 *Batwa* (n 9) para 166 (le témoin K. M. par exemple déclare : 'je vis difficilement avec ma famille alors que nos terres et ressources du PNKB nous procurait tout … […] Ma santé n'est pas assurée et l'accès aux soins de santé est payant, nous les pauvres sans terres mourrons sans avoir eu les soins et privées d'accès aux plantes médicinales qui sont généralement dans le parc.… […]'.

52 Art 26(2) DUDH.

53 Art 13 PIDESC.

29, que l'éducation de l'enfant doit viser à développer le respect de l'identité culturelle, de la langue et des valeurs qui lui sont propres.

Au niveau africain, la Charte africaine contient une disposition relative au droit à l'éducation[54] et prévoit que les États assurent le respect des droits de l'homme, notamment par l'éducation.[55] La Charte africaine des droits et du bien-être de l'enfant (CADBE) garantit un droit à l'éducation plus large et plus complet que celui qui est assuré dans la Charte africaine.[56] Cette éducation doit, entre autres, être axée sur le respect des droits de l'homme et «la préservation et le renforcement de la morale, des valeurs traditionnelles et des cultures africaines positives»,[57] et «susciter le respect pour l'environnement et les ressources naturelles».[58] La Charte africaine de la jeunesse fait référence aux droits, aux libertés et aux devoirs de la jeunesse en Afrique, dont le droit à l'éducation. Son article 13 reconnaît le droit de tous les jeunes à une éducation de qualité. Il fait référence aux multiples formes d'éducation dont l'éducation formelle et informelle. Il définit les objectifs de l'éducation et établit les obligations des États. La charte africaine de la jeunesse prévoit aussi l'égalité des sexes et l'utilisation des langues africaines dans l'enseignement à son article 20.

Au niveau national, la Constitution congolaise reconnait le droit à l'éducation scolaire à toute personne sans discrimination.[59] L'accès des enfants autochtones pygmées est obligatoire et gratuit à tous les niveaux de l'enseignement primaire, secondaire et de la formation professionnelle dans les établissements publics.[60] L'Etat congolais est tenu de prendre des mesures pour une communication positive sur les populations autochtones pygmées dans ses programmes d'éducation, de formation et mettre en place des structures appropriées.[61] Il s'agit notamment de l'institution d'un système d'alphabétisation et d'éducation non formelle des jeunes, des femmes et des adultes autochtones pygmées adapté à leurs langues et coutumes.[62]

Selon la Commission africaine, l'éducation doit viser le plein épanouissement de la personnalité humaine et du sens de sa dignité et renforcer le respect des droits de l'homme et des libertés fondamentales.[63] La Commission africaine reconnaît qu'en tant que

54 Art 17 Charte africaine.

55 Art 25 Charte africaine.

56 Voir art 10 CADBE.

57 Art 11(2)(c) CADBE.

58 Art 11(2)(g) CADBE.

59 Art 43 de la Constitution congolaise, 18 février 2006.

60 Art 22 Loi no 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées

61 Art 23(1) Loi no 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées

62 Art 23(3) Loi no 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones pygmées.

63 *Batwa* (n 9) para 171.

droit fondamental,[64] l'éducation est le premier véhicule par lequel les enfants et les adultes économiquement et socialement marginalisés peuvent vaincre la pauvreté et acquérir les moyens de participer pleinement à la vie de leur communauté.[65] Plus particulièrement, elle permet aux populations marginalisées de participer pleinement à la vie communautaire. Par ailleurs, le droit à l'éducation englobe aussi le droit à la connaissance des savoirs traditionnels et ancestraux pour les populations autochtones.[66] La Commission africaine accorde une attention particulière aux besoins éducatifs des populations autochtones et de leurs enfants, en grande partie grâce aux travaux de son groupe de travail sur les populations/communautés autochtones établi en 2000.[67]

La brève et «vague»[68] formulation de l'article 17(1) de la Charte africaine ne prévoit aucune modalité concrète de mise en œuvre du droit qu'il consacre ; il semble tout au contraire en hypothéquer la jouissance par le biais de son dernier paragraphe selon lequel il incombe à l'Etat le singulier devoir de promotion et de protection de la morale et des valeurs traditionnelles reconnues par la communauté.[69] Dans la décision sous commentaire, la Commission africaine adopte une approche intégrée c'est-à-dire tenant compte des déterminants socio-culturels et structurels sur les modalités de mise en œuvre du droit à l'éducation adaptée aux populations autochtones. Elle note à cet effet que l'éviction des Batwa de leur forêt ancestrale les a privés d'une forme d'enseignement particulière *in situ*.[70] Ce type d'enseignement profondément ancré dans le style de vie des populations autochtones permet la transmission des connaissances, notamment médicinales, aux jeunes générations, en témoignent différentes déclarations des membres de cette communauté victime de cette éviction citées intégralement dans la décision de la Commission africaine.[71] Ces

64 Voir Observation générale 13 du Comité des Droits Économiques, Sociaux et Culturels des Nations unies sur l'Application de l'article 13 du Pacte International relatif aux Droits Économiques, Sociaux et Culturels, para 1.

65 *Batwa* (n 9) 171. Voir aussi Principes et lignes directrices DESC, para 69.

66 *Batwa* (n 9), para 172.

67 KN Bojosi 'The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: some reflections on its work so far' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 95. Voir aussi J Gilbert 'Indigenous peoples' human rights in Africa: the pragmatic revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) *International and Comparative Law Quarterly* 245-270

68 F Ouguergouz *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité* (1993) 115.

69 *Ouguergouz* (n 68) 115.

70 *Batwa* (n 9) 174.

71 *Batwa* (n 9) 174 : OM, un des Batwa expulsé déclare : 'la Forêt était notre espace d'éducation et d'initiation des jeunes à l'adulte'. NBI, une autre victime de cette expulsion réitère que 'cette privation d'accès à la terre et aux ressources naturelles les rend plus vulnérables en ce qu'ils accèdent difficilement aux services sociaux de base tels l'éducation' ; NBI, une autre victime de cette expulsion réitère que 'cette privation d'accès à la terre et aux ressources naturelles les rend plus vulnérables en ce qu'ils accèdent difficilement aux services sociaux de base tels l'éducation'.

témoignages convergent sur le fait qu'il y a des connaissances liées à l'identité des Batwa dont ils bénéficiaient étant dans la forêt de Kahuzi-Biega mais qu'ils n'apprennent plus. A cet égard, la Commission africaine conclut que ne pas permettre l'accès à ce savoir constitue une violation du droit à l'éducation protégé aux termes des dispositions de l'article 17(1).[72]

En reconnaissant cette forme d'éducation, la Commission africaine invite implicitement les Etats à mettre en place des politiques scolaires et culturelles respectueuses de la morale et des valeurs traditionnelles de la communauté,[73] selon la Charte Culturelle de l'Afrique du 5 juillet 1976. Cette dernière a, entre autres pour objectifs de «réhabiliter, restaurer, sauvegarder, promouvoir le patrimoine culturel africain» et de «développer dans le patrimoine culturel africain toutes les valeurs dynamiques et rejeter tout élément qui soit un frein au progrès».[74] Les États doivent veiller à ce que l'éducation soit adaptée, entre autres, aux besoins de groupes spécifiques tels que les populations autochtones.[75] Des programmes d'enseignement appropriés doivent être conçus pour répondre aux besoins des communautés autochtones afin de préserver leur langue, leur culture, leur histoire particulière et leur héritage spirituel.[76] Les programmes d'enseignement doivent être adaptés aux besoins spécifiques, aux intérêts, à l'histoire et au système de connaissances des communautés autochtones.[77]

Par ailleurs, la reconnaissance de l'éducation *in situ* comme l'une des modalités de mise en œuvre du droit à l'éducation prévue à l'article 17(1) de la Charte africaine s'oppose à toute logique d'assimilation forcée ou d'homogénéisation[78] culturelle. Ces logiques produisent souvent des effets inverses: plutôt qu'être des stratégies d'intégration, elles constituent une composante de la marginalisation des populations autochtones. En effet, un système éducatif qui ne tient pas compte des spécificités culturelles des populations autochtones, les isole davantage.[79] Les politiques coercitives de développement de l'éducation avec des intentions assimilationnistes non seulement détruisent les cultures et les valeurs des populations autochtones et sapent l'intégrité de leur identité communautaire. Dans cette logique, les programmes et services d'éducation destinés aux populations

72 *Batwa* (n 9) 174.

73 *Batwa* (n 9) 115.

74 *Batwa* (n 9) 115-116.

75 Lignes directrices relatives aux rapports parallèles à la commission africaine des droits de l'homme et des peuples, ACHPR (2016), para 47.

76 Kenya: Mission Working Group Indigenous Populations/Communities, 2010, ACHPR (2011) 21. Traduction de l'auteur.

77 *Ibid* (traduction de l'auteur).

78 S Slimane *Recognising minorities in Africa* (2003) 5.

79 Rapport de la visite de recherche et d'information du groupe de travail de la Commission africaine sur les populations/communautés autochtones en République du Congo du 5 au 19 septembre 2005, CADHP (2007), para 3-5.

intéressées doivent être élaborés et mis en œuvre en coopération[80] avec elles pour répondre à leurs besoins particuliers.[81]

4 OBLIGATIONS SPECIFIQUES DE L'ETAT ET RÉFLEXIONS SUR LEUR MISE EN ŒUVRE

L'approche intégrée adoptée par la Commission africaine dans l'interprétation des droits à la santé et à l'éducation, nécessite de préciser la portée des obligations spécifiques de l'État (4.1) et réfléchir sur des mesures pratiques et programmatiques de la mise en œuvre des recommandations (4.2).

4.1 Portée des obligations spécifiques de l'Etat

La décision de la Commission africaine dans *Batwa c. RDC* réaffirme que la réalisation du droit à la santé et à l'éducation peut nécessiter l'adoption de mesures supplémentaires pour certaines catégories d'individus ou de groupes,[82] comme les populations autochtones.

En ce qui concerne en premier lieu le droit à la santé, la lecture des dispositions tant internationales que nationales renseigne que ce droit doit être largement défini et inclure non seulement l'accès aux services de santé, mais aussi les déterminants socio-économiques sous-jacents de la santé tels que définis par l'Organisation mondiale de la santé (OMS).[83] Ainsi, le PIDCP contient une approche «plus intégrée»[84] de la santé en prévoyant non seulement le droit de l'individu à la sécurité sociale mais aussi son droit à des conditions de vie satisfaisantes. Au niveau africain, les Principes et lignes directrices sur la mise en œuvre des droits économiques, sociaux et culturels (Principes et lignes directrices DESC) prévus dans la Charte africaine des droits de l'homme et des peuples, considèrent que le droit à la santé ne signifie pas seulement le «droit d'être en bonne santé»[85] ou simplement le «droit aux soins de santé»,[86] mais aussi tous les aspects sous-jacents de la santé à savoir l'accès à l'eau potable et à des installations sanitaires adéquates, un approvisionnement suffisant en aliments sains, la nutrition et le logement, des conditions de travail et d'environnement

80 Art 24 de la loi No 22/030 du 15 juillet 2022 portant protection et promotion des droits des peuples autochtones Pygmées.

81 Art 27(1) of the ILO Convention (No 169).

82 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 421.

83 OMS *Aspects économiques des déterminants sociaux de la santé et des inégalités en santé* (2014) ; M Marmot & RG Wilkinson RG (eds) *Social determinants of health* (1999).

84 Ouguergouz (n 68) 114.

85 Principes et lignes directrices DESC, para 61.

86 Résolution sur l'accès à la santé et aux médicaments nécessaires en Afrique, ACHPR/Res.141, 2008.

saines,[87] y compris l'accès aux soins de santé, services de santé sexuelle et reproductive, sur une base non discriminatoire.[88]

Il s'en suit que droit au meilleur état de santé suppose l'existence des soins, services et conditions de santé, leur accessibilité, leur acceptabilité et la qualité et impose à l'Etat le devoir de le respecter, de le réaliser et de le protéger.[89] L'obligation de respecter impose aux Etats de s'abstenir de prendre des mesures qui affectent négativement l'accès telles que des expulsions forcées éloignant les populations autochtones de leurs terres et, par conséquent, des médicaments traditionnels. C'est dans ce contexte que la Commission africaine a condamné les tentatives des gouvernements de la République du Congo de restreindre l'accès des communautés autochtones aux forêts, ce qui a pour effet «d'éroder les connaissances et les compétences des populations autochtones dans le domaine de la médecine traditionnelle».[90] L'obligation de promouvoir l'accès aux médicaments, selon la Commission africaine, implique de s'abstenir d'adopter des mesures telles que le refus d'accès aux personnes issues des communautés marginalisées, l'interdiction ou l'entrave à «l'utilisation de médicaments traditionnels et des pratiques de guérison scientifiquement fondées et médicalement appropriées».[91] L'obligation de garantir l'accès aux médicaments requiert que l'État encourage les individus et les groupes marginalisés concernés à participer de manière significative aux décisions qui affectent l'accès aux médicaments.[92] Ceci appelle à la reconnaissance par l'Etat de la pharmacopée traditionnelle des populations autochtones, notamment de préserver leurs plantes médicinales, animales et minéraux d'intérêt vital.[93] Dans la Convention africaine révisée sur la nature, il est impératif que les États respectent les «droits traditionnels et les droits de propriété intellectuelle des communautés locales, y compris les droits des agriculteurs», et que les «connaissances autochtones» ne soient accessibles qu'avec le consentement des communautés concernées et qu'elles soient indemnisées pour la «valeur économique» de ces connaissances.[94] Pour garantir une utilisation durable des ressources, les communautés locales doivent être activement

87 Principes et lignes directrices DESC, para 63.

88 Voir E Durojaye 'Article 14: Health and reproductive rights' in A Rudman, C Musembi & T Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 317-318.

89 Voir Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, ACHPR(2009), para 209.

90 Report of the Country Visit of the Working Group on Indigenous Populations/ Communities to the Republic of Congo, 15–24 March, ACHPR(2010) 10.

91 Murray (n 82) 412.

92 As above.

93 Art 24 de Déclaration des Nations Unies sur les Droits de Peuples Autochtones, AGNU(2007)

94 Art XVII (1-2) de la Convention africaine révisée sur la conservation de la nature et des ressources naturelles.

impliquées dans la «planification et la gestion des ressources naturelles» dont elles dépendent.[95]

En second lieu, quant au droit à l'éducation des populations autochtones, elle suppose que les programmes éducatifs destinés aux populations autochtones respectent et intègrent pleinement les protections des droits de l'homme, en particulier les droits à la continuité et à l'intégrité culturelles. C'est dans cette logique que la Commission africaine recommande au gouvernement congolais de ratifier la Convention No. 107 de l'OIT[96] qui prévoit que les gouvernements «doivent adopter des mesures appropriées aux caractéristiques sociales et culturelles des populations intéressées pour faire connaître [aux populations autochtones] leurs droits et leurs devoirs, notamment en matière de travail et de protection sociale».[97] Sur le droit à l'éducation des populations autochtones, dans le *Corrigendum*, la Commission africaine a corrigé sa décision, en recommandant la ratification de la convention No. 169 de l'OIT[98] à la place Convention No. 107 de l'OIT.[99] En effet, la convention No. 107 de l'OIT est souvent critiquée parce qu'elle est ancrée dans une vision des populations autochtones comme étant moins avancée et parce qu'elle propose de manière assez inconditionnelle une approche assimilationniste.[100] La Convention No. 169 par contre, prévoit des mesures adaptées aux traditions et aux cultures des populations concernés, pour leur faire connaître leurs droits et leurs devoirs, notamment en matière de travail, de perspectives économiques, d'éducation et de santé, de protection sociale et leurs droits découlant de la présente convention».[101] L'article 27 de cette convention oblige les Etats à reconnaître le droit de ces populations de créer leurs propres établissements et installations d'enseignement et à disponibiliser ressources à cette fin». L'Etat est en outre tenu de protéger les enfants autochtones dans les écoles et autres établissements d'enseignement

95 Art XVII (3) de la Convention africaine révisée sur la conservation de la nature et des ressources naturelles

96 *Batwa* (n 9) para 233(2).

97 OIT Convention No 107, art. 26.

98 ILO, Ratifications pour République démocratique du Congo, https://normlex.ilo.org/dyn/normlex/fr/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102981 (consulté le 4 septembre 2024).

99 Voir Communication 588/15 *Minority Rights Group International et Environnement Ressources Naturelles et Développement (au nom des Batwa du Parc national de Kahuzi-Biega, RDC) c. République démocratique du Congo* ACHPR (2022), Corrigendum, (In paragraph 219(i) where it reads 'Convention No. C07', it should read 'Convention No. C169' ; where it reads '1957', it should read '1989'. Therefore, the paragraph should read as follows: *Ratify the International Labour Organisation Convention No. C169 concerning Indigenous and Tribal Peoples, 1989,* https://minorityrights.org/app/uploads/2024/07/eng-corrigendum-communication-588-15.pdf (consulté le 29 octobre 2024).

100 Viljoen (n 4) 79.

101 ILO Convention No. 169, art. 30.

contre toute forme de mauvais traitements et de veiller à ce que les auteurs d'abus soient sanctionnés.[102]

4.2 Mise en œuvre des recommandations de la Commission africaine

Ainsi que le note la Commission africaine, les modèles de conservation des forteresses fondées sur l'exclusion des populations autochtones de leurs terres ancestrales sous forme d'expropriations pour cause d'utilité publique ou de privatisation ne doivent pas «constituer une menace pour la disponibilité, l'accessibilité, l'acceptabilité et la qualité des installations, biens et services de santé».[103] D'ailleurs, grâce à leurs pratiques traditionnelles, les Pygmées ont contribué au maintien et à la conservation des écosystèmes forestiers.[104] Dans le cadre des obligations qui leur incombent en vertu du droit à la santé des populations autochtones, les États devraient adopter une stratégie et un plan d'action nationaux en matière de santé publique qui devraient couvrir tous les groupes et adopter une approche holistique de la santé.[105]

La Commission africaine encourage l'utilisation de la médecine traditionnelle en demandant aux États de «protéger les connaissances médicales traditionnelles»[106] et d'assurer «la reconnaissance, l'acceptation, le développement, l'efficacité, la modernisation et l'intégration de la médecine dans le système de santé publique».[107] Autrement dit, le droit à la santé pour les populations autochtones ne peut être dissocié de la reconnaissance et de la protection de leurs territoires, car ces éléments sont indissociables de leur identité et de leur survie. Dans l'affaire *Endorois,* la Commission africaine a constaté qu'en forçant la communauté à vivre sur des terres semi-arides sans accès aux eaux salées du lac dotées de vertus médicinales ou aux sources d'eau traditionnelles ainsi qu'à d'autres ressources vitales pour la santé de leur bétail, l'État défendeur a créé une menace majeure pour le mode de vie des pasteurs *endorois*.[108]

102 Voir Observation générale n° 5 du Comité africain de l'enfance sur les obligations des États parties en vertu de la Charte africaine des droits et du bien-être de l'enfant, para 20.

103 Principes et lignes directrices DESC, para 67(p).

104 La Dynamique des Groupes des Peuples Autochtones (DGPA) et autres 'SOS pour le peuple oublié : Etat des lieux de la situation des violations des droits des peuples autochtones Pygmées en RDC' Rapport des Organisations Non Gouvernementales de promotion et de défense des droits des peuples Autochtones Pygmées en RDC Examen Périodique Universel de la République Démocratique du Congo 3ème Cycle (2019) cité par *Mirindi* (n 2) 124.

105 Principes et lignes directrices DESC, para 67(f).

106 Principes et lignes directrices DESC, para 67(w).

107 Murray (n 82) 412.

108 Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, ACHPR (2009), paras 249, 286.

Quant au droit à l'éducation des populations autochtones, les écoles modernes peuvent facilement devenir des espaces psychologiquement accablants pour les enfants indigènes, car les méthodes d'enseignement modernes et le contenu éducatif peuvent diverger des matières et de l'environnement dans lesquels ils sont enseignés dans un contexte tribal. La Commission africaine a reconnu le faible taux de scolarisation et le taux élevé d'analphabétisme des enfants des populations autochtones, en raison de la langue d'enseignement dans les écoles, du traitement discriminatoire par les enseignants et les autres enfants et du «manque d'adaptation du système et des horaires scolaires aux identités et pratiques culturelles des communautés autochtones».[109] Elle a aussi constaté au Botswana que les langues d'enseignement étaient le *setswana* et l'anglais, que le fait d'amener les apprenants loin de leur famille à des fins éducatives avait également un impact négatif sur eux, et que le gouvernement ne disposait pas d'une politique éducative spécifique à l'égard des *Basarwa*.[110] Dans le même ordre d'idées, un rapport du Fonds des Nations unies pour l'enfance (UNICEF) note que l'un des principaux facteurs d'exclusion des enfants autochtones de l'école ou d'entrave à leurs progrès scolaires est que les programmes et les méthodes d'enseignement sont souvent culturellement inappropriés, ou que la langue d'enseignement est inconnue de l'enfant autochtone.[111]

Il est important de noter que le droit à la santé et le droit à l'éducation en tant que droits socio-économiques, et donc programmatiques, leur réalisation est progressive et dépend de la disponibilité des ressources de l'Etat et de l'aide internationale et régionale.[112] En tout état de cause, les pays africains en général et la RDC en particulier sont confrontés au problème de la pauvreté qui les rend incapables de fournir les équipements, l'infrastructure et les ressources nécessaires qui facilitent la pleine jouissance des droits à la santé[113] et à l'éducation. Déjà dans son rapport de 2005, le Groupe de travail d'experts sur les populations autochtones et les minorités dresse un bilan sombre de la situation des droits des populations autochtones: stéréotypes et de diverses formes de discrimination, entraînant une marginalisation des services sociaux essentiels, y compris l'éducation et la santé.[114] Les populations autochtones portent une charge disproportionnée de maladies, de mortalité, d'alphabétisation et de pauvreté. Ces inégalités sont aggravées par des processus historiques et

109 Rapport de la visite de recherche et d'information du groupe de travail de la Commission africaine sur les populations/communautés autochtones en République du Congo, du 5 au 19 septembre 2005, ACHPR (2007).

110 Report of the African Commission's Working Group on Indigenous Populations/ Communities, Mission to the Republic of Botswana 15-23 June 2005, 2008, para 14.

111 UNICEF *Ensuring the Rights of Indigenous Children* (2004).

112 Voir Principes et lignes directrices DESC, para 13.

113 Communication 241/01, *Purohit and Moore v Gambia* (The) ACHPR (2003), para 84 ; Communication 323/06, *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, ACHPR (2011), para 264.

114 Rapport 2005 du Groupe de travail d'experts sur les peuples autochtones et les minorités en Afrique.

des pratiques d'exclusion sociopolitique,[115] le manque d'éducation, la marginalisation sociale, la discrimination, la dislocation culturelle, la dépossession des terres, etc.

Cela dit, la réalisation du droit à la santé et à l'éducation des populations autochtones exigent la mise en place des plans d'action nationaux raisonnables et soumises à des délais spécifiques,[116] accordant la priorité à ces groupes de telle sorte que l'accès aux équipements, biens et services de santé et d'éducation, soit assuré sans discrimination et que les indicateurs de santé et d'éducation soient désagrégés.[117] La mise en œuvre des telles mesures nécessite donc un financement adéquat.[118] La Commission africaine recommande aux États de diversifier leurs mécanismes de mobilisation des ressources nécessaires à la mise en œuvre de ces droits. Ces mécanismes incluent, entre autres, l'adoption d'innovations fiscales fondées sur un système efficient et équitable, de sorte que la jouissance des droits socio-économique soient prioritaires dans la distribution des ressources.[119]

Cependant, bien que le droit à la santé et à l'éducation en général et pour les populations autochtones en particulier, soient programmatiques, leur réalisation impose des obligations immédiates à l'État, tels que la garantie d'un contenu minimum essentiel.[120] Cette obligation existe quelle que soit la disponibilité des ressources et elle n'est pas dérogeable.[121] Ce contenu minimum oblige l'État à prendre des mesures immédiates pour assurer un accès sans discrimination aux de services de base en matière de santé et d'éducation. Dans le cas des populations autochtones du parc Kahuzi-Biega, cette obligation implique la mise en œuvre de politiques spécifiques et adaptées qui tiennent compte des vulnérabilités historiques et structurelles de ces groupes. L'argument selon lequel les ressources limitées justifieraient l'inaction de l'État est juridiquement inadéquat, car les États doivent démontrer qu'ils utilisent au maximum leurs ressources disponibles pour prioriser les besoins socio-économiques de ses populations, y compris les populations autochtones.[122] Ne pas accorder une priorité explicite à ces populations dans l'allocation des ressources et dans l'élaboration des politiques publiques aggrave les inégalités historiques, renforce leur marginalisation et viole les obligations internationales de l'État. Par conséquent, une approche intégrant ces spécificités est non seulement nécessaire mais juridiquement impérative pour garantir une pleine jouissance de ces droits.

115 L Kirmayer & G Brass *Addressing global health disparities among Indigenous peoples* (2016) 105.

116 Principes et lignes directrices DESC, para 13.

117 Principes et lignes directrices DESC, para 67.

118 S Wamahiu & C Musembi 'Article 12: The right to education' in A Rudman, C Musembi & T Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 272.

119 Principes et lignes directrices DESC, para 15.

120 Principes et lignes directrices DESC, para 17.

121 Principes et lignes directrices DESC, para 17.

122 Principes et lignes directrices DESC, para 17.

5 CONCLUSION

La réalisation du droit à la santé peut nécessiter l'adoption de mesures supplémentaires pour certaines catégories d'individus ou de groupes, comme les populations autochtones. La décision de la Commission africaine dans la présente communication s'inscrit dans cette logique et place ladite Commission comme un avant-gardiste des droits des populations autochtones interprétés dans leur unicité et leur interdépendance, tout en garantissant leur intégration dans le cadre plus large des droits humains. Elle révèle le recours par la Commission africaine, au discours sur les droits de l'homme comme un impératif juridique et moral, pour améliorer la jouissance des droits à la santé et à l'éducation des populations autochtones en général et de Batwa de la RDC.

La décision commentée explique comment la réalisation des droits à la santé et à l'éducation nécessite des mesures supplémentaires à l'égard des groupes vulnérables et en l'espèce les populations autochtones Batwa de la RDC. Ces mesures spécifiques sont essentielles pour leur garantir la jouissance de leurs droits en toute égalité avec d'autres groupes (égalité matérielle/substantielle). La pleine égalité reconnaît les différences de situation de départ qui peuvent nécessiter un traitement différencié pour parvenir à une égalité réelle et effective. Dans la mesure où la réalisation de l'égalité réelle peut nécessiter un traitement différencié ou des droits spéciaux, ceux-ci ne sont pas censés être des privilèges, en ce sens qu'ils ne doivent pas aller au-delà de ce qui est nécessaire pour obtenir une véritable égalité de traitement.[123] Dans le même temps, la position vulnérable des personnes appartenant à des minorités nécessite également une attention accrue pour l'égalité d'accès à l'emploi, aux services publics et à la participation effective à la vie économique, sociale et culturelle ainsi qu'aux affaires publiques.[124] Ainsi, la réalisation des droits à la santé et à l'éducation des populations autochtones exige les plans d'action nationaux sanitaires et éducatifs qui accordent la priorité à ces groupes afin de respecter les différences culturelles et la diversité ethnique.

Finalement, aussi longtemps que les gouvernements n'auront pas garanti des programmes de santé et d'éducation qui reflètent et promeuvent le mieux leurs valeurs et leur culture, les droits des populations autochtones en général restent fragiles et volatiles. L'utilisation des systèmes de santé et d'éducation pour contraindre les populations autochtones à s'adapter à une culture majoritaire qui ne reconnaît pas leurs droits et qui cherche à détruire leur capacité à maintenir et à transmettre aux générations futures leur langue et leur culture, les voue à la disparition. Si les préoccupations spécifiques des populations autochtones ne sont pas mises en évidence, la vulnérabilité et la marginalisation particulières qui découlent de leur statut de

123 Wachira (n 6) 214.
124 As above.

groupes extrêmement marginalisés seront noyées dans les préoccupations générales relatives à la situation des droits de l'homme.