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Annuaire africain des droits de l'homme

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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 2021 is 'Arts, culture and heritage: levers for building the Africa we want'.

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Université de Pretoria
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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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Contents
Table des matières

III
CASE COMMENTARIES

COMMENTAIRES DE DECISIONS

Acknowledgments
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Editorial
Éditorial

Our main theory, which in a way is a foundation on which we build our doctrine in a university environment, is based on the idea that human rights evolve in international organisations in order to protect individuals against the absolutism or omnipotence of states, which are none other than those that gave rise to them (from the point of view of legal positivism). This idea is at the heart of what we call the strange human rights loop theory.

Indeed, when we consider this theory, our thinking is set in movement and invariably ends up at the starting point, only to start again in the same direction, in a kind of 'interlocking hierarchy' between human rights, international organisations, individuals and states in which the dynamism of each element emanates from that of the other and feeds it permanently, thereby keeping the whole process alive. The strange human rights loop theory is also the foundation of the African Union, and is the supporting pillar of its institutional architecture;

Moreover, in my reflections on the interpretation of the African Charter on Human and Peoples' Rights (Charter), I stated in an article during the 2020 lockdown that African regional human rights law has a dual standard, a two-headed structure with, on the one hand, the African Commission on Human and Peoples' Rights and, on the other, the African Court on Human and Peoples' Rights.[1] These two institutions, which complement each other, regulate by themselves the relations between states (governments) and individuals.

In another article published during the same period, I articulated the idea that the science of human rights, which is the subject of this publication, comports a veritable science of government that is of interest to sociologists. This science of government holds that there are interactions between academic knowledge and bureaucratic practices, which interactions open the way to scientific activism.[2]

It is in this backdrop that I consider it an honour to write the preface to this fifth issue of the *African Human Rights Yearbook* (2021). Having analysed its content, I am convinced, without any shadow of doubt, of the ubiquity of these interactions. For those who are familiar with the science of human rights, it is also part of the

1 RN Lumbu 'Sur la contestation de la *potestas interpretandi* de la Commission africaine des droits de l'homme et des peuples vis-à-vis de la Charte africaine des droits de l'homme et des peuples. *Potestas ordinaria* ou *potestas extraordinaria*' (2020) 7(1) *Cahiers africains des droits de l'Homme et de la Démocratie et du Développement Durable* 44.

2 RN Lumbu & JN Lumbu 'L'influence des philosophies des lumières sur l'abolition de l'esclavage en France d'antan (XVIIIème siècle)' (2020) 7(1) *Cahiers africains des droits de l'Homme et de la Démocratie et du Développement Durable* 89.

science of government, bridging the gap between the academic knowledge of legal scholars specialised in human rights on the one hand and, on the other hand, bureaucratic practices, in the broadest sense of the term, that is, the way human rights are practiced by judges and honorary commissioners who are in fact quasi-judges, their know-how in the contentious human rights framework regularly submitted to them under the Charter.

Of course, the best way to make the Charter a concrete, living and dynamic instrument is to interpret it literally, in a way that is simple but not simplistic. However, beyond that, the Charter should be read and interpreted not only in its letter, but also in its spirit, with a view to understand the original intention of its drafters, and this, given the lack of access to its *travaux préparatoires*, which are not accessible to the general public. Where these two organs falter, scholarly writings come to boost the system and give it the impetus to grow.

While the Commissioners and judges, in whom is vested the interpretative authority by virtue of the Charter, occasionally adopt new avenues of reading, hesitating sometimes to go further, scholarly writings come at the right time to shine the spotlight on the most obscure areas of the African regional human rights law.

It is in this context that the authors of this fifth volume reflect, in the context of both the science of government and the theory of the strange loop, on relevant themes such as the rights of children in armed conflicts, the interpretation of fundamental social rights, fair trial, human dignity, the implementation of the Kampala Convention, the role of NGOs, the death penalty and peoples' rights. This fifth volume also features various topics on arts, culture and heritage, which are the African Union theme of the year 2021. It ends with the traditional Case commentaries which, as usual, live up to their reputation for sterling intellectual rigour.

Rémy Ngoy Lumbu
Chairperson of the African Commission on Human and Peoples' Rights (2021-2023)
Professor at the University of Kinshasa

Notre théorie principale, une espèce de socle sur lequel nous construisons notre doctrine en mileu universitaire, repose sur l'idée suivante: les droits de l'homme évoluent dans les organisations internationales en vue de protéger les individus contre l'absolutisme ou la toute puissance des Etats qui sont pourtant à la base de leur naissance (sous l'angle du positivisme juridique). Cette idée est au cœur du sytème névralgique de ce que nous appelons la théorie de la boucle étrange des droits de l'homme.

En effet, lorsqu'on se met à reflechir, comme nous le proposons, notre pensée se met en mouvement, par scension, par déscension, ou circulairement (en colimaçon), et finit toujours à la case de départ (où se se situent les droits de l'homme) pour repartir encore dans le même sens dans une sorte de «hiérarchie enchevetrée» entre les droits de l'homme, les organisations internationales, les individus et les Etats; chaque élement est à l'origine du dynamisme de l'autre et l'alimente en permanence, et maitient en vie l'ensemble du processus.

Cette théorie dite de la «boucle étrange des droits de l'homme» est également le fondement de l'Union africaine, et constitue le pillier soutenant son architecture institutionnelle.

Par ailleurs, refléchissant dans le domaine de l'interpration de la Charte africaine des droits de l'homme et des peuples (Charte), j'indiquais ceci dans un article pendant le confinement de 2020: le droit régional africain des droits de l'homme obéit à un double standard, une structure bicéphale avec, d'une part, la Commission africaine des droits de l'homme et des peuples et, de l'autre, la Cour africaine des droits de l'homme et de Peuples.[3] Ces deux institutions, dont la complémentarité est désormais une lapalissade, regulent à elles-seules les relations entre les Etats (gouvernements) et les individus.

Poursuivant mes cogitations, au cours de la même période, je précisais dans un autre article, l'idée connue de certains, sur la présence, dans la science des droits de l'homme qui nous occupe ici, d'une véritable science de gouvernement, qu'étudient les sociologues, selon laquelle: il existe des interactions entre savoirs académiques et pratiques bureaucratiques ouvrant la voie à un militantisme scientifique.[4]

C'est dans ce contexte que je considère qu'il s'agit d'un honneur pour moi de rediger la préface de ce cinquième numéro de l'*Annuaire africain des droits de l'homme* (2021), convaincu, à l'analyse de son contenu, de l'omniprésence des interactions de cette nature, à n'en point douter. Pour ceux qui connaissent parfaitement la science desdits droits, elle s'inscrit également dans le cadre de la science de

3 RN Lumbu 'Sur la contestation de la *potestas interpretandi* de la Commission africaine des droits de l'homme et des peuples vis-à-vis de la Charte africaine des droits de l'homme et des peuples. *Potestas ordinaria* ou *potestas extraordinaria*' (2020) 7(1) *Cahiers africains des droits de l'Homme et de la Démocratie et du Développement Durable* 44.

4 RN Lumbu & JN Lumbu 'L'influence des philosophies des lumières sur l'abolition de l'esclavage en France d'antan (XVIIIème siècle)' (2020) 7(1) *Cahiers africains des droits de l'Homme et de la Démocratie et du Développement Durable* 89.

gouvernement, en créant des ponts entre les savoirs académiques, que l'on retrouve chez les érudits du droit ayant une spécialité averée dans le domaine des droits de l'homme; et les pratiques bureaucratiques, au sens large du terme, c'est-à-dire, la manière de pratiquer les droits de l'homme chez les juges et les quasi-juges que sont les Honorables commissaires, leur savoir-faire dans le cadre du contentieux des droits de l'homme leur régulièrement soumis au titre de la Charte.

La meilleure manière de faire de cette dernière, un instrument concret, vivant et dynamique est certes de l'interpréter littéralement, de manière simple, pourquoi pas simplissime. Mais au délà de cela, il faudrait la lire et l'intepréter entre les lignes, en essayant de comprendre la volonté première de ses *Founding Fathers*, à défaut d'avoir accès à ses travaux préparatoires, non accessibles au public, du moins à un certain public. Là où ces deux organes font leur tortue, les écrits de doctrine, au sens large, viennent redynamiser le système et lui donnent des ailes pour son épanouissement

Si les Commisssaires et les juges qui ont recu une autorité interprétative de cette convention, ouvrent de temps en temps de nouvelles avenues de lecture, hésitant des fois à aller plus loin, la doctrine arrive à point nommé pour allumer des projecteurs dans les bas-fonds des zones obscures du droit régional africain des droits de l'homme.

C'est dans ce contexte que s'inscrit ce cinquième numéro, en ce que les auteurs de articles y enchâssés réflechissent, dans le contexte à la fois de la science de gouvernement, et de la théorie de la boucle étrange, sur des thèmes pertinents: les droits des enfants dans les conflits armés, l'interprétation des droits sociaux fondamentaux, le procès équitable, la dignité humaine, la mise en œuvre de la Convention de Kampala, le rôle des ONG, la peine de mort, les droits des peuples. Il proposent aussi diverses thématiques sur le thème de l'année 2021 de l'Union africaine (arts, culture et patrimoine). Il finit avec les traditionnels *Cases commentaries* qui tiennent, comme de coutume, leur promesse avec une rigueur intellectuelle incontestable.

Rémy Ngoy Lumbu
Président de la Commission Africaine des Droits de
l'Homme et des Peuples (2021-2023)
Professeur à l'Université de Kinshasa

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

Commentaire de l'observation générale sur l'article 22 de la Charte africaine des droits et du bien-être de l'enfant: «Les enfants dans les situations de conflit»

*Junior Mumbala Abelungu**
https://orcid.org/0000-0003-1396-0185

RÉSUMÉ: L'observation générale sur l'article 22 de la Charte africaine des droits et du bien-être de l'enfant entend guider et éclairer les États parties sur l'interprétation et l'application de cette disposition. En se fondant sur cette dernière, cette observation générale examine les obligations des États en temps de conflits armés, de tensions et de troubles civils. Cependant, le texte de l'observation générale pose quelques problèmes qui pourraient ne pas faciliter son interprétation et son application par les États parties. En effet, se fondant sur la technique juridique (ou dogmatique juridique), la présente étude révèle que l'observation générale sous examen s'oriente plus vers les implications juridiques relevant du droit international des droits de l'homme que du droit international humanitaire. Ce qui paraît une contradiction remarquable par rapport au vœu de ladite observation d'accorder un intérêt particulier au droit international humanitaire. Suivant la même optique, elle n'arrive pas toujours à établir clairement et distinctement les implications juridiques des obligations des États parties selon qu'on se situe en droit international humanitaire ou en droit international des droits de l'homme. Bien plus, les règles et concepts concernés sont appréhendés avec une faiblesse d'études de l'évolution jurisprudentielle, de la pratique des États et de la doctrine.

TITLE AND ABSTRACT IN ENGLISH:

Commentary on the General Comment on article 22 of the African Charter on the Rights and Welfare of the Child: 'Children in Conflict Situations'

Abstract: The General Comment on article 22 of the African Charter on the Rights and Welfare of the Child is intended to guide and enlighten state parties on the interpretation and application of this provision. Based on the latter, this General Comment examines the obligations of states in times of armed conflict, tension and

* Docteur en droit (PhD) de l'Université de Gand (Belgique), Master de spécialisation en droit international de l'Université Libre de Bruxelles, Master de spécialisation en droits de l'homme des Universités Catholique de Louvain, Namur et Saint-Louis – Bruxelles, Master de spécialisation en Analyse interdisciplinaire de la construction européenne des Universités Catholique de Louvain et Saint-Louis – Bruxelles, Professeur de droit international humanitaire et droits de l'homme à l'Ecole de Criminologie de l'Université de Lubumbashi et de droit international public à l'Université Protestante de Lubumbashi et de droit administratif à l'Institut Supérieur de Commerce de Lubumbashi et à l'Université Mapon en RD Congo. Il a été également Professeur visiteur et titulaire de la Chaire du Sud 2021-2022 au programme de Master de spécialisation en droits humains des Universités Catholique de Louvain, Namur et Saint-Louis – Bruxelles (Belgique). L'auteur remercie le Dr Trésor Makunya pour ses aimables conseils et encouragements et dédie cette contribution à sa fille, Zelya Julie Cedrick Mumbala Nizet; juniormumbala@gmail.com

civil unrest. However, the text of the General Comment poses some problems which may not facilitate its interpretation and application by state parties. Using a doctrinal approach, this study reveals that the General Comment under consideration is oriented more towards the legal implications of international human rights law than of international humanitarian law. This appears to be a remarkable contradiction in light of the aim of this General Comment to pay a particular attention to international humanitarian law. Similarly, the General Comment does not always succeed in establishing clearly and distinctly the legal implications of the obligations of states Parties depending on whether the issue is contemplated under international law or international human rights law. Moreover, the rules and concepts involved are examined without a full consideration of the development of case law, state practice and doctrine.

MOTS CLÉS: observation générale sur l'article 22, enfants, conflit armé, tensions civiles, troubles civils, droit international humanitaire, droit international des droits de l'homme, Charte africaine des droits et du bien-être de l'enfant, Comité africain d'experts sur les droits et le bien-être de l'enfant

SOMMAIRE:

1 INTRODUCTION

Dans son mandat d'«élaborer et [de] formuler des principes et des règles visant à protéger les droits et le bien-être des enfants en Afrique»,[1] le Comité africain d'experts sur les droits et le bien-être de l'enfant (Comité africain sur les droits de l'enfant) adopte des observations générales ou finales. Les observations générales orientent les États parties sur l'interprétation et l'application d'une disposition conventionnelle. C'est dans ce sens que l'observation générale sur l'article 22 de la Charte africaine des droits et du bien-être de l'enfant[2] (observation générale sur l'article 22) a été adoptée en septembre 2020.[3]

Dans le contexte africain où les enfants[4] sont les plus affectés par les conflits armés,[5] contexte caractérisé notamment par la présence de

1 Art 42(a)(ii) de la Charte africaine des droits et du bien-être de l'enfant.

2 La Charte africaine des droits et du bien-être de l'enfant a été adoptée à Addis-Abéba, le 11 juillet 1990 et entrée en vigueur le 29 novembre 1999. Seuls le Maroc, la République Arabe Sahraouie Démocratique, la Somalie, le Soudan du Sud et la Tunisie ne l'ont pas encore ratifiée, voir https://www.acerwc.africa/ratifications-table/ (source consultée le 1 décembre 2021).

3 Comité africain sur les droits de l'enfant *Observation générale sur l'article 22 de la Charte africaine des droits et du bien-être de l'enfant: les enfants dans les situations de conflit*, septembre 2020, p 32 in https://www.acerwc.africa/general-comments/ (source consultée le 20 mai 2020).

4 Au sens de l'article 2 de la Charte africaine des droits et du bien-être de l'enfant, 'on entend par "enfant" tout être humain âgé de moins de 18 ans'.

5 Comité africain sur les droits de l'enfant *Etude continentale sur l'impact des conflits et des crises sur les enfants en Afriqu*e (2017) 29-33.

plus d'enfants soldats qu'ailleurs,[6] l'adoption de cette observation générale était d'une nécessité.[7] Elle entend guider et éclairer les États parties dans la prévention des violations des droits des enfants et la protection des enfants dans les conflits armés, tensions et troubles civils.[8]

En effet, avec un intérêt particulier accordé au droit international humanitaire (DIH),[9] l'observation générale sur l'article 22 adopte une approche de complémentarité entre le DIH et le droit international des droits de l'homme (DIDH) comme cadre juridique international de protection des enfants dans les conflits armés.[10] En outre, dans la mesure où le DIH serait d'une moindre protection en dehors des conflits armés, l'article 22(3) vise une meilleure protection possible des enfants en situations de tensions et troubles civils.[11] Ce qui vaut de même pour l'article 22(2) applicable en temps de paix et de conflits armés. Ceci privilégiera l'application des instruments de DIDH. Bien plus, de nombreux instruments ou sources de droit international qui se rapportent à la protection des enfants et de leurs droits inspirent cette observation générale.[12]

Cependant, l'observation générale sur l'article 22 reste un texte perfectible. Des passages sont à approfondir, dont ceux sur les notions de conflits armés, hostilités, tensions ou troubles civils, participation directe aux hostilités. Des analyses comparées devaient être effectuées notamment avec les articles 38 de la Convention relative aux droits de l'enfant et 11 du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes, lesquels consacrent les mêmes types d'obligations. Même si l'observation générale dit s'être inspirée de ces instruments précités,[13] elle se devait d'éclairer les États parties sur les contenus et les sens à accorder véritablement à chacun des trois paragraphes de cette disposition et au texte de celle-ci dans son ensemble. A ce titre, l'évolution jurisprudentielle et doctrinale, ainsi que la pratique des États sur la question devaient réellement être prises en considération. Bien qu'elle affirme mettre un accent sur le DIH, l'interprétation qu'effectue l'observation générale sur l'article 22 reste en général celle des droits de l'homme et non véritablement du DIH.

Ainsi, au regard des problèmes d'interprétation et d'application qu'ils présentent, deux points de cette observation générale seront particulièrement étudiés: la «nature des obligations de l'État partie dans le contexte des enfants et des conflits armés» (partie 3) et le «contenu essentiel de l'article 22» (partie 4). Une présentation générale

6 JM Abelungu 'Le système africain de protection des droits de l'homme et la question des enfants soldats' (2019) 3 *Annuaire africain des droits de l'homme* 2.
7 Comité africain sur les droits de l'enfant (n 3) para 5.
8 Comité africain sur les droits de l'enfant (n 3) para 7.
9 Comité africain sur les droits de l'enfant (n 3) para 11.
10 Comité africain sur les droits de l'enfant (n 3) paras 9-11.
11 Comité africain sur les droits de l'enfant (n 3) paras 12-13.
12 Comité africain sur les droits de l'enfant (n 3) paras 3-4.
13 Comité africain sur les droits de l'enfant (n 3) para 3.

critique de l'observation générale sous examen précèdera ces deux points (partie 2).

2 PRÉSENTATION DE L'OBSERVATION GÉNÉRALE SUR L'ARTICLE 22

L'observation générale sur l'article 22 est composée de dix points à savoir: introduction; objectifs; portée de l'observation générale; principes généraux; nature des obligations de l'État partie dans le contexte des enfants et des conflits armés; contenu essentiel de l'article 22; rôle des autres parties prenantes; recours; responsabilité et diffusion de l'observation générale.

L' *introduction* rappelle le mandat du Comité africain sur les droits de l'enfant consacré par l'article 42(a)(ii) de la Charte africaine des droits et du bien-être de l'enfant.[14] Elle présente les sources d'inspiration ayant servi à la rédaction de l'observation générale sur l'article 22 et souligne la nécessité de son adoption.[15] Elle libelle l'article 22[16] avant d'indiquer les différentes obligations contenues dans cette disposition et de présenter le cadre juridique – DIH et DIDH – assurant la prévention des violations des droits des enfants et la protection des enfants en période de conflits armés, tensions et troubles civils.[17] Ces deux branches ont un point commun, la protection de la dignité et de la vie humaines,[18] et se complètent.[19] Spécialement en période de conflit armé, c'est l'approche de complémentarité qui se trouve privilégiée par l'observation générale sur l'article 22.[20] Cette

14 Art 42(a)(ii) de la Charte africaine des droits et du bien-être de l'enfant.

15 Comité africain sur les droits de l'enfant (n 3) paras 5-7.

16 Comité africain sur les droits de l'enfant (n 3) para 6.

17 Comité africain sur les droits de l'enfant (n 3) paras 7-13.

18 Comité africain sur les droits de l'enfant (n 3) para 9.

19 Sur la complémentarité entre le DIH et le DIDH, lire par exemple, J Pictet 'Le droit international humanitaire: définition' in Institut Henry-Dunant (dir) *Les dimensions internationales du droit humanitaire* (1986) 15; E David *Principes de droit des conflits armés* (2012) 93-102; MF Diop *Droit international des droits de l'homme et droit international humanitaire: Réflexions sur la complémentarité de deux faces d'une même médaille* (2016) 235; A Meyer 'La protection de l'enfance dans les conflits armés: perspectives de mise en œuvre des normes du droit international humanitaire et du droit international des droits de l'homme' in A Biad & P Tavernier (dirs) *Le droit international humanitaire face aux défis du XXIe Siècle* (2012) 219-243; H Tigroudja 'La Cour suprême israélienne et la protection des personnes en temps de conflit' (2009) 3 *Revue générale de droit international public* (2009) 555-588; A Guellali '*Lex speciali,* droit international humanitaire et droits de l'homme: leur interaction dans les conflits armés' (2007) 3 *Revue générale de droit international public* 539-574; JM Abelungu 'Le droit international humanitaire et la protection des enfants en situations de conflits armés: étude de cas de la République démocratique du Congo', Thèse de doctorat en droit, Université de Gand (2017) 4; CIJ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, Avis consultatif, *Recueil* (2004) 178, para 106; CIJ *Affaire des Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, Recueil* (2005) 243, para 216.

20 Comité africain sur les droits de l'enfant (n 3) paras 7-13.

approche vise à apporter une plus-value dans l'interprétation et l'application coordonnées des instruments juridiques de ces deux disciplines.[21] Dans la mesure où l'article 22 réaffirme l'application des règles du DIH dans les conflits armés et que son contenu figure déjà dans des instruments du DIH, l'observation générale sur l'article 22 affirme mettre davantage l'accent sur le DIH, conformément au mandat du Comité africain sur les droits de l'enfant et à l'approche fondée sur les droits de l'enfant.[22] En même temps, cette observation générale dissipe le doute et précise le sens à accorder au paragraphe 3 dudit article dont le but n'est pas d'étendre l'application du DIH en dehors de son cadre (conflits armés) mais de garantir la meilleure protection possible de l'enfant tant en temps de conflits armés que dans les tensions et troubles civils.[23]

Par ailleurs, au regard de cette *introduction,* trois observations s'avèrent importantes. Premièrement, le DIH et le DIDH ne sont pas les seules disciplines formant le cadre juridique de protection des enfants en situation de conflits armés. Le droit international pénal, par exemple, est une discipline autonome de grand apport pour la protection des enfants en temps de conflits armés. Il incrimine les six violations graves des droits de l'enfant[24] dont l'interdiction de recrutement ou d'enrôlement et de participation ou d'utilisation des enfants aux hostilités. Le DIH est lacunaire à ce sujet. Par exemple, la liste des infractions graves ne comporte pas le recrutement ou l'utilisation des enfants dans les hostilités.[25] Le Statut de Rome portant création de la Cour pénale internationale est éloquent à ce sujet.[26] Or, puisque le Comité africain sur les droits de l'enfant s'inspire également de la jurisprudence internationale,[27] les décisions des juridictions pénales internationales ou mixtes traitent abondamment de la répression des violations des dispositions protégeant les enfants en situation de conflits armés.[28] Ainsi, sur la base de l'article 42(a)(ii) de la Charte africaine des droits et du bien-être de l'enfant,[29] le Comité africain sur les droits de l'enfant devait donc se référer aux principes et règles du droit international pénal en lien avec les violations des droits de l'enfant. Deuxièmement, la coutume africaine en matière de protection des enfants en conflits armés, plus développée que celle universelle,[30] est une source importante que le Comité africain sur les

21 Comité africain sur les droits de l'enfant (n 3) para 11.

22 Comité africain sur les droits de l'enfant (n 3) para 11.

23 Comité africain sur les droits de l'enfant (n 3) paras 12-13.

24 Comité africain sur les droits de l'enfant (n 3) para 8.

25 Abelungu (n 19) 207.

26 Lire l'article 8(2)(b)(xxvi et e vii) du Statut de la Cour pénale internationale.

27 Comité africain sur les droits de l'enfant (n 3) para 3.

28 Lire, par exemple, Cour pénale internationale, *Le Procureur c. Thomas Lubanga Dyilo,* affaire ICC-1/4-1/6, jugement du 14 mars 2012; Cour pénale internationale, *Le Procureur c. Thomas Lubanga Dyilo,* affaire ICC-1/4-1/6, Chambre de première instance I, décision relative à la peine rendue en application de l'article 76 du Statut, 10 juillet 2012; Tribunal spécial pour la Sierra Leone, *Prosecutor against Moinina Fofana, Allieu Kondewa,* Case SCSL-04-14-T, Trial Chamber I, judgement, 2 août 2007.

29 Art 42(a)(ii) de la Charte africaine des droits et du bien-être de l'enfant.

droits de l'enfant devait mentionner et s'en inspirer. Troisièmement, mettre l'accent sur le DIH, en dépit de son caractère de *lex specialis*, n'est pas synonyme d'une protection efficace de l'enfant que doit rechercher le Comité africain sur les droits de l'enfant.

Les *objectifs* précisent le but de l'observation générale consistant à éclairer les États sur la nature de leurs obligations sur pied de l'article 22. Toutefois, en limitant ces obligations aux «mesures législatives, administratives et autres que les États parties [...] devraient prendre pour protéger les droits des enfants dans les situations de conflit armé ou touchés par un conflit armé»,[31] l'observation générale sur l'article 22 entreprend une interprétation restrictive. En effet, l'article 22 de la Charte africaine des droits et du bien-être de l'enfant ne vise pas uniquement les enfants en conflits armés comme le mentionne d'ailleurs le titre de l'observation générale. Les tensions et troubles civils sont également concernés par cette disposition (cfr article 22(3)). Bien plus, de l'interprétation de cette disposition, il n'est pas seulement question de la «protection» des enfants ou de leurs droits dans ces contextes précités mais aussi de la «prévention» de leurs violations. Toutefois, le projet d'observation générale sur l'article 22 faisait mention de la «prévention»[32] et de la «protection»[33] comme objectifs de l'observation générale.

Pour sa part, la *portée de l'observation générale* s'attèle à la présentation des éléments contenus dans l'observation générale sur l'article 22.[34] Elle précise le champ d'application de celle-ci – conflits armés, tensions et troubles – et les obligations y afférentes.[35] Tout en rappelant l'approche fondée sur l'enfant adoptée par cette observation générale,[36] la portée de l'observation générale insiste sur la nécessité d'utiliser les synergies avec d'autres sources pour prévenir les conflits et promouvoir la gestion post-conflit.[37] D'où l'importance de reconnaître la protection des enfants contre les dangers des conflits armés comme «un impératif moral, une responsabilité juridique et une question de paix et de sécurité internationales».[38] De la portée de l'observation générale, il est important de signifier que l'article 22 s'inscrit dans le cadre d'un instrument des droits de l'homme dont les obligations s'appliquent en principe en tout temps.

Les *principes généraux*[39] étalent et explicitent, en rapport avec l'article 22, l'intérêt supérieur de l'enfant; le droit à la participation; la non-discrimination et le droit à la vie, à la survie et au développement. Il s'agit en même temps des droits et des principes fondamentaux de la

30 Abelungu (n 6) 9-12.
31 Comité africain sur les droits de l'enfant (n 3) 4, para 14 (nous soulignons).
32 Comité africain sur les droits de l'enfant (n 3) para 8.
33 Comité africain sur les droits de l'enfant (n 3) para 10.
34 Comité africain sur les droits de l'enfant (n 3) para 15.
35 Comité africain sur les droits de l'enfant (n 3) paras 15-16, 18.
36 Comité africain sur les droits de l'enfant (n 3) para 17 & 21.
37 Comité africain sur les droits de l'enfant (n 3) paras 20-21.
38 Comité africain sur les droits de l'enfant (n 3) para 20
39 Comité africain sur les droits de l'enfant (n 3) paras 24-42.

Charte africaine des droits et du bien-être de l'enfant. Ces principes ont guidé les auteurs de la Convention relative aux droits de l'enfant.[40] Dans l'interprétation et l'application de toutes les dispositions de la Charte africaine des droits et du bien-être de l'enfant, ces principes doivent être pris en considération.[41]Aucune disposition de celle-ci ne peut donc être lue indépendamment de ces principes. Cela vaut de même pour toutes les autres dispositions en rapport avec les droits et le bien-être de l'enfant en vertu notamment de l'interdépendance et de l'indivisibilité des droits de l'homme qui caractérisent aussi les droits de l'enfant.[42] «La réalisation de tous les droits de l'enfant repose sur [ces] principes clés».[43] C'est la raison pour laquelle toutes les observations générales du Comité africain sur les droits de l'enfant reviennent sur ces principes.[44]

Le cinquième point relatif à la *nature des obligations de l'État partie dans le contexte des enfants et des conflits armés*, développé en deuxième partie de ce travail, rappelle que l'article 22 doit être lu à la lumière de l'article 1er de la Charte africaine des droits et du bien-être de l'enfant et «interprété dans une optique axée sur les droits de l'enfant et centrée sur l'enfant»[45] en tenant notamment compte des principes fondamentaux développés ci-avant. Ainsi, les États parties ont l'obligation de prendre immédiatement et concrètement des mesures nécessaires – législatives, administratives, judiciaires et autres mesures pratiques – pour rendre effective l'obligation de protection ou de traitement des enfants en situation de conflit armé, tensions et troubles.[46] Ils ont également une obligation de respect. Celle-ci impose de s'abstenir de toute violation des droits garantis par la Charte africaine des droits et du bien-être de l'enfant dont le droit des enfants de ne pas être enrôlés ou utilisés dans des hostilités par les forces ou groupes armés.[47] Plus précisément, l'obligation de respect comporte

40 AM Rchid *Les droits de l'enfant dans les conventions internationales et les solutions retenues dans les pays arabo-musulmans* (1999) 79.

41 Lire Comité africain sur les droits de l'enfant, *Observation générale sur l'article 6 de la Charte africaine des droits et du bien-être de l'enfant* (2014) 14, para 13; Commission africaine des droits de l'homme et des peuples et Comité africain sur les droits de l'enfant, *Observation générale conjointe de la Commission 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 (CAEDBE) sur l'éradication du mariage des enfants*, Commission africaine – Comité africain sur les droits de l'enfant (2017) para 7; ACERWC, *General comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection'*, ACERWC (2018) 9 et 11.

42 Comité africain sur les droits de l'enfant *Observation générale sur l'article 31 de la Charte africaine des droits et du bien-être de l'enfant sur les 'Responsabilités de l'enfant'* (2017) 6, paras 20-21. Voir aussi Comité des droits de l'enfant, *Observation générale 5 (2003) sur les mesures d'application générales de la Convention relative aux droits de l'enfant* (Art 4, 42 et 44, para 6), CRC/GC/2003/5, 27 novembre 2003, 6.

43 Comité africain sur les droits de l'enfant (n 41) para 15.

44 Comité africain sur les droits de l'enfant (n 3) paras 13-22; Comité africain sur les droits de l'enfant (n 41) paras 14-19; Commission africaine - Comité africain sur les droits de l'enfant (n 41) paras 7-14; ACERWC (n 41) 9-14.

45 Comité africain sur les droits de l'enfant (n 3) para 43.

46 Comité africain sur les droits de l'enfant (n 3) paras 44-45.

des devoirs (obligations) positifs et négatifs. Les devoirs positifs impliquent: premièrement, la prévention des violations de l'article 22 et du DIH[48] et l'adoption de mesures pour la connaissance et le respect du DIH et de la Charte africaine des droits et du bien-être de l'enfant; deuxièmement, la responsabilité du fait de ces violations dont les droits de la Charte africaine des droits et du bien-être de l'enfant en général; et troisièmement, les recours et les réparations efficaces aux victimes de ces violations.[49] Sous l'angle des devoirs négatifs, les États doivent s'abstenir de: fournir des armes; protéger les auteurs des violations de ces droits; prêter assistance aux parties aux conflits armés par le droit de passage sur leurs territoires.[50]

Il importe de souligner que l'article 22(1) traite des obligations de «respecter» et de «faire respecter» les règles du DIH applicables aux conflits armés concernant les enfants. Il s'agit là de deux obligations de nature différente (cfr. l'article 1er commun aux Conventions de Genève (CG) et l'article 1(1) du Protocole additionnel I (PA I), voir également le point suivant de cette étude). Ainsi, après l'examen de l'obligation de respect du DIH, l'observation générale tente d'appréhender l'obligation de faire respecter le DIH par les autres. En effet, celle-ci comporte également une obligation négative et celle positive. L'obligation négative implique que «les États ne peuvent ni encourager, ni aider ou assister les violations du DIH par les parties à un conflit».[51] Et l'obligation positive impose aux États de «faire tout ce qui est raisonnablement en leur pouvoir pour prévenir et faire cesser ces violations».[52] Bien plus, cette obligation exige des États des mesures appropriées à l'endroit de la population, des groupes armés, d'autres États et partenaires non étatiques pour respecter le DIH.[53]

Le sixième point portant sur le contenu essentiel de l'article 22,[54] dont une analyse approfondie est envisagée en dernière partie de cette étude, examine les éléments constitutifs de cette disposition et les obligations des États y afférentes.

Pour sa part, le septième point aborde le rôle des autres parties prenantes. Ces dernières désignent «[t]outes les personnes, organisations, entités qui sont en mesure d'améliorer la situation d'un enfant touché par un conflit armé».[55] Elles ont un rôle dans la prévention des conflits et la protection des enfants pendant et après un conflit.[56] Elles agissent seules ou en concertation.[57] En réalité,

47 Comité africain sur les droits de l'enfant (n 3) paras 46-47.
48 Comité africain sur les droits de l'enfant (n 3) paras 48 & 50.
49 Comité africain sur les droits de l'enfant (n 3) para 48.
50 Comité africain sur les droits de l'enfant (n 3) para 49.
51 Comité africain sur les droits de l'enfant (n 3) para 51.
52 Comité africain sur les droits de l'enfant (n 3) para 51.
53 Comité africain sur les droits de l'enfant (n 3) paras 52-53.
54 Comité africain sur les droits de l'enfant (n 3) paras 54-92.
55 Comité africain sur les droits de l'enfant (n 3) para 93.
56 Comité africain sur les droits de l'enfant (n 3) para 93.
57 Comité africain sur les droits de l'enfant (n 3) para 93.

conformément au champ d'application de l'article 22, leur rôle doit être joué en tout temps.

Le huitième point porte sur les *recours*, lesquels sont envisagés sous l'angle du Comité africain sur les droits de l'enfant et des États parties. Pour le Comité africain sur les droits de l'enfant, ses solutions aux questions des enfants touchés par les conflits armés, tensions et troubles passent par «des mécanismes de plainte individuelle, le recours aux visites de missions [...] l'examen des rapports des États et l'utilisation des observations finales sur les rapports des États parties».[58] Concernant les États, «les recours adéquats, efficaces et complets» sont envisagés pour faire face aux violations des droits de l'enfant en rapport avec l'article 22.[59]

Le neuvième point, traitant de la *responsabilité*, approfondit la question de la responsabilité telle qu'abordée au cinquième point précité. En effet, les systèmes nationaux doivent être le reflet des obligations internationales des États.[60] Ces derniers doivent criminaliser les violations des droits de l'enfant dont les crimes de guerre, enquêter et poursuivre leurs auteurs.[61]

Enfin, le dernier point insiste sur la large *diffusion de l'observation générale* par les États parties et autres parties prenantes.[62]

3 NATURE DES OBLIGATIONS DE L'ÉTAT PARTIE DANS LE CONTEXTE DES ENFANTS ET DES CONFLITS ARMÉS

Ce cinquième point de l'observation générale sur l'article 22 traite en réalité de l'«effet utile» de l'article 22. Autrement dit, l'interprétation réservée à l'article 22 ne doit pas le vider de toute sa substance ou de toute son utilité. En revanche, elle doit viser à le rendre effectif[63] dans le sens que prescrit l'article 1er. Et ce dernier insiste en son paragraphe premier sur des mesures nécessaires à prendre par les États parties «pour donner effet aux dispositions de la présente Charte».[64] C'est d'ailleurs suivant la même interprétation que le Comité africain sur les droits de l'enfant, dans sa décision sur la communication soumise par Michelo Hansungule et autres contre le gouvernement de l'Ouganda concluait à la violation de l'article 22 en tant que devoir fondamental de l'article 1(1) par l'Ouganda.[65]

58 Comité africain sur les droits de l'enfant (n 3) para 101.
59 Comité africain sur les droits de l'enfant (n 3) para 102.
60 Comité africain sur les droits de l'enfant (n 3) paras 105, 110 & 114
61 Comité africain sur les droits de l'enfant (n 3) paras 106-113.
62 Comité africain sur les droits de l'enfant (n 3) paras 115-117.
63 Abelungu (n 19) 81.
64 Lire l'article 1(1) de la Charte africaine des droits et du bien-être de l'enfant
65 The African Committee of Experts on the Rights and Welfare of the Child, *Decision on the communication submitted by Michelo Hansungule and others (on behalf of children in northen Uganda) against the Government of Uganda,* Communication 1/2005, 15-19 avril 2013, paras 60, 81.

Bien plus, l'observation générale précise que la lecture de l'article 22 doit être effectuée au regard de l'article 1er «dans une optique axée sur les droits de l'enfant et centrée sur l'enfant et de manière à souligner et à renforcer la relation dynamique entre les obligations découlant de l'article 22 et les principes fondamentaux de la Charte».[66] En effet, ce passage précise l'approche au cœur de cette observation générale et souligne l'interdépendance et indivisibilité qui existent entre l'article 22 et les principes fondamentaux de la Charte africaine sur les droits de l'enfant. Cela n'exclut évidemment pas une interdépendance entre les obligations de cette disposition et entre celle-ci et les autres dispositions de la Charte africaine sur les droits de l'enfant. En toute logique, l'interprétation à donner au contenu de l'article 22 ne devrait pas aller dans le sens de priver ces principes fondamentaux ou d'autres dispositions de leurs «effets utiles», mais plutôt de les renforcer.

Par ailleurs, l'observation générale sur l'article 22 mentionne que les États parties doivent prendre des *mesures nécessaires* pour l'élaboration et la mise en œuvre des mesures administratives, législatives, judiciaires et autres mesures pratiques relatives à la protection ou au traitement des enfants touchés par des conflits armés, tensions et troubles.[67] Tout doit être entrepris pour que les mesures ci-dessus décrites soient élaborées et mises en œuvre. Cette obligation de protection est accompagnée de celle de respect.

Partant des obligations découlant de l'article 22, l'observation générale sur l'article 22 indique qu'il revient aux États, en vue d'assurer la mise en œuvre du DIH, «de prendre immédiatement, délibérément, concrètement et de manière ciblée, toutes les mesures législatives, administratives et autres mesures possibles».[68] C'est donc l'obligation de respecter le DIH.

En effet, suivant l'observation générale sur l'article 22, l'obligation de respecter impose de s'abstenir immédiatement de toute violation des droits de l'enfant dont l'interdiction d'enrôlement ou d'utilisation directe ou indirecte des enfants aux hostilités.[69] Des restrictions sont toutefois admises, dans l'optique d'assurer une protection continue et efficace de l'article 22,[70] moyennant la démonstration de leur nécessité, de leur proportionnalité au regard du but légitime poursuivi. De cette obligation, une mise en œuvre de bonne foi du DIH et sans discrimination est requise.[71] Bien plus, l'«obligation de respecter», tout comme celle de «faire respecter», le DIH comporte des devoirs positifs et négatifs, comme vu précédemment. Clairement, elles imposent aux États de prendre des mesures nécessaires.[72]

Par ailleurs, il va sans dire que la présentation de l'obligation de respecter est plus orientée vers les droits de l'homme que vers le DIH.

66 Comité africain sur les droits de l'enfant (n 3) para 43.
67 Comité africain sur les droits de l'enfant (n 3) para 44.
68 Comité africain sur les droits de l'enfant (n 3) para 45.
69 Comité africain sur les droits de l'enfant (n 3) paras 46-47.
70 Comité africain sur les droits de l'enfant (n 3) para 46.
71 Comité africain sur les droits de l'enfant (n 3) para 46.
72 Comité africain sur les droits de l'enfant (n 3) para 50.

Cependant, l'obligation de respecter dont est question dans l'article 22(1) est celle de DIH. En effet, l'obligation de respecter le DIH s'impose sans exception pour des interdictions absolues en DIH. C'est seulement en dehors de la réglementation expresse ou des interdictions du DIH que celui-ci permet aux parties à un conflit armé d'observer l'équilibre entre la nécessité militaire et les exigences humanitaires.[73] Autrement dit, la nécessité militaire ne doit pas être poursuivie au détriment des exigences humanitaires et inversement. Ainsi, cette présentation qui introduit le contrôle de légalité, de légitimité et de proportionnalité pour la validité des restrictions des droits humains n'a pas de soubassement en DIH.

Bien plus, si l'article 22 doit être lu à la lumière de l'article 1er, cela ne doit nullement faire perdre à cet article sa substance propre. En effet, l'article 22(1) traite essentiellement de l'«obligation de respecter» et de «faire respecter» le DIH applicable aux enfants affectés par les conflits armés. Il n'est donc pas question de l'«obligation de respecter» ou de «faire respecter» les droits contenus dans la comme le veut logiquement l'article 1er. A ce sujet, l'observation générale sur l'article 22 entreprend une interprétation extensive. Celle-ci vaut également lorsqu'elle traite du droit des enfants de ne pas être utilisés «directement ou indirectement» dans les hostilités.[74] L'article 22(2) ne retient que l'utilisation ou la participation «directe» des enfants aux hostilités, contrairement à l'article 11(4) du Protocole de Maputo qui retient largement la «participation» des enfants aux hostilités, entendue comme la participation directe ou indirecte aux hostilités.

Il convient de préciser que les obligations de respecter et de faire respecter les règles du DIH qu'impose l'article 22 sont plus complexes que ce que présente son observation générale.[75] Il s'agit, en réalité, d'une porte ouverte de référence au DIH que fait un instrument des droits de l'homme. Ainsi pour tout dire, les obligations de «respecter» et de «faire respecter» le DIH n'apparaissent pas pour la première fois avec l'article 22. Les CG du 12 août 1949 et leur PA I les abordent.[76] Bien plus, suivant la Cour internationale de justice (CIJ), ces obligations «ne découle[nt] pas seulement des Conventions elles-mêmes, mais des principes généraux du droit humanitaire dont les Conventions ne sont que l'expression concrète».[77] Les deux obligations vont au-delà de celles relevant du droit international coutumier.[78] Il s'agit, dans le cas de la Charte africaine des droits et du bien-être de l'enfant, de la

73 Voir N Melzer *Guide interprétatif sur la notion de participation directe aux hostilités en droit international humanitaire* (2010) 81-82.

74 Comité africain sur les droits de l'enfant (n 3) para 47.

75 Lire avec intérêt, Union interparlementaire et Comité international de la Croix-Rouge *Respecter et faire respecter le droit international humanitaire* (1999) 39-72

76 Lire avec intérêt Abelungu (n 19) 134-137.

77 CIJ Affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis)*, *Recueil* (1986) 114, para 220; F Shaygan *La Compatibilité des sanctions économiques du Conseil de sécurité avec les droits de l'homme et le droit international humanitaire* (2008) 71.

78 Shaygan (n 77) 70.

transposition et de l'adaptation des règles de DIH aux enfants dont font mention également d'autres instruments des droits de l'homme.[79]

En effet, l'article 1er commun aux CG et l'article 1(1) du PA I imposent aux États non seulement l'obligation de *respecter* ces instruments internationaux mais aussi de les *faire respecter* en toutes circonstances. «[A] première vue, cette disposition peut paraître superfétatoire en ce qu'elle n'ajoute rien au principe général du droit des traités, *pacta sunt servanda* [...].[80] En réalité, il semble que les auteurs de ces textes aient voulu à la fois rappeler la règle et y insister [...]».[81] Cette disposition est interprétée comme visant non seulement le respect du DIH dans l'ordre interne mais aussi dans l'ordre international.[82] Suivant la CIJ, «[i]l résulte de cette disposition l'obligation de chaque État partie à cette convention, qu'il soit partie ou non à un conflit déterminé, de faire respecter les prescriptions des instruments concernés».[83]

La conception largement dominante reconnaît l'existence d'une obligation étatique d'agir, afin d'amener un État à respecter ses engagements au regard de la convention, en cas de violation.[84] Cette conception se trouve confortée par le commentaire du CICR et attestée dans la pratique étatique à travers les résolutions et avis des organes onusiens dont le Conseil de sécurité des Nations unies, l'Assemblée générale des Nations unies et la CIJ.[85]Bien plus, différentes approches – bilatérales ou multilatérales, régionales ou universelles – sont adoptées dans la pratique des États pour remplir cette obligation de «faire respecter» le DIH, dont des démarches discrètes ou des protestations, des dénonciations publiques, des pressions diplomatiques, des mesures coercitives, des mesures de rétorsion, *etc.*[86] Bref, un certain nombre de mesures doivent être prises si l'on veut assurer le respect des obligations découlant du DIH tant au plan interne qu'international.[87] Pour cerner le caractère complexe ci-haut mentionné, il y a lieu de comprendre que l'article 1er commun aux CG

79 Lire les article 38 (1) et 11 (1) respectivement de la Convention relative aux droits de l'enfant et du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes (Protocole de Maputo).

80 Voir l'article 26 de la Convention de Vienne sur le droit des traités.

81 G Niyungeko 'La mise en œuvre du droit international humanitaire et le principe de la souveraineté des États' (1991) 788 *Revue internationale de la Croix-Rouge* 114-115.

82 S Bula-Bula 'Droit international humanitaire' in *Droits de l'homme et droit international humanitaire. Séminaire de formation cinquantenaire de la DUDH* (1999) 169.

83 CIJ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, *Recueil* (2004) 199-200, para 158.

84 F Dubuisson 'Les obligations internationales de l'Union européenne et de ses États membres concernant les relations économiques avec les colonies israéliennes' (2013) 2 *Revue belge de droit international* 428.

85 Dubuisson (n 84) 429-432.

86 M Veuthey 'L'Union européenne et l'obligation de faire respecter le droit international humanitaire' in A-S Millet-Devalle (dir) *L'Union européenne et le droit international humanitaire* (2010) 196-197.

87 H-P Gasser *Le droit international humanitaire: introduction* (1993) 88-89. Voir aussi M Deyra *Le droit dans la guerre* (2009) 163.

(et l'article 1(1) du PA 1) «n'offre lui-même aucune indication quant aux mesures qui peuvent être prises pour le mettre en œuvre».[88] L'identification de telles mesures devrait être guidée par leur licéité en droit international et, surtout, «par le souci d'efficacité c'est-à-dire celui d'améliorer réellement le sort des victimes».[89]

Cependant, il faut préciser que l'article 22 utilise l'expression «mesures nécessaires» concernant l'interdiction d'enrôlement et de participation directe des enfants aux hostilités.[90] S'agissant de la protection et du soin à administrer aux enfants affectés par un conflit armé, une tension ou un trouble, le même article fait usage des «mesures possibles». Au sens de l'observation générale sur l'article 22, les «mesures possibles» «font référence aux initiatives, aux interventions et aux stratégies dont dispose l'État pour protéger et s'occuper des enfants».[91] Il s'agit de mesures réalisables,[92] ou envisageables par les États pour protéger et prendre soin des enfants victimes des conflits armés, des tensions et des troubles.[93] Il existe donc deux obligations distinctes, de résultat et de moyen.

Toutefois, s'il faut appréhender la question essentiellement sous l'angle de DIH, au regard du développement entrepris ci-dessus, l'application des règles du DIH relatives aux enfants touchés par les conflits armés exige des mesures nécessaires.

4 CONTENU ESSENTIEL DE L'ARTICLE 22 DE LA CHARTE AFRICAINE DES DROITS ET DU BIEN-ÊTRE DE L'ENFANT

Les obligations substantielles formant le contenu de l'article 22 concernent: le droit de ne pas être torturé ou soumis à des traitements cruels, inhumains ou dégradants; les enfants associés aux forces armées et aux groupes armés; les abus, violence et exploitation sexuels; le droit à la santé; le droit à l'éducation; les règles du DIH applicables dans les conflits armés qui affectent l'enfant; les situations de conflits armés internes, de tensions et de troubles; toutes les mesures nécessaires; les hostilités; la participation directe aux hostilités; la protection de la population civile dans les conflits armés; toutes les mesures possibles.

L'article 22 étant composé de trois paragraphes, il aurait été souhaitable que le contenu de chacun de ces paragraphes soit graduellement présenté: premièrement, l'obligation de «respecter» et

88 CICR 'Protection des victimes de la guerre' Préparation de la Réunion du Groupe d'experts intergouvernemental pour la protection des victimes de la guerre, Genève 23-27 janvier 1995, Suggestions du CICR, Genève, avril 1994, 809 *RICR* (septembre-octobre 1994) 478.

89 CICR (n 88) 478.

90 Lire l'article 22(2) de la Charte de droit de l'enfant.

91 Comité africain sur les droits de l'enfant (n 3) para 91.

92 Comité africain sur les droits de l'enfant (n 3) para 91.

93 Comité africain sur les droits de l'enfant (n 3) para 71.

celle de «faire respecte» les «règles de droit international humanitaires applicables aux conflits armés qui affectent particulièrement les enfants». Ensuite, l'examen des «mesures nécessaires» relatives à l'interdiction d'«enrôlement» et de «participation directe» des enfants aux «hostilités» devait intervenir. Enfin, il aurait été utile d'expliciter les «obligations de droit international humanitaire relatives à la protection de la population civile» en cas de «conflit armé», de même que des «mesures possibles pour la protection et le soin des enfants affectés par de conflits armés, de «tensions» ou «troubles civils». Et dans cet exercice de détermination du contenu matériel de l'article 22, l'observation générale sur l'article 22 devait expliciter toutes les expressions ci-dessus mises en exergue voire toutes autres utiles.

Par ailleurs, il importe de relever que l'approche utilisée pour analyser le contenu du «droit de ne pas être torturé ou soumis à des traitements cruels, inhumains ou dégradants»,[94] ou à des «abus, violence et exploitation sexuels»,[95] du «droit à la santé»[96]et du «droit à l'éducation»[97] est essentiellement celle des droits de l'homme. Le DIH dont les obligations devaient être étudiées est relégué en seconde zone.

A cet égard, il faut rappeler que l'article 22 appréhende les obligations de DIH applicables aux conflits armés affectant les enfants. Il n'est donc pas question de reconduction des obligations des droits de l'homme applicables naturellement en tout temps dont le contexte de conflit armé. Il est plutôt question d'application d'une *lex specialis*, le DIH.

En effet, au sujet du *droit de ne pas être torturé ou soumis à des traitements cruels, inhumains ou dégradants*, l'observation générale sur l'article 22 reprend en somme le contenu de l'article 16 de la Charte africaine des droits et du bien-être de l'enfant. Ainsi, elle rappelle que différentes dispositions du même instrument (articles 16, 27 et 29) protègent les enfants contre toute forme de tortures, traitements inhumains et dégradants.[98] Et cette protection, affirme-t-elle, se trouve renforcée en DIH dont la CG IV[99] sans citer les dispositions. En vertu de la Charte africaine des droits et du bien-être de l'enfant (art 16), les États parties doivent prendre des mesures législatives, administratives, sociales et éducatives spécifiques pour rendre effective cette protection. C'est dans ce sens que la mise en place des unités spéciales de surveillance pour «prévenir, identifier, signaler, enquêter, traiter et assurer le suivi des enfants [affectés]»[100] devrait être effectuée. Une unité spéciale devrait aussi être organisée dans le cadre des troupes en mission pour des enquêtes et des collectes des preuves se rapportant aux violations des droits des enfants et lutter contre la violence, les abus

94 Comité africain sur les droits de l'enfant (n 3) paras 54-57.
95 Comité africain sur les droits de l'enfant (n 3) paras 64-65.
96 Comité africain sur les droits de l'enfant (n 3) paras 66-71.
97 Comité africain sur les droits de l'enfant (n 3) paras 72-82.
98 Comité africain sur les droits de l'enfant (n 3) para 54.
99 Comité africain sur les droits de l'enfant (n 3) para 54.
100 Comité africain sur les droits de l'enfant (n 3) para 55.

et l'exploitation sexuels.[101] Cela vaut de même pour des mécanismes nationaux d'intervention rapide pour la prévention des actes de tortures ou des traitements cruels, inhumains et dégradants et de sécurisation notamment des écoles, les lieux de culte, hôpitaux.[102]

Concernant *les enfants associés aux forces armées et aux groupes armés*, adoptant une approche de victimisation de l'enfant, l'observation générale retient que les États doivent prendre des mesures nécessaires contre la détention et la poursuite des enfants du fait de leur participation aux groupes armés ou terroristes. La détention, étant contraire à l'intérêt supérieur de l'enfant, le transfert des enfants vers les autorités civiles de protection en vue de leur réhabilitation ou réinsertion dans la société est à privilégier.[103] L'égalité d'accès à l'aide à la réintégration doit être garantie aux garçons et aux filles.[104] Une formation sur la protection de l'enfance au personnel militaire est requise.[105] Les crimes sur les enfants doivent être enquêtés et poursuivis.[106] Les enfants bénéficieront d'un traitement spécial moyennant les programmes de désarmement, de démobilisation et de réintégration (DDR).[107] La justice spécialisée pour enfants, sauvegarde de l'intérêt supérieur de l'enfant, doit être mise en place.[108]

Des mesures examinées au sujet du *droit de ne pas être torturé ou soumis à des traitements cruels, inhumains ou dégradants* doivent également être reconduites pour les cas *d'abus, de violences et d'exploitation sexuels* sur les enfants.[109] En effet, suivant l'observation générale sur l'article 22, «la protection contre la torture ou les traitements cruels, inhumains et dégradants, doit être interprétée comme incluant le viol et la violence sexuelle».[110] Cela vaut également, dans le cas des conflits armés, pour la détention des enfants par des groupes armés tant étatiques que non étatiques et les abus sexuels.[111]

Par ailleurs, les termes utilisés dans le cadre de l'article 22 font essentiellement part des obligations positives. Ainsi, au lieu d'être plus détaillé dans le cadre du «droit de ne pas être torturé ou soumis à des traitements cruels, inhumains ou dégradants» ou d'«abus, exploitation et violence sexuels» – obligations principalement négatives et secondairement positives – l'observation générale sur l'article 22 devait orienter son raisonnement dans le sens de «traitement humain» des enfants. Dans ce cadre, considéré comme une personne affectée par le conflit armé, l'enfant bénéficie d'un ensemble de dispositions des CG et

101 Comité africain sur les droits de l'enfant (n 3) paras 57 & 71.
102 Comité africain sur les droits de l'enfant (n 3) paras 57 & 71.
103 Comité africain sur les droits de l'enfant (n 3) para 58.
104 Comité africain sur les droits de l'enfant (n 3) para 63.
105 Comité africain sur les droits de l'enfant (n 3) para 61.
106 Comité africain sur les droits de l'enfant (n 3) para 61.
107 Comité africain sur les droits de l'enfant (n 3) para 58.
108 Comité africain sur les droits de l'enfant (n 3) paras 60-62
109 Comité africain sur les droits de l'enfant (n 3) paras 64-65.
110 Comité africain sur les droits de l'enfant (n 3) para 65.
111 Comité africain sur les droits de l'enfant (n 3) para 65.

de leurs PA qui imposent *généralement* aux parties de lui accorder, à l'instar d'autres personnes civiles, un «traitement humain» – entendu comme «le minimum de ce qui doit être réservé à l'individu pour qu'il puisse mener une existence acceptable»[112] – en toutes circonstances[113] et de le protéger contre tout acte pouvant porter atteinte à sa vie et à son intégrité physique et morale. Se trouvant affecté par des tensions ou des troubles civils, les obligations des droits de l'homme lui seront appliquées afin d'assurer ce «traitement humain». Une protection spéciale serait également réservée aux enfants au regard de leurs vulnérabilités. Les filles, particulièrement vulnérables des abus, violences et exploitations sexuels, par exemple, mériteraient encore une prise en charge plus adéquate.[114]

Il faudrait faire observer que les articles 16 et 27 de la Charte africaine des droits et du bien-être de l'enfant se consacrent respectivement à la «protection contre l'abus et les mauvais traitements» et à l'«exploitation sexuelle». Les analyser dans le cadre de l'article 22 fait perdre à celui-ci son autonomie. Les droits de l'homme s'appliquant en temps de conflit armé, toutes les dispositions de la Charte africaine des droits et du bien-être de l'enfant s'y appliquent donc indépendamment de l'article 22.

Au sujet du *droit à la santé*, l'observation générale reconduit en réalité l'application de l'article 14 de la Charte africaine des droits et du bien-être de l'enfant en période de conflit armé. C'est donc l'obligation des États de prendre des mesures nécessaires pour assurer le droit de l'enfant de «jouir du meilleur état de santé physique, mentale et spirituelle possible»[115] en temps de conflits armés. A cet égard, la logique des droits de l'homme reste très affirmée[116] au point de ne pas cerner véritablement la différence avec le DIH. Cependant, sous l'angle du DIH, l'observation générale souligne que «l'importance de la protection du droit à la santé exige la protection des hôpitaux»[117] et que les préoccupations de santé des enfants s'avèrent éminentes en conflits armés.[118] Ceci a tout son sens si l'on sait que les conflits armés n'annihilent pas la mise en œuvre du droit de l'enfant, mais attestent de la nécessité des États d'assurer sa mise en œuvre en pareilles circonstances.[119] Ce droit concerne non seulement les «enfants civils», mais également ceux impliqués dans les conflits armés. Un intérêt particulier devra être réservé aux fillettes qui sont gravement affectées en pareilles périodes.[120] Les États parties ont donc l'obligation de veiller à l'accès aux soins de santé reproductive et à un soutien psychosocial par les victimes de violences et exploitations sexuelles.[121]

112 J Pictet *Les principes du droit international humanitaire* (1966) 31.

113 H P Gasser 'Protection of the civilian population' in D Fleck (ed) *The handbook of humanitarian law in armed conflicts* (1995) 216-217.

114 Comité africain sur les droits de l'enfant (n 3) 19-20, paras 68-69.

115 Comité africain sur les droits de l'enfant (n 3) para 66.

116 Lire religieusement Comité africain sur les droits de l'enfant (n 3) paras 66-71.

117 Comité africain sur les droits de l'enfant (n 3) para 66.

118 Comité africain sur les droits de l'enfant (n 3) para 66.

119 Comité africain sur les droits de l'enfant (n 3) para 53.

120 Comité africain sur les droits de l'enfant (n 3) para 67.

La satisfaction de ce droit exige également des États des mesures préventives idoines et adaptées aux conflits armés.[122]

L'observation générale n'arrive donc pas à établir clairement et distinctement les implications juridiques des obligations des États parties selon qu'on se situe en DIH ou en DIDH. C'est essentiellement la logique du DIDH qui est ici en application, en dépit de la référence ci-dessus faite au DIH. Ainsi, il aurait été possible d'appréhender, sous l'angle de DIH, les obligations des parties aux conflits armés en rapport avec la protection générale et spéciale de la santé des enfants,[123] par exemple, l'examen des principes d'inviolabilité des blessés, malades et naufragés; d'immunité du personnel et des installations sanitaires et du droit d'accès aux victimes s'agissant des enfants affectés par les conflits armés. Il en va de même de l'étude du droit des parties au conflit de créer sur leurs propres territoires ou sur les territoires occupés des *zones et localités sanitaires et de sécurité* pour mettre les enfants de moins de 15 ans à l'abri des effets de la guerre;[124] de l'obligation d'évacuation des enfants d'une *zone assiégée ou encerclée*[125] ou encore de celle de recueillir et de prodiguer des soins aux «enfants» blessés, malades et naufragés.[126]

En revanche, concernant le *droit à l'éducation*, il est remarquable que l'observation générale sur l'article 22 entreprenne une interprétation véritablement du DIH sans ignorer le DIDH. En effet, elle mentionne au préalable l'obligation des États parties de garantir à tout enfant son droit à l'éducation même en temps de conflit armé.[127] Cette obligation entraîne plusieurs implications juridiques que l'observation générale analyse sous l'angle de DIH,[128] d'abord et du DIDH,[129] ensuite.

Sous l'angle du DIH, garantir à tout enfant son droit à l'éducation implique notamment l'interdiction lors de conflits armés d'attaques contre les établissements scolaires, les élèves et le personnel éducatif,[130] lesquels ne sont pas des objectifs militaires.[131] Les violences sexuelles, les enlèvements, les recrutements forcés des élèves, les harcèlements et menaces à l'encontre des enseignants, des parents et des élèves sont donc interdits.[132] Dans le même sens, l'observation générale mentionne les dispositions des CG et PA I qui se rapportent à

121 Comité africain sur les droits de l'enfant (n 3) 68-69.
122 Comité africain sur les droits de l'enfant (n 3) para 69.
123 Lire, par exemple, les articles 13 à 26 de la CG IV; 10 à 31 du PA I et 7 à 12 du PA II.
124 Article 14 de la CG IV.
125 Article 17 de la CGIV.
126 Lire, par exemple, l'article 17 du PA I.
127 Comité africain sur les droits de l'enfant (n 3) 20, para 72.
128 Comité africain sur les droits de l'enfant (n 3) paras 72-78.
129 Comité africain sur les droits de l'enfant (n 3) paras 79-82.
130 Comité africain sur les droits de l'enfant (n 3) para 72; paras 21-22, paras 75, 76 & 78.
131 Comité africain sur les droits de l'enfant (n 3) para 75.
132 Comité africain sur les droits de l'enfant (n 3) para 76.

la «nécessité de protéger l'accès à l'éducation» dans les conflits armés internationaux[133]ou internes.[134]

En DIDH, l'observation générale indique que la réalisation du droit à l'éducation garanti par l'article 11 de la Charte africaine des droits et du bien-être de l'enfant exige des États l'égalité des chances et des institutions appropriées.[135] Les États sont encouragés à faire du droit à l'éducation «un outil pour respecter, protéger et réaliser le développement holistique des enfants dans les conflits armés».[136] Même lors de conflits armés, le mariage forcé ou la grossesse ne peuvent constituer des motifs d'empêchement du droit à l'éducation aux filles.[137]Enfin, sous l'angle de DIDH, les attaques ou destruction des écoles ont pour effet de priver les enfants de leur droit à l'éducation.[138]

Le point relatif aux *règles du DIH applicables dans les conflits armés qui affectent l'enfant* traite de la protection spéciale des enfants en conflits armés. Il se contente d'indiquer, avec quelques exemples, que le DIH impose une protection spéciale aux enfants en conflits armés,[139] sans expliquer le fondement de cette protection spéciale. Ainsi, il aurait été important d'indiquer préalablement que les enfants bénéficient d'une protection générale réservée à toute personne en situation de conflits armé. La protection spéciale leur est accordée sur fondement de leurs vulnérabilités particulières[140] en plus de celle-là. A ce titre, le DIH se réfère «à plusieurs reprises à l'âge de quinze ans comme âge limite au-dessous duquel l'enfant doit jouir d'une protection spéciale. Il est généralement admis qu'au-dessus de quinze ans le développement des facultés de l'enfant sont telles que des mesures spéciales ne s'imposent pas systématiquement avec la même nécessité».[141]

Sous le point relatif aux *situations de conflits armés internes, de tensions et de troubles*,[142] l'observation générale tente de définir et de distinguer les conflits armés internes, les tensions et les troubles civils. A cet égard, elle reste peu claire, pas fouillée et perplexe. Elle ne tient nullement compte de la jurisprudence sur ces questions et de son évolution, ni de la doctrine abondante, notamment l'important

133 Comité africain sur les droits de l'enfant (n 3) para 73.
134 Comité africain sur les droits de l'enfant (n 3) para 74.
135 Comité africain sur les droits de l'enfant (n 3) para 79.
136 Comité africain sur les droits de l'enfant (n 3) para 80.
137 Comité africain sur les droits de l'enfant (n 3) para 81.
138 Comité africain sur les droits de l'enfant (n 3) para 82.
139 Comité africain sur les droits de l'enfant (n 3) para 83.
140 KM Chenut 'La protection des enfants en temps de conflit et le phénomène des enfants-soldats' in J-M Sorel & C-L Popescu (dirs) *La protection des personnes vulnérables en temps de conflit armé* (2010) 168.
141 MT Dutli 'Enfant-combattants prisonniers' (1990) 785 *Revue internationale de la Croix-Rouge* 458.
142 Comité africain sur les droits de l'enfant (n 3) para 84.

commentaire du CICR pour ne citer qu'un seul article de la doctrine.[143] Elle ne fait nullement allusion à la définition du «conflit armé interne» selon que l'on se situe sous l'article 3 commun aux CG de 1949 ou sous le PA II. Elle finit par confondre les tensions et les conflits armés.[144]

En revanche, l'observation générale sur l'article 22 est explicite quant au contenu de «toutes les mesures nécessaires» qu'il développe dans ses paragraphes 85 et 87. Elle y indique des mesures qui éviteront le recrutement ou l'enrôlement des enfants et leur participation directe aux hostilités.[145] Elle précise que «[l]e concept de toutes les mesures nécessaires, est utilisé dans le contexte de la nécessité de veiller à ce qu'un enfant ne participe pas directement aux hostilités et ne soit pas enrôlé pour y prendre part».[146] Ainsi, à travers l'expression «toutes les mesures nécessaires», il importe de mentionner que la Charte africaine des droits et du bien-être de l'enfant fait référence à une obligation de résultat, identique à la fois pour l'interdiction de recrutement ou d'enrôlement des enfants (personne de moins de 18 ans) et de leur participation directe aux hostilités.[147] En cela, elle diffère, par exemple, de la Convention relative aux droits de l'enfant qui contient aux paragraphes 2 et 3 de son article 38 «respectivement une obligation de moyen concernant l'interdiction de la «participation directe» des enfants de moins de 15 ans aux hostilités et une obligation de résultat à propos de l'interdiction de recrutement ou d'enrôlement de ces enfants».[148]

Au sujet du contenu du terme *hostilités*, l'observation générale sur l'article 22 accorde une définition compréhensible et pratique.[149] En résumé, les hostilités s'appréhendent comme des actes de violences ou d'opérations militaires auxquels recourent les forces armées ou groupes armés.[150] Cette définition rejoint celles que développent le *Dictionnaire de droit international public*[151] et le CICR[152] voire la jurisprudence pénale internationale.[153]

Cependant, l'observation générale demeure simpliste, imprécise et moins claire concernant le contenu à réserver à la *participation directe aux hostilités*,[154] notion fortement développée en jurisprudence.

Au sujet de la *protection de la population civile dans les conflits armés*, l'observation générale fait mention, en réalité, de l'application

143 Il s'agit de S Vité 'Typologie des conflits armés en droit international humanitaire: concepts juridiques et situations réelles' (2009) 91(873) *Revue internationale de la Croix-Rouge* 69-94, 74.

144 Comité africain sur les droits de l'enfant (n 3) para 84.

145 Comité africain sur les droits de l'enfant (n 3) paras 85-87.

146 Comité africain sur les droits de l'enfant (n 3) para 85.

147 Abelungu (n 19) 205.

148 Abelungu (n 19) 204-205.

149 Comité africain sur les droits de l'enfant (n 3) para 88.

150 Comité africain sur les droits de l'enfant (n 3) para 88.

151 Voir J Salmon (dir) *Dictionnaire de droit international public* (2001) 550.

152 Voir Commentaire de l'article 51(3), du PA I, 633, para 1942 disponible sur https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=F18532328D8075E0C12563BD002D9397 (Source consultée le 20 mai 2021) et N Melzer (n 85) 45-46.

de la *lex specialis* dans les conflits armés, tensions et troubles. A chaque situation, il faudrait appliquer les règles idoines – de DIH ou de DIDH – correspondant.

5 CONCLUSION

L'observation générale sur l'article 22 entend guider et éclairer les États parties sur l'interprétation et l'application de cette disposition. Elle dégage des mesures relatives à la protection ou au traitement des enfants en situations de conflit armés, tensions et troubles civils. Cependant, son texte pose quelques problèmes, d'où le sens des critiques apportées par la présente réflexion.

Après la présentation générale de l'observation générale sur l'article 22 accompagnée des commentaires critiques, deux de ses points ont particulièrement retenu l'attention de cette étude: la «nature des obligations de l'État partie dans le contexte des enfants et des conflits armés» et le «contenu essentiel de l'article 22».

En effet, traitant de l'effet utile de l'article 22 dans une approche centrée sur l'enfant et sur ses droits, le point sur la «nature des obligations de l'État partie dans le contexte des enfants et des conflits armé» souligne les caractères interdépendant et indivisible qui existent entre l'article 22, les principes fondamentaux et les autres dispositions de la Charte africaine des droits et du bien-être de l'enfant. Il examine, en réalité, les obligations des États en cas de conflits armés, de tensions et de troubles civils. Ces obligations sont celles de protection ou de traitement des enfants, de prévention des violations de leurs droits, et celles de respecter et de faire respecter le DIH. Si les deux premières s'imposent dans tous ces contextes, cependant les deux dernières concernent essentiellement les conflits armés. La mise en œuvre de ces obligations exige des mesures appropriées que mentionne l'observation générale.

Quant au «contenu essentiel de l'article 22», il se rapporte à l'examen des éléments suivants: le droit de ne pas être torturé ou soumis à des traitements cruels, inhumains ou dégradants; les enfants associés aux forces armées et aux groupes armés; les abus, violence et exploitation sexuels; le droit à la santé; le droit à l'éducation; les règles du DIH applicables dans les conflits armés qui affectent l'enfant; les situations de conflits armés internes, de tensions et de troubles; toutes

153 Lire CPI *Le Procureur c. Thomas Lubanga Dyilo,* affaire ICC-01/04-01/06, jugement du 14 mars 2012, 311, para 622; TPIR, *Le Procureur c. Jean-Paul Akayesu,* affaire ICTR-96-4-T, jugement, Chambre de première instance I, 2 septembre 1998, 255, para 629; TPIR, *Le Procureur c. Ignace Bagilishema*, affaire ICTR-95-1A-T, jugement, Chambre de première Instance I, 7 juin 2001, para 104; TPIR, *Le Procureur c. Laurent Semanza,* affaire ICTR-97-20-T, jugement et sentence, Chambre de première Instance III, 15 mai 2003, 101, para 366; TPIR, *Le Procureur c. Georges Anderson Nderubumwe Rutaganda,* affaire ICTR-96-3-T, jugement et sentence, Chambre de première instance I, 6 décembre 1999, para 100 et TPIR, *Le Procureur c. Alfred Musema*, ICTR-96-13-T, jugement et sentence, Chambre de première instance I, 27 janvier 2000, para 279.

154 Comité africain sur les droits de l'enfant (n 3) para 89.

les mesures nécessaires; les hostilités; la participation directe aux hostilités; la protection de la population civile dans les conflits armés; et toutes mesures possibles. Pour les différents droits examinés sous ce cadre, c'est l'orientation essentiellement des droits de l'homme qui est suivie, à l'exception du droit à l'éducation. Ces règles et concepts importants sont appréhendés avec une faiblesse d'études de l'évolution jurisprudentielle, de la pratique des États et de la doctrine.

Par ailleurs, l'observation générale sur l'article 22 n'arrive pas toujours à établir clairement et distinctement les implications juridiques des obligations des États parties selon qu'on se situe en DIH ou en DIDH. En effet, même si l'article 22 doit être lu à la lumière de l'article 1er, cela ne veut nullement dire qu'il doit être vidé de toute sa substance propre. L'article 22(1) traite essentiellement des obligations de «respecter» et de «faire respecter» le DIH applicable aux enfants affectés par les conflits armés. En dépit de l'interdépendance et de l'indivisibilité des droits ci-haut soulignées, il n'est pas question dans cette disposition de «respecter» ou de «faire respecter» les droits contenus dans la Charte africaine des droits et du bien-être de l'enfant dans leur ensemble, mais le DIH. Ainsi, l'interprétation entreprise par l'observation générale sur l'article 22 est extensive. Cette extensivité est aussi remarquable lorsqu'elle traite du droit des enfants de ne pas être utilisés «directement ou indirectement» dans les hostilités. En effet, seule l'interdiction de la participation «directe» des enfants aux hostilités est retenue par l'article 22(2). Il va sans dire que cette interprétation extensive se confond avec l'article 1er de la Charte africaine des droits et du bien-être de l'enfant et fait perdre à l'article 22 sa substance propre.

En outre, l'observation générale retient les restrictions des droits de l'article 22 moyennant la démonstration de leur nécessité et de leur proportionnalité au regard du but légitime poursuivi. Une telle logique de DIDH est inopérante en DIH en l'espèce. Car l'obligation de respecter le DIH s'impose sans exception pour des interdictions absolues en DIH. C'est seulement en dehors de la réglementation expresse ou des interdictions du DIH que l'équilibre entre la nécessité militaire et les exigences humanitaires est possible.

Il faudrait dire qu'en réalité les obligations de respecter et de faire respecter les règles du DIH qu'impose l'article 22 sont plus complexes que ce que présente l'observation générale sur l'article 22. La licéité du droit international et le souci d'amélioration du sort des enfants demeurent les seuls guides de l'identification de ces mesures.

L'article 22 étant composé de trois paragraphes, il aurait été souhaitable que le contenu de chacun de ces paragraphes soit graduellement présenté. Ainsi, il devait être présenté premièrement l'obligation de «respecter» et celle de «faire respecter» les «règles de droit international humanitaires applicables aux conflits armés qui affectent particulièrement les enfants». Ensuite, l'examen des «mesures nécessaires» relatives à l'interdiction d'«enrôlement» et de «participation directe» des enfants aux «hostilités» devait intervenir. Enfin, il aurait été utile d'expliciter les «obligations de droit international humanitaire relatives à la protection de la population civile» en cas de «conflit armé», de même que des «mesures possibles

pour la protection et le soin des enfants affectés par de conflits armés, de «tensions» ou «troubles civils»». Dans cet exercice de détermination du contenu matériel de l'article 22, l'observation générale sur l'article 22 devait expliciter toutes les expressions ci-dessus mises en exergue voire d'autres. Bien que la détermination de ce contenu soit effectuée, mais le registre du DIDH reste dominant par rapport au DIH.

The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights

*Anneth Amin**
https://orcid.org/0000-0002-4626-5827

ABSTRACT: Socio-economic rights in the African Charter are ideal in transforming socio-economic conditions of Africa's people and preserving their historical collective way of living. For these rights to achieve goals envisaged by the Charter, an innovative interpretation that engages relevant interpretative tools is required. This article argues that African philosophy is a potential interpretative tool that can contribute immensely to upholding the Charter's object and purpose. Founded on the principles of collectiveness and togetherness of Africa's people, African philosophy has the potential to enrich the meaning, scope and content of socio-economic rights and enable individuals to commune with others in all spheres of socio-economic activities. The article argues that engaging African philosophy in the interpretative process will guarantee individual and collective enjoyment of socio-economic rights to Africa's people as understood in the African context. However, the supervisory organs of the African Charter have not effectively applied this significant interpretative tool in their socio-economic rights jurisprudence.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le pouvoir interprétatif de la philosophie africaine en matière de droits socio-économiques garantis par la Charte africaine des droits de l'homme et des peuples

RÉSUMÉ: Les droits socio-économiques de la Charte africaine peuvent transformer les conditions socio-économiques des populations africaines et préserver leur mode de vie collectif historique. Cependant, ces droits ne peuvent atteindre les objectifs envisagés par la Charte que lorsque leurs interprètes recourent fréquemment aux techniques d'interprétation innovantes. Cet article avance que la philosophie africaine est un outil d'interprétation contextuel important qui peut contribuer de façon significative à faire respecter l'objet et le but de la Charte africaine. Fondée sur les principes de collectivité et d'unité du peuple africain, la philosophie africaine a le potentiel d'enrichir le sens, la portée et le contenu des droits socio-économiques et de permettre aux individus de communier avec les autres dans toutes les sphères

* LLB (Dar-Es-Salaam); LLM and LLD (Stellenbosch); Lecturer at the Institute of Judicial Administration, Tanzania; Email: annethmnzava11@gmail.com

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d'activités socio-économiques. L'article soutient que le recours à la philosophie africaine dans le processus d'interprétation garantira la jouissance individuelle et collective des droits socio-économiques des peuples d'Afrique tels qu'ils sont compris dans le contexte africain. Cependant, les organes de surveillance de la Charte africaine n'ont pas appliqué efficacement cet important outil d'interprétation dans leur jurisprudence sur les droits socio-économiques.

KEY WORDS: African philosophy, interpreting socio-economic rights, African Charter

CONTENT:

1 INTRODUCTION

The African Charter on Human and Peoples' Rights (African Charter),[1] like other human rights instruments, formulates socio-economic rights broadly. This formulation is characterised by lack of an exhaustive elaboration of rights' meaning, scope and content. As such, the meaning, scope and content of socio-economic rights in the African Charter as envisaged by its drafters require a holistic interpretation that engages different interpretative tools. While the author paid substantial attention to relevant interpretative tools elsewhere, this article focuses on African philosophy. The article focuses on how the interpretation of socio-economic rights can benefit from African philosophy. Thusfar, little has been explored on the potential and implications of African philosophy for developing the meaning, scope and content of socio-economic rights.

The Preamble to the African Charter stipulates the member states' commitment to promoting the African philosophy. It declares states' consideration of the virtues of African historical tradition and values as sources and reflection of the African human rights concept.[2] The preamble acknowledges that the enjoyment of the rights in the African Charter requires the performance of duties by everyone.[3] Founded on

1 African Charter on Human and Peoples' Rights (1981) OAU CAB/LEG/67/3/ rev 5, 21 ILM 58 (1982) African Charter) adopted on 27 June 1981 and entered into force on 21 October 1986.

2 Preamble to the African Charter paras 5-6.

these principles of collectiveness and togetherness of Africa's people, African philosophy has the potential to enrich the meaning, scope and content of socio-economic rights and enable individuals to commune with others in all spheres of socio-economic activities. However, the supervisory organs of the African Charter has not effectively applied this significant interpretive tool in its socio-economic rights jurisprudence. The article argues that engaging African philosophy in the interpretative process will guarantee everyone's enjoyment of socio-economic rights to Africa's people as understood in the African context.

The article has seven sections, of which this introduction is the first. The second section shows the legal basis for the application of African philosophy in the interpretative process. The third section discusses the meaning and debates surrounding the existence of African philosophy. The fourth section analyses the implications of African philosophy for interpretation of socio-economic rights. The analysis of the socio-economic rights jurisprudence of the African Commission and the African Court regarding their application of African philosophy in interpreting these rights is explored in section five. Section six suggests the way forward that can assist the supervisory organs of the Charter in engaging African philosophy to interpret socio-economic rights. Section seven concludes this article.

2 LEGAL BASIS FOR APPLICATION OF AFRICAN PHILOSOPHY IN INTERPRETING SOCIO-ECONOMIC RIGHTS IN THE AFRICAN CHARTER: TELEOLOGICAL APPROACH

The teleological approach is one of the major approaches to treaty interpretation. The other two are the textual approach, and the 'intention of the parties' approach. The teleological approach emerged in international law in 1935 through article 19(a) of the Harvard Draft Convention on the Law of Treaties (Harvard Draft),[4] as formulated by the Harvard research in international law programme and elaborated in Fitzmaurice's 1951 classification on approaches to treaty interpretation and then codified in the Vienna Convention.

The teleological approach considers the object and purpose of a treaty as the main element in its interpretation. The object and purpose of a treaty is established through a range of other significant elements from within and outside the treaty in question. These elements include the treaty's historical background and preparatory work; the subsequent conduct of the parties in applying the provisions of the treaty; and conditions prevailing at the time the treaty is interpreted.[5]

3 Preamble to the African Charter para 7.

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

Other elements include the entire treaty, the relevant international, regional and national legal instruments and jurisprudence, and the principle of effectiveness.

In establishing the object and purpose of a treaty concerning provisions being interpreted, the teleological approach considers the treaty as a whole. Considering a treaty, as a whole requires interpretive organs to engage its preamble and other relevant provisions within a treaty to assign meaning to the provisions in question.[6] The preamble is composed of two characteristics, namely interpretive and binding characters. Regarding its interpretive character, a treaty's preamble enshrines and elaborates its object and purpose.[7] This inclusion renders a useful interpretative tool for meaning elaboration of treaty provisions, as well as clarifying the context in which such provisions are construed.[8] The preamble, when applied as an interpretive aid, becomes binding just like any other treaty provision.[9] It is for this reason that parties' statements contained in the preamble to the treaty must be treated as relevant when interpreting the treaty in question.[10]

In the context of the African Charter, this element enables the interpretive organs to consider a range of preambular statements including the notion of African philosophy as the relevant interpretive tools to elaborate the meaning, scope, and content of the socio-economic rights. Therefore, the interpretation of socio-economic rights in the African Charter should engage among other interpretive tools African philosophy. The focus on African philosophy in this article does not necessarily mean to underestimate other interpretive tools. This article mainly focuses on African philosophy because its interpretative potential has not been efficiently explored in the socio-economic rights jurisprudence of the supervisory organs compared to other interpretative tools.

3 AFRICAN PHILOSOPHY: MEANING AND DEBATES SURROUNDING ITS EXISTENCE

There is a scholarly debate concerning the existence of African philosophy. Hountondji rejects the existence of African philosophy on the ground that it is not in written literature. According to her, the African philosophy is a 'set of texts written by Africans and described as philosophical by their authors'.[11] She argues that lack of literature on an

5 As above.

6 See also art 31(2) of the Vienna Convention.

7 GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 25

8 Fitzmaurice (n 7) 25.

9 G 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* 229.

10 Fitzmaurice (n 9) 229.

11 PJ Hountondji *African Philosophy: myth and reality* (1983) 33.

African philosophy 'prevents its integration into a collective theoretical tradition' and from 'taking its place in history as a reference point capable of orienting future discussion'.[12] Maurier denies the existence of African philosophy on the basis that it does not satisfactorily meet the three criteria required for the existence of genuine philosophy, namely, that it should be reflective, rational, and systematic.[13] Bodunrin rejects the existence of African philosophy on the basis that it is wrong to argue that African philosophy is centred on an individual's collective nature. According to him, since philosophy is studied through examining the thoughts of an individual, the African conception of philosophy based on the collective nature of individuals is based on an incorrect conception.[14] He argues that this view of an African philosophy merely portrays a specific system of thought of a particular African community.[15]

It is wrong to rely exclusively on the existence of philosophical literature and philosophers as the sole justification for the existence of African philosophy. The denial of the existence of African philosophers implies the denial of the existence of African people who can reflect and conceptualise their experiences.[16] Apart from published literature, philosophical information can be found through other undocumented sources, like stories. Although the subject of philosophy is established through a systematically identifiable body of literature, as developed by philosophers, this proof can be difficult as there is no work by individual African philosophers similar to 'Aristotle's *Metaphysics*, Hume's *Treatise of human nature*, or Kant's *Critique of pure reason*'.[17] It is genuine to assume that the existence of a particular philosophy largely depends on published literature.[18] However, it is wrong to assume that written literature is an exclusive means to substantiate the existence of philosophy.[19] African philosophy can be found through stories, oral tradition, and social institutions, as well as the writings of scholars.[20] For example, ubuntu, as an African philosophical concept, was expressed through songs and stories.[21] As such, African philosophy exists and that 'its tenets may legitimately be found in the types of literature mentioned earlier'.[22] African philosophy can be demonstrated through the cultures, experiences, and mentalities of Africans, which shape their societies.[23] If the scepticism concerning the

12 Hountondji (n 11) 106.

13 H Maurier 'Do we have an African philosophy?' in RA Wright (ed) *African philosophy: an introduction* 3 ed (1984) 26.

14 PO Bodunrin 'The question of African philosophy' in RA Wright (ed) *African philosophy: an introduction* 3 ed (1984) 11.

15 Bodunrin (n 14) 1.

16 K Appiagyei-Atua 'A rights-centred critique of African philosophy in the context of development' (2005) 2 *African Human Rights Law Journal* 346.

17 RA Wright 'Investigating African philosophy' in RA Wright (ed) *African Philosophy: an introduction* 3 ed (1984) 50.

18 Wright (n 17) 51.

19 Wright (n 17) 51.

20 Wright (n 17) 51.

21 A Shutte *Ubuntu: an ethic for a new South Africa* (2001) 9.

22 Wright (n 17) 51.

existence of African philosophy is based on historical reasons (namely, that there have been no renowned African philosophers) then such a doubt is wrong. The existence of African philosophy can be established through common social values in African communities, which lay the foundation for African philosophy.[24]

The foundation of African philosophy is the collective way of living in African societies. African philosophy is founded in the phrase 'I am, because we are, and since we are, therefore I am'.[25] This phrase demonstrates that African philosophy is built on the collective nature of humans, rather than on an individual. African philosophy is characterised by the relationship that an individual maintains with others in the community.[26] Similarly, President Senghor acknowledges that African philosophy considers individuals as part and parcel of the community in the sense that the individual and the community are inseparable.[27]

The African philosophy accordingly refers to an individual as a person who is responsible to the entire community for the realisation of his or her rights. 'The African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'.[28] Therefore, African philosophy is guided by values of collectiveness, humanism, togetherness, corporation, responsibility, and interdependence. African philosophy refers to the 'fundamental and general principles governing the community of people called Africans'.[29]

Scholars challenge the community-oriented nature demonstrated by the African philosophy. Howard argues that the collective conception of individuals is not the exclusive system in Africa.[30] According to her, African societies are largely divided into classes and status, like age and sex, free-men and slaves, members and aliens.[31] She contends that individualism has increased in contemporary African society due to economic difficulties and unemployment.[32] According to

23 Appiagyei-Atua (n 16) 347.

24 MA Makinde *African philosophy, culture, and traditional medicine* (1988) 28-29.

25 JS Mbiti *African religions and philosophy* 2 ed (1990) 106 and 141.

26 H Maurier 'Do we have an African philosophy?' in RA Wright (ed) *African philosophy: an introduction* 3 ed (1984) 35.

27 Address delivered by Leopold Sedar Senghor, President of the of Senegal, OAU Doc CAB/LEG/67/5 27-29

28 BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American Systems' (1984) 6 *Human Rights Quarterly* 148.

29 KC Anyanwu 'The African world-view and theory of knowledge' in EAR Omi & KC Anyanwu (eds) *African philosophy: an introduction to the main philosophical trends in contemporary Africa* (1984) 81.

30 RE Howard 'Human rights in commonwealth Africa' 25, as quoted in IG Shivji *The concept of human rights in Africa* (1989) 12.

31 RE Howard 'Group versus individual identity in the African debate on human rights' in AA An-Na'im & FM Deng (eds) *Human rights in Africa: cross-cultural perspectives* (1990) 163-174.

32 Howard (n 31) 165.

her, insistence on the communal-oriented nature of the African philosophy is not feasible.[33]

The communal oriented nature of an individual in a society is characterised as African philosophy given that it was practiced by many pre-colonial African societies. This community-oriented practice enshrined in African philosophy is identified through different names. Scholars in contemporary African society identify the philosophy as 'African personality'; 'negritude'; and 'Ujamaa' (the Kiswahili term for African socialism).[34] Winks terms the African philosophy 'African humanism'.[35] African humanism was pre-dominant in pre-colonial societies and is similar to Kwame Nkrumah's modern reformulation of 'consciencism'; Kenneth Kaunda's 'humanism'; and Julius Nyerere's 'Ujamaa'.[36]

These formulations of African philosophy are practised and expressed in many African countries through various languages. For example, in South Africa, it is known as 'ubuntu'.[37] Ubuntu originates from the Zulu phrase 'Umuntu ngumuntu ngabantu', which means 'a person is a person through other persons'.[38] Langa J notes in *S v Makwanyane* (*Makwanyane*):[39]

> Ubuntu emphasises on collective and 'interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[40]

Broodryk points out the existence and practice of ubuntu in other African languages.[41] Although the names for African philosophies are different, they all represent the 'respect for, and protection of, the individual and individuality within the family and the greater socio-political unit'.[42]

33 Howard (n 31) 163-174.

34 M Mutua 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 352.

35 BE Winks 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 456.

36 Winks (n 35) 456.

37 Winks (n 35) 456.

38 Winks (n 35) 456.

39 *S v Makwanyane* 1995 3 SA 391 CC.

40 *Makwanyane* (n 39) paras 224 and 308.

41 Broodryk *Ubuntu*: *African Life Coping Skills* (2006) 3-4, Paper delivered at the CCEAM conference in Lefkosia (Nicosia), Cyprus, 12-17 October 2006. According to Broodryk, *Ubuntu* is also known as *Botho* in Sesotho; *Biakoye* in Akan; *Ajobi* in Yoruba; *Numunhu* in Shangaan; *Vhuthu* in Venda; *Bunhu* in Tsonga; *Umntu* in Xhosa; *Hunhu* in Shona; *Utu* or *Ujamaa* in Swahili; *Abantu* in Ugandan languages; and *Menslikgeit* in Cape Afrikaans.

42 Mutua (n 34) 352.

4 IMPLICATIONS OF AFRICAN PHILOSOPHY FOR INTERPRETATION OF SOCIO-ECONOMIC RIGHTS

The concept of African philosophy has direct implications for the interpretation of individual and collective socio-economic rights in the African Charter. Based on the values of cooperation, collectiveness, obligations, and interdependence African philosophy is appropriate for developing socio-economic rights.[43] Commenting on the relationship between ubuntu and the socio-economic rights enshrined in the Constitution of South Africa, 1996 ('South African Constitution),[44] Metz notes that the inclusion of socio-economic rights in the Constitution relates to the respect for communal nature enshrined in ubuntu in two ways. Firstly, it requires a state to foster a communal relationship between itself and its people, by improving the quality of an individual's socio-economic life through poverty reduction. Poverty reduction strengthens togetherness between people and their state. Secondly, it requires a state to foster community among the people themselves by reducing the level of an individual's impoverishment.

The state is required to protect an individual's socio-economic rights to enable that individual to commune and engage in joint projects with others. Disregarding socio-economic rights undermines the ability of an individual to commune with others and weakens solidarity among the people. An individual feels ashamed to commune with others if his or her basic socio-economic needs are not realised, while those of other members of the community are. As such, a state must provide individuals with the socio-economic resources that will help them commune with others in society.[45] In a similar vein, writing on the link between ubuntu and the socio-economic right to social security, Tshoose posits that ubuntu is relevant to the right to social security, as it advocates for the concepts of 'humanness', 'justice' and 'equality'. Humanness is the basis for the provision of social security.[46]

African philosophy is linked to the concept of human rights, as understood in the African context. Like an African philosophy that considers an individual as inseparable from his or her community, the African concept of human rights is communal in nature as it considers an individual's rights as being integrally related to the rights of the community. An individual's human dignity and rights in Africa are not derived from an individualistic framework but rather from a communal structure.[47] The conception of an individual who is endowed with rights

43 JAM Cobbah 'African values and the human rights debate: an African perspective' (1987) 9 *Human Rights Quarterly* 331.

44 Constitution of South Africa, 1996.

45 T Metz '*Ubuntu* as a moral theory and human rights in South Africa' (2005) 5 *African Human Rights Law Journal* 550-551.

46 CI Tshoose 'The emerging role of the constitutional value of *Ubuntu* for informal social security in South Africa' (2009) 3 *African Journal of Legal Studies* 14-15.

47 Cobbah (n 43) 331.

and bound by obligations towards the community is the essence of the African notion of human rights.[48] This communal nature of rights in Africa was deliberately adopted to ensure equality among groups and classes in matters of justice.[49] The recognition of an individual's rights is subject to his respect and recognition of the rights of others.[50]

In African societies, an individual depends on other community members (such as the extended family) to enforce his or her rights. This dependence guarantees a form of social security among individuals.[51] Hence, the conception of human rights in Africa recognises not only the rights of the individual but also his obligations towards others. This African philosophical context expresses rights and duties through certain principles, namely respect, restraint, responsibility, and reciprocity.[52]

Philosophers criticise the communal conception of human rights in Africa on three grounds. First, they argue that proponents of the communal nature of rights confuse it with human dignity. According to Howard, the African concept of human rights is a mere concept of human dignity, which expresses the moral nature of an individual and his relationship with society.[53] Second, the African communal nature of human rights is considered a mere mechanism used by African leaders to justify their undemocratic rule. Howard argues that the communal conception of human rights, which denies the existence of economic and political inequalities, is invoked to support African leaders holding power for a long time.[54] Third, the African communal nature of human rights is subject to objection on the ground that pre-colonial African societies did not know human rights due to their low level of development. Scholars like Eze, Howard and Donelly believe that the existence of human rights in a society largely depends on the level of development of that society.

Three arguments can be raised in response to these objections. Firstly, while it is true that African philosophy is mainly founded on the value of human dignity, it is a mistake to contend that the philosophy is exclusively a human dignity notion, which is isolated from the recognition and respect for human rights. To the contrary, African philosophy based on human dignity is the foundation for human rights as understood in the African context. It is also worth noting that, human dignity per se is a human right. As such an African philosophy solely based on human dignity is not contrary to human rights. Therefore, the value of human dignity enshrined in the African philosophy broadly encompasses a recognition and respect for human

48 Mutua (n 34) 363.

49 R Cohen 'Endless teardrops: prolegomena to the study of human rights in Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human rights and governance in Africa* (1993) 14.

50 Mbiti (n 25) 106.

51 EA Ankumah *The African Commission on Human and Peoples' Rights: practice and procedures* (1996) 160.

52 Cobbah (n 43) 321.

53 Howard (n 31) 165.

54 Howard (n 30) 12.

rights. Writing on the African philosophical concept of ubuntu, Metz argues that:

> one is required to develop one's humanness by honoring friendly relationships (of identity and solidarity) with others who have dignity by virtue of their inherent capacity to engage in such relationships, and human rights violations are serious degradations of this capacity. This Ubuntu-inspired theory is sufficient to account to many arrays of human rights.[55]

The collective nature of African philosophy demarcates individuals' rights and obligations. It is thus not correct to claim that African philosophy does not reflect the notion of human rights. African philosophy is developed through a system of rights and obligations structured through political and social organisations, like gender and age.[56] Moreover, African pre-colonial societies recognised various human rights norms similar to those that are currently recognised as human rights in various human rights instruments. These include the rights to life, personal freedom, and property. Pre-colonial societies had respect for the right to life, which was subject to the right to justice. Accordingly, cases regarding the right to life were determined through a judicial process. Moreover, accused persons convicted of murder or manslaughter were allowed to appeal from a subordinate court to a higher court.[57]

Secondly, it is unjustifiable to contend that under-developed African societies were not aware of human rights norms. African societies recognised the rights to membership, freedom of thought, speech, belief, and association, as well as the right to property.[58] The right to freedom of association was closely linked to the right to family in that it incorporated the rights to marriage and children.[59] The right to property, for example, is a fundamental right of any African society. In pre-colonial African societies, the right to property was communal in nature[60] in the sense that it largely depended on family membership.[61] Hence, any disposition of the family property required the consent of the extended family.[62] This consent requirement was significant for land transactions, like leasing, mortgaging, as well as the determination of the boundaries.[63] The requirement for consent demonstrates that pre-colonial African societies recognised the limits attached to the enjoyment of the right to property.[64]

Thirdly, it is flawed to generally argue that African philosophy encourages undemocratic rule. The existence of undemocratic leaders

55 Metz (n 45) 547.
56 Mutua (n 34) 361.
57 T Fernyhough 'Human rights and precolonial Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human rights and governance in Africa* (1993) 56.
58 L Marasinghe 'Traditional conceptions of human rights in Africa' in CE Welch Jr & RI Meltzer (eds) *Human rights and development in Africa* (1984) 33.
59 Marasinghe (n 58) 33-34.
60 Marasinghe (n 58) 41.
61 Marasinghe (n 58) 42.
62 Marasinghe (n 58) 41.
63 Marasinghe (n 58) 42.
64 Marasinghe (n 58) 41.

in Africa does not necessarily mean that the practice is attributed to African philosophy. It can be argued that African philosophy enshrines attributes that embrace democracy and respect for human rights. As demonstrated above, African philosophy is founded on the principles of humanness; dignity; togetherness; community; and respect for human rights.

The significance of an individual is also seen through his capacity to commune with others. African philosophy places an individual as the leader of the family or community who should support his family or community. African philosophy treats all human beings as equal. In doing so, it fosters the value of equality. Thus, African philosophy encourages leaders to practice humanness, respect for human rights, and human dignity. It also encourages individuals in leadership positions to be on good terms with the people they govern. In this regard, it embraces a mutual relationship between the leaders and the other members of the state.

Writing on ubuntu as an African leadership philosophy, Ncube argues that ubuntu centres on relationships with others.[65] It also embraces the significance of mutual relationships between leaders and their followers. According to her, this value of togetherness fosters the sanctity of human life to treat all humans equally. Ncube argues further that ubuntu provides a viable leadership philosophy that helps leaders to balance the past and present by examining immediate and pressing concerns in society, as well as the vision for the future.[66] Writing on the African philosophy from the Akan context, Appiagye-Atua argues that African philosophy does not exclusively confine itself to thoughts of the past. While considering the past, African philosophy identifies and leaves norms that are irrelevant to present circumstances. Through its various values, African philosophy can consider norms that are relevant for present living conditions'.[67]

As demonstrated above, there is a close link between African philosophy and the values of freedom, equality, justice, and dignity. African philosophy is founded on the value of dignity, which considers freedom, equality, and justice as part of human dignity. In elaborating on the concept of ubuntu as an African philosophical approach in *Makwanyane*, Langa J[68] and Mokgoro J[69] stated that ubuntu relates to the values of human dignity, freedom, and equality that need to be upheld in society. Ubuntu is directly linked to the values of human dignity, equality, and the advancement of human rights and freedoms, accountability, responsiveness, and openness.[70]

65 LB Ncube '*Ubuntu*: A transformative leadership philosophy' (2010) 4 *Journal of Leadership Studies* 78.

66 Ncube (n 65) 78.

67 Appiagyei-Atua (n 16) 347-348.

68 *Makwanyane* (n 39) para 224.

69 *Makwanyane* (n 39) para 308.

70 H Keep & R Midgley 'The emerging role of *ubuntu-botho* in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Explorations in legal cultures* (2007) 35.

Therefore, the interpretation of the socio-economic rights in the African Charter should be able to depict the adherence to and promotion of African philosophy and its identified values. The significance of promoting these elements is that they can ensure that socio-economic rights are interpreted in a manner that achieves the collective nature of human rights and obligations, values of equality, dignity, justice, and freedom in the enjoyment of these rights. It is imperative for the African Charter's supervisory organs to engage the values of freedom, equality, justice, and dignity in developing the scope and content of socio-economic rights. As Tshoose notes, interpreting fundamental human rights requires considering the values accepted in an open and democratic society.[71]

5 APPLICATION OF THE AFRICAN PHILOSOPHY BY THE SUPERVISORY ORGANS OF THE AFRICAN CHARTER: MISSED OPPORTUNITIES

The supervisory organs, particularly the African Commission, have had various opportunities to interpret socio-economic rights and have developed significant socio-economic rights jurisprudence. While the African Commission's jurisprudence is substantial the Court's socio-economic rights jurisprudence is in its infancy. However, it is very relevant and worth a discussion in this article. In their jurisprudence, the supervisory organs have been applying various aspects of the teleological approach. Although the supervisory organs have applied aspects of the teleological approach to interpreting the socio-economic rights in question, the potential of African philosophy has not been fully explored. The discussion in this section highlights the jurisprudence where the supervisory organs had an opportunity to engage African philosophy but missed those opportunities. The section pinpoints the implications of the non-engagement of African philosophy.

5.1 African Commission's socio-economic rights jurisprudence

5.1.1 *Social and Economic Rights Action Centre (SERAC) v Nigeria*

The complainants in *SERAC* brought the communication on behalf of the Ogoni Community. They alleged that the military government of the respondent state had been directly engaged in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), which was the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). According to the

71 Tshoose (n 46) 18-19.

complainants, the oil production activities had been contaminating the environment, and causing health problems to the Ogoni people. It was further alleged that the victims were not engaged in the decision-making process concerning the development projects affecting their land. The complainants alleged that the respondent state, through its security forces attacked, burned and destroyed several villages and homes in Ogoniland. Allegedly, the respondent state destroyed and threatened food sources in Ogoniland through pollution of soil and water on which the Ogoni people relied for farming and fishing activities. During the raids on villages, the armed forces destroyed crops and killed animals. All these activities resulted in malnutrition and starvation among the Ogoni people. They alleged that these actions and omissions of the respondent state amounted to the violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.[72]

The African Commission commenced its decision by describing the states' obligations as set out in the African Charter. According to the African Commission, both civil and political rights, as well as socio-economic rights impose upon states a quartet of obligations, namely: duties to respect, protect, promote and fulfil the rights.[73] Drawing inspiration from the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[74] the African Commission stated that states are required to implement all these categories of obligations.[75]

The African Commission went on to determine the allegations regarding the violations of the rights to health and healthy environment in articles 16 and 24 of the African Charter respectively.[76] It stated that the joint reading of the provisions of articles 16 and 24 guarantees the right to a healthy environment.[77] It explained that the right to a healthy environment relates to socio-economic rights.[78] It noted that polluted environment does not meet the standards of healthy living conditions and is dangerous to the individual's physical and mental health.[79] According to the African Commission, article 24 imposes upon states 'an obligation to take reasonable legislative and other measures' to avoid air and environmental pollution as well as promoting progressive environmental conservation and 'ecologically sustainable development and use of natural resources'.[80] It drew inspiration from the provisions of article 12 of the ICESCR to reach to these findings. It found the respondent state to be in violation of articles 16 and 24 of the African Charter.

72 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) 1-9.

73 *SERAC* (n 72) para 44.

74 International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3.

75 *SERAC* (n 72) para 48.

76 *SERAC* (n 72) para 50.

77 *SERAC* (n 72) para 51.

78 As above.

79 As above.

80 *SERAC* (n 72) para 52.

Moreover, the African Commission determined the alleged violation of article 21 concerning the right of peoples to dispose freely of their natural wealth and resources. The African Commission elaborated upon the nature and scope of states' obligations imposed by this right.[81] According to the African Commission, the state has an obligation to protect its citizens through legislation and effective enforcement, and protecting them from damaging acts perpetrated by third parties.[82] Drawing inspiration from *Velasquez Rodriguez v Honduras* (*Velasquez*)[83] the African Commission held that a state violates its obligation to protect when it permits third parties to act in a manner that violates peoples' rights.[84] The African Commission then held that the respondent state failed to protect the victims from interferences in the enjoyment of their rights.[85] Instead, it facilitated the destruction of Ogoniland.

The African Commission then determined the right to housing implicitly recognised in articles 14, 16 and 18(1) of the African Charter.[86] It held that, while the African Charter does not expressly recognise the right to housing, it is implicitly protected through the provisions protecting the rights to health, property and family.[87] According to the African Commission, when housing is destroyed, property, health and family are negatively affected.[88] It stated that at the minimum, the right to shelter imposes upon the respondent state an obligation to refrain from destroying the housing of its citizens and to desist from preventing their efforts to reconstruct the destroyed homes.[89] It stated further that this obligation requires states to refrain from conducting, supporting or tolerating conduct that violates the right to housing.[90] The obligation to protect housing requires the respondent state to prevent third parties from violating the same.[91] According to the African Commission, the right to housing includes not only 'a roof over one's head' but also individuals' 'right to be left alone and to live in peace'.[92] Moreover, the African Commission held that the implicit right to adequate housing incorporates the right to protection against forced evictions.[93] Drawing on the Committee on Economic, Social and Cultural Rights' (CESCR) definition, the African Commission defined forced evictions as the permanent removal, against their will, of individuals, families and communities from their

81 *SERAC* (n 72) para 57.
82 As above.
83 *Velasquez Rodriguez* (Judgment) Inter-American Court of Human Rights series C 4 (29 July 1988).
84 *SERAC* (n 72) para 57.
85 *SERAC* (n 72) para 58.
86 *SERAC* (n 72) para 60.
87 As above.
88 As above.
89 *SERAC* (n 72) para 61.
90 As above.
91 As above.
92 As above.
93 *SERAC* (n 72) para 63.

homes which they occupy without the provision of, and access to, appropriate forms of legal or other protection.[94] According to the African Commission, forced evictions cause physical, psychological and emotional distress, loss of means of economic sustenance and increased impoverishment.[95] They cause sporadic deaths, break up of families and homelessness.[96] The African Commission drew inspiration from the CESCR General Comment 4 on the right to adequate housing (General Comment 4)[97] that recognises the right of everyone to possess security of tenure that ensures legal protection against forced eviction, harassment, and other threats against his or her property.[98] The respondent state's actions demonstrated a violation of this right enjoyed by the Ogoni as a collective right.[99]

The African Commission dealt with the right to food alleged by the applicants to be impliedly incorporated in articles 4, 16 and 22 of the African Charter. The African Commission noted that the right to food is directly linked to the dignity of human beings and relevant for the enjoyment and fulfilment of other rights including: health, education, work and political participation.[100] The respondent state is bound by the African Charter and international law to protect and improve existing food sources, and ensures access to adequate food for its citizens.[101] The minimum core of the right to food requires the respondent state to desist from destroying or contaminating food sources and prevent peoples' efforts to feed themselves.[102] The respondent state violated the minimum core of the right to food, namely the destruction of food sources through armed forces and state oil companies, permitting private companies to destroy food sources.[103] Through terror, it also prevented the Ogoni people from feeding themselves.[104]

Regarding the violation of the right to life, the African Commission held that the violations of the rights to housing, food, property, health, and protection of the family amounted to the violation of the right to life.[105] This was done through the killings of Ogonis, environmental pollution and degradation, and the destruction of farms.[106]

I argue in this article that in addition to the provisions of the ICESCR the African Commission could broadly engage the principles of

94 *SERAC* para 63.
95 As above.
96 As above.
97 Committee on Economic, Social and Cultural Rights General Comment 4 The right to adequate housing (1991) UN Doc E/1992/3.
98 *SERAC* (n 72) para 63.
99 As above.
100 *SERAC* (n 72) para 65.
101 As above.
102 As above.
103 *SERAC* (n 72) para 66.
104 As above.
105 *SERAC* (n 72) para 67.
106 As above.

obligations, responsibility and accountability embedded in African philosophy to elaborate state's duties. This way the Commission could have demonstrated the notion of state's duties as understood by African societies and its acceptance. It could show that the state's duties are not an alien in Africa. The Commission did not engage the African philosophy's values of dignity, responsibility, leadership, obligations, and right to life to elaborate the link between the rights to health and healthy environment and their obligations. The Commission didn't invoke the African philosophy's principle of freedom and the pre-colonial African societies' communal understanding of the right to property to interpret article 21 of the Charter. Holistic interpretation of the right to property as understood in Africa's pre-colonial societies requires any disposition of property and other natural resources to include the consent of all members of the community. This consent requirement is significant for land transactions, like leasing, mortgaging, and the determination of the boundaries. The requirement for consent thus demonstrates that African societies recognise the limits attached to the enjoyment of the right to property and other resources. Again, the Commission missed an opportunity to apply the principles of obligations and the rights to property and family embedded in the African philosophy to elaborate the right to housing and other relevant rights. The Commission did not engage the principle of human dignity and the right to life as understood in the African philosophy to elaborate the rights to food, health, education, work, life and political participation.

5.1.2 *Purohit and Moore v The Gambia*

In *Purohit and Moore v The Gambia* (*Purohit*)[107] the complainants called upon the African Commission to decide on the alleged violations of the rights to non-discrimination, equality, dignity, and health. The complainants brought the communication on behalf of the patients who were detained in a psychiatric unit of the Royal Victoria Hospital at Campama, and on behalf of both the current and future mental health patients who will be detained under the Mental Health Acts of the respondent state.[108] The complainants alleged that the law governing mental health in the respondent state was out-dated.[109] They referred to the failure of the Lunatic Detention Act (LDA) to define the term 'lunatic', and to the lack of provisions and significant requirements to protect the mental health of patients during diagnosis, certification and detention processes.[110] They further claimed that the psychiatric unit was overcrowded and that there was a lack of requirement of consent to treatment or continuation of treatment.[111] They further alleged that the LDA does not provide for legal aid scheme and compensatory

107 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit* case).

108 *Purohit* (n 107) para 1.

109 *Purohit* (n 107) para 3.

110 *Purohit* (n 107) para 4.

111 *Purohit* (n 107) para 5.

mechanisms for the violations of the patients' rights.[112] As such, the complainants alleged the violation of articles 16 and 18(4) of the African Charter that provide for the right to health.[113] Moreover, the complainants alleged that the treatment of mental patients to indefinite institutionalisation and the conditions in which they are held under the LDA violate the rights to non-discrimination, equality and dignity provided in articles 2, 3 and 5 of the African Charter.[114]

The African Commission determined whether the respondent state violated the right to dignity in article 5.[115] On this issue, it responded in the affirmative. It referred to the provisions of article 5 and stated that this right also imposes on every human being the obligation to respect this right.[116] It further stated that all state parties to the African Charter should respect this right.[117] With reference to *Media Rights Agenda and Others v Nigeria* (*Media Rights Agenda*)[118] and *John K Modise v Botswana* (*Modise*)[119] the African Commission stated that the LDA's description of persons with a mental illness as 'lunatics', and 'idiots' violates the right to dignity in article 5 as these terms dehumanise and deny such persons any form of dignity.[120] It further drew inspiration from UN Principles for the Protection of Persons with Mental Illness and stated that the dignity of persons with a mental disability should be respected.[121] Moreover, the right to dignity requires persons with a disability to be treated with humanity.[122] It then stated that persons with a mental disability have the right to enjoy the right to dignity and that the right should be protected by all state parties to the African Charter.[123]

In this case, the African Commission could also engage the African philosophy's element of individual duties, values of dignity, equality, and humanness to elaborate the rights to dignity, equality, non-discrimination, and health. For example, the African Commission could enhance its decision by applying the value of human dignity as holistically understood in the African philosophy to elaborate the right to dignity in the African Charter. The holistic application of the value of dignity in the African philosophy could assist the African Commission to enrich the meaning, scope, and content of the right to dignity in article 5 of the African Charter.

112 *Purohit* (n 107) para 8.
113 *Purohit* (n 107) para 9.
114 As above.
115 *Purohit* (n 107) para 55.
116 *Purohit* (n 107) paras 56-57.
117 *Purohit* (n 107) para 61.
118 *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998).
119 *John K Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).
120 *Purohit* (n 107) paras 56-61.
121 *Purohit* (n 107) para 60.
122 As above.
123 *Purohit* (n 107) para 61.

5.1.3 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*

In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (*COHRE*),[124] the second complainant (complainant) alleged the violation of human rights by the respondent state against the indigenous black African tribes in the Darfur region found in the western part of the respondent state.[125] The complainant alleged that through the Janjaweed the respondent state attacked the civilian population, raided and bombed their villages, markets and water wells by helicopter gunships and airplanes (aeroplanes).[126] They further claimed that the respondent state forcibly evicted a large number of people from their homes that were also totally or partially burned and destroyed. The complainant alleged that the respondent state deliberately and indiscriminately killed people and many other people were displaced.[127] Based on this background the complainant alleged the respondent state's violation of, amongst others, articles 4, 5, 14, 16, 18(1) and 22 of the African Charter.[128]

The African Commission found the respondent state in violation of articles 4 and 5 of the African Charter.[129] With regard to article 4, the African Commission noted that the right to life should be interpreted broadly to include the right to dignity and livelihood.[130] It is a supreme right without which other rights become meaningless.[131] This right to life imposes upon states the duty to protect people from arbitrary actions committed by public authorities and private persons.[132] This duty is broad as it includes strict control and limits circumstances under which a person may be deprived of his or her life by state authorities.[133] The right also imposes a duty upon the state to respect the right to life by desisting from violating it by protecting it from violation by non-state actors within its jurisdiction.[134] Referring to *Zimbabwe Human Rights NGO Forum v Zimbabwe* (*Zimbabwe Human Rights NGO Forum*),[135] the African Commission held that lack of due diligence on the part of the state to prevent the violation or for not taking steps to provide the victims with reparation, amounts to a violation of the right.[136]

124 *Sudan Human Rights Organisation & Centre on Human Rights and Evictions v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*COHRE* case).
125 *COHRE* (n 124) para 2.
126 *COHRE* (n 124) para 13.
127 *COHRE* (n 124) para 14.
128 *COHRE* (n 124) paras 15-16.
129 *COHRE* (n 124) paras 153 and 168.
130 *COHRE* (n 124) para 146.
131 As above.
132 *COHRE* (n 124) para 147.
133 As above.
134 *COHRE* (n 124) para 148.
135 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).
136 *COHRE* (n 124) para 148.

Regarding the right to dignity the African Commission through reference to *Media Rights Agenda*, *Modise* and the decision of the United Nations Committee Against Torture in *Hajrizi Dzemajl et al v Yugoslavia* (*Hajrizi*),[137] held that 'cruel, inhuman and degrading punishment or treatment' in article 5 should be broadly interpreted to protect people from physical or mental abuse.[138] It noted that forced evictions and destruction of housing amount to cruel, inhuman and degrading treatment or punishment. The forced eviction of Darfurians from their villages and homes, executed by the respondent state through the Janjaweed militia and its agents, amounted to cruel and inhuman treatment and threatened their right to human dignity. Then, the respondent state violated both articles 4 and 5 of the African Charter.[139]

Furthermore, the African Commission found Sudan in violation of article 14 of the African Charter on the right to property.[140] It started by stating the significance of the right to property and the nature and scope of states' obligations imposed by this right.[141] According to the African Commission, the right to property is a fundamental right in democratic states and imposes upon states obligations to respect and protect it from encroachment by the states and non-state actors.[142] states are required to ensure that this right is accessible to everyone while taking the public interest into account.[143]

The African Commission explained further that the right to property incorporates two principles: ownership and peaceful enjoyment of property, as well as conditions for deprivation of the right such as public or general interest and 'in accordance with the law'.[144] According to the African Commission, the respondent state's action through the Janjaweed militia to destroy the victims' villages and homes amounted to the deprivation of the right to property.[145] The respondent state failed to refrain from forcible evictions of the victims or demolition of their houses and other properties.[146] The African Commission further found that the respondent state failed to take measures to protect the victims from attacks and bombings.[147] It held that the fact that the victims could no longer use their possessions to earn their living indicated that they were deprived the right to use their property in circumstances allowed by article 14 of the African Charter.[148]

137 *Hajrizi Dzemajl et al v Yugoslavia* Communication no. 161/2000 UN Doc No CAT/C/29/D/161/2000 (2 December 2002).
138 *COHRE* (n 124) paras 158-159.
139 *COHRE* (n 124) paras 158-168.
140 *COHRE* (n 124) para 205.
141 *COHRE* (n 124) para 192.
142 As above.
143 As above.
144 *COHRE* (n 124) para 193.
145 *COHRE* (n 124) para 194.
146 *COHRE* (n 124) para 205.
147 As above.
148 As above.

The African Commission also considered the allegations regarding the right to health.[149] It found Sudan in violation of the right to health contained in article 16 of the African Charter.[150] Significantly, the African Commission defined the content of the broadly formulated right to health to include both health care and health conditions.[151] It then stated that the respondent state's destruction of homes, livestock, farms, and the poisoning of water sources like wells, exposed the victims to serious health risks. Referring to CESCR General Comment 14 on the right to the highest attainable standard of health (General Comment 14) the African Commission held that, in addition to timely and appropriate health care, the right to health encompasses other underlying determinants such as access to safe and potable water, an adequate supply of food, nutrition and housing.[152] The right should be available, accessible, and acceptable, and of good quality.[153] The right to health imposes obligations to respect, fulfil and protect.[154] states should thus not infringe on the enjoyment of this right.[155] Through this obligation, states should refrain from polluting air, water and soil.[156] The right to health also imposes upon states an obligation to ensure that non-state actors do not restrict individuals or groups' accessibility to any information and services related to this right.[157] The African Commission went on to state that the state's failure to adopt and enforce legislation that prevents water pollution equally amounts to the violation of the right to health.[158] Referring to *free legal assistance* the African Commission held that failure to provide safe drinking water and electricity amounts to a violation of the right to health.[159] The African Commission found the respondent state in violation of the right to health enshrined in article 16 of the African Charter.[160]

The African Commission also found the respondent state in violation of the right to the protection of the family contained in article 18(1) of the African Charter. It stated that article 18 imposes upon states a positive obligation to protect the physical and moral well-being of a family.[161] The provisions of article 18 also prohibit states' and non-state actors' arbitrary or unlawful interference with the family.[162] Drawing inspiration from the CESCR General Comment 19 on the right to social security (General Comment 19) the African Commission stated that the right to family protection imposes on states obligations to adopt

149 *COHRE* (n 124) para 206.
150 *COHRE* (n 124) para 212.
151 *COHRE* (n 124) para 208.
152 *COHRE* (n 124) para 209.
153 As above.
154 As above.
155 As above.
156 As above.
157 *COHRE* (n 124) para 210.
158 As above.
159 *COHRE* (n 124) para 211.
160 *COHRE* (n 124) para 212.
161 *COHRE* (n 124) para 213.
162 As above.

legislative, administrative, or other measures to give effect to this right.[163] It also obliges states to desist from conducts that may endanger the family unit such as arbitrary separation of family members and displacement of families involuntarily.[164] Drawing inspiration from the judgment of the European Court of Human Rights (European Court) in *Dogan v Turkey* (*Dogan*)[165] the African Commission stated that the respondent state's refusal to allow the victims to access their homes and livelihood amounts to an interference with the family.[166] Significantly, the African Commission connected the mass expulsions of the applicants with their right to the protection of the family.[167] Referring to *Union Interafricaine des Droits de l'Homme v Angola*[168] it held that massive forced expulsions of people adversely affects the right to the protection of the family.[169] The respondent state's forcible eviction of the victims from their homes, the killing of some family members and the displacement of others threatened the foundation of family and made the enjoyment of the right to family difficult. Therefore, the respondent state was found to have violated the right to family.[170]

Then the African Commission determined allegations regarding the violation of the right to development in article 22 of the African Charter.[171] It found the respondent state to be in violation of the right to development.[172] According to the African Commission, article 22 is collective in nature in that it is endowed on a people.[173] The African Commission reasoned that to establish the violation of article 22 the question whether victims constitute 'people' in the context of the African Charter is vital.[174] Therefore, it had to determine whether Darfurians constitute a 'people' thus entitling them to the right to development.[175] According to the African Commission, various characteristics can be used to identify persons referring to themselves as 'a people'.[176] These characteristics include language, religion, culture, the territory they occupy in a state and a common history.[177] The African Commission stated further that race also characterises 'people' in communities with a population of different racial

163 *COHRE* (n 124) para 214.
164 As above.
165 *Dogan v Turkey* App 8803-8811/02, 8813/02 and 8815-8819/02 (ECtHR, 29 June 2004).
166 *COHRE* (n 124) para 214.
167 *COHRE* (n 124) para 215.
168 *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997).
169 *COHRE* (n 124) para 215.
170 *COHRE* (n 124) para 216.
171 *COHRE* (n 124) para 217.
172 *COHRE* (n 124) paras 224 and 228.
173 *COHRE* (n 124) para 218.
174 As above.
175 As above.
176 *COHRE* (n 124) para 220.
177 As above.

composition.[178] It stated that in Africa racial and ethnic diversity contribute to the cultural diversity that should be embraced.[179] Significantly, the African Commission elaborated on the object and purpose of the African Charter regarding peoples' rights. It stated that the object and purpose of the African Charter is to protect peoples against external and internal rights' violations.[180] Based on this reasoning the African Commission pointed out that the African Charter protects individuals and groups of different racial, ethnic, religious and other social backgrounds.[181] The African Commission applied article 19 of the African Charter to emphasise that Darfurians in their collective are 'a people'.[182] The article recognises peoples' right to equality and enjoyment of the same human rights without distinction.[183] Thus, the respondent state's action to target Darfur's civilians instead of combatants amounted to collective punishment.[184] According to the African Commission;

> the attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and the pursuit of other activities'. In this respect, the African Commission found the respondent state to have violated article 22 of the African Charter.[185]

While the Commission's findings in *COHRE* is commendable, the Commission could have strengthened its jurisprudence and give it the African context by broadly engaging the African philosophy's principle of duties to elaborate the states' obligation towards its people. It missed an opportunity to elaborate the African philosophy's principle of dignity, humanness, equality and the rights to life, Africa's concept of family, and property to elaborate the rights to dignity, life health, food, water, family, development and property in *COHRE*. This was an opportunity for the Commission to elaborate the significance of the right to property in the African context. This was an opportunity that the Commission could apply the general understanding of African philosophy that is based on the collective nature of Africa's people to define the Darfurians as 'a people'. The Commission missed an opportunity to cement on African philosophy's emphasis on states to respect human rights including socio-economic rights in a manner that would enable people to commune with others and engage in various individual and collective socio-economic rights.

The African Commission applied similar approach, by exclusively relying on the relevant jurisprudence of the Inter American Court while completely leaving out African philosophy, in its subsequent communication, *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois*

178 *COHRE* (n 124) para 220.
179 *COHRE* (n 124) para 221.
180 *COHRE* (n 124) para 222.
181 *COHRE* (n 124) para 223.
182 As above.
183 *COHRE* (n 124) para 221.
184 *COHRE* (n 124) para 223.
185 *COHRE* (n 124) para 224.

Welfare Council v Kenya (Endorois).[186] The complainants in *Endorois* alleged that the respondent state violated in particular, the rights to property, cultural life, natural resources, and the right to development contained in articles 14, 17, 21 and 22 of the African Charter.[187]

The *Endorois* was an opportune moment for the African Commission to enrich its jurisprudence by applying various aspects of African philosophy. It could apply the notion of African philosophy first to develop the scope and content of the property rights of the indigenous peoples and then apply the relevant jurisprudence to establish the external coherence. The Commission could also apply the general understanding of African philosophy founded on the collective way of life to enrich its definition of peoples. It could also invoke the African philosophy's understanding of the right to property and other natural resources to broadly interpret the rights to property and free disposal of wealth in article 21. These two rights in African context include the right to free consent, freedom of enjoyment, and obligation to respect. As such the rights broadly encompass the obligation to consult.

5.2 African Court's socio-economic rights jurisprudence

5.2.1 *African Commission on Human and Peoples' Rights v Kenya* (*Ogiek case*)[188]

The applicant in the *Ogiek* alleged that the Ogiek Community (the Ogieks)[189] in the respondent state are an indigenous minority ethnic group residing in the greater Mau forest complex.[190] The applicant submitted that the state, through its agency the Kenya Forestry Service, issued the Ogieks and other settlers with a 30-day notice to vacate the Mau forest on the grounds that it is a reserved water catchment zone and 'government land', as stipulated in section 4 of the Government Land Act.[191] The applicant further argued that the eviction notice failed to consider the importance of the Mau forest for the Ogieks' survival.[192] The applicant, therefore, alleged a violation of articles 1, 2, 4, 14, 17(2)-(3), 21, and 22 of the African Charter.

The African Court subsequently had to consider whether the Ogieks constitute indigenous peoples.[193] It noted the African Charter's

186 *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHLRLR 75 (ACHPR 2009).

187 *Endorois* (n 186) paras 1-6 and 14-21.

188 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012.

189 Ogiek (n 236) para 6.

190 Ogiek (n 236) para 6.

191 *Ogiek* (n 236) paras 7-8.

192 *Ogiek* (n 236) para 8.

193 *Ogiek* (n 236) para 102.

omission regarding the meaning of indigenous peoples.[194] Through articles 60 and 61 of the African Charter, the Court drew inspiration from the African Commission's Working Group on Indigenous Populations/Communities, as well as the work of the United Nations Special Rapporteur on Minorities, which establish criteria to identify indigenous populations.[195] It found that the survival of indigenous populations hinges on 'unhindered access to and use of their traditional land and the natural resources thereon'. Satisfied that the Ogieks possess all these requirements, the Court held that they are indigenous people.[196]

Regarding the right to property in article 14 of the African Charter, the African Court found that this right is both individual and collective in nature.[197] The right includes three elements namely the 'right to use the property (*usus*)'; the 'right to enjoy the property (*fructus*)'; and the 'right to dispose the property or transfer it (*abusus*)'.[198] Drawing inspiration from the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples, the Court held that the Ogieks have the right to occupy, use, and enjoy their traditional lands.[199]

Regarding the right to non-discrimination in article 2, the African Court held that it guarantees the enjoyment of all the rights in the African Charter and that it is directly related to the right to equality in article 3.[200] The scope of the right to non-discrimination extends, however, beyond the right to equality in that it practically enables individuals' enjoyment of their rights without distinction.[201] According to the Court, the phrase 'any other status' in article 2 includes any form of distinction that was not foreseen during the Charter's adoption.[202] The Court explained that it considers the African Charter's object and purpose when establishing the forms of distinction covered in the phrase 'any other status'. It noted that not all forms of distinction are discriminatory. A distinction is discriminatory when it is not objective, reasonably justifiable, necessary, or proportional.[203] The African Court held that denying the Ogieks their rights (which are recognised as similar to indigenous peoples in that their survival depends on their traditional lands) amounts to a distinction based on ethnicity or another status provided in article 2.[204]

On the right to life in article 4, the African Court stated that this right guarantees the realisation of all rights in the African Charter.[205] It

194 *Ogiek* (n 236) para 105.
195 *Ogiek* (n 236) paras 105-106 & 108.
196 *Ogiek* (n 236) paras 110-112.
197 *Ogiek* (n 236) para 123.
198 *Ogiek* (n 236) para 124.
199 *Ogiek* (n 236) para 125-128.
200 *Ogiek* (n 236) para 137.
201 *Ogiek* (n 236) para 138.
202 As above.
203 *Ogiek* (n 236) para 139.
204 *Ogiek* (n 236) paras 142 and 146.
205 *Ogiek* (n 236) para 152.

held that the right to life prohibits the arbitrary deprivation of life and establishes a link between the right to life and the inviolable nature and integrity of human beings.[206] The Court further found that violating socio-economic rights through evictions does not necessarily violate the right to life, but rather engenders conditions unfavourable to a decent life.[207] According to the Court, the right to life in article 4 refers to a physical right to life, rather than an existential understanding of the right.[208] It held further that the Ogieks' eviction negatively affected their decent existence of a group.[209] The African Court, however, held that the applicant failed to prove the direct link between the evictions of the Ogieks and the death of some members of their community.[210] It, therefore, held that the respondent state did not violate article 4.[211]

Regarding the right to freely dispose of wealth, the African Court started by defining the notion of 'peoples'. It noted the African Charter's omission regarding the meaning of this term. According to the Court, the omission was deliberate to allow supervisory organs the necessary flexibility to define it.[212] The African Court explained that, during anti-colonial struggles, the term 'peoples' meant populations in countries struggling for their independence and national sovereignty.[213] In the independent states, the Court had to decide whether the term extends to ethnic groups or communities within a state.[214] It held that, provided that such groups do not challenge the sovereignty and territorial integrity of a state, they should be recognised as peoples.[215] The Court then held that the violation of the Ogieks' right to property also amounts to a violation of their right to freely dispose of their wealth in article 21 of the African Charter.[216]

Concerning the right to development, the African Court held that peoples are entitled to the socio-economic right to development in article 22 of the African Charter.[217] According to the Court, the respondent state's eviction of the Ogieks without consultation violated their socio-economic right to development, as well as their rights to health, housing, and other socio-economic programmes related to the right to development.[218]

206 *Ogiek* (n 236) para 152.

207 *Ogiek* (n 236) para 153.

208 *Ogiek* (n 236) para 154.

209 *Ogiek* (n 236) para 155.

210 As above.

211 *Ogiek* (n 236) para 156. For a detailed discussion regarding the manner in which this decision fails to resonate with the teleological approach to interpretation see A Amin 'Teleological interpretation in the emerging socio-economic rights jurisprudence of the African Court: *African Commission on Human and Peoples' Rights v Kenya*' (2021) *African Journal of Legal Studies* 13-14.

212 *Ogiek* (n 236) para 196.

213 *Ogiek* (n 236) para 197.

214 *Ogiek* (n 236) para 198.

215 *Ogiek* (n 236) para 199.

216 *Ogiek* (n 236) para 201.

217 *Ogiek* (n 236) para 208.

218 *Ogiek* (n 236) paras 210-211.

The *Ogiek* was an opportune moment for the African Court to enrich its jurisprudence by applying various aspects of African philosophy. The Court could apply the general understanding of African philosophy founded on the collective way of life to enrich its definition of peoples. The Court missed an opportunity to engage the African philosophy's aspects of dignity, family, property, equality and life to elaborate the rights to life, non-discrimination, property, and development involved in this case.

For example, the Court's decision on the right to property is significant as it recognises indigenous peoples' rights to their traditional land. Upholding indigenous peoples' property rights embrace the African Charter's approach, which draws on African realities and philosophical perspectives regarding peoples' rights including peoples' socio-economic rights. The recognition of collective socio-economic rights is justified by the notion of African philosophy entrenched in the African Charter's preamble and elaborated on in its provisions. The African Court did not, however, invoke the notion of African philosophy to develop the unique and important scope and content of indigenous peoples' rights to property.

6 TOWARDS A COHERENT APPLICATION OF AFRICAN PHILOSOPHY IN INTERPRETING SOCIO-ECONOMIC RIGHTS IN THE AFRICAN CHARTER

6.1 Applying the teleological approach to interpretation

African philosophy is not an interpretive approach but rather an interpretative tool. As such, its application in interpreting socio-economic rights in the Charter will only be feasible if justified by an appropriate approach to interpretation. The effective application of African philosophy will require an interpretative approach that engages the object and purpose of the African Charter. In this regard, the teleological approach to interpretation becomes an appropriate interpretive approach. The engagement of the object and purpose of the African Charter in the interpretative process creates space for the supervisory organs to apply a wide range of interpretive tools including African philosophy in developing the meaning, scope and content of socio-economic rights in the African Charter. The supervisory organs can use principles embedded in the African philosophy to elaborate on both individual and collective socio-economic rights. Resultantly, there is a close link between the application of the African philosophy and the teleological approach to developing the meaning, scope and content of socio-economic rights in the African Charter.

6.2 Engaging African philosophy, its foundational principles, values and human rights

African philosophy is a vital interpretive tool in the African Charter with enormous potential in elaborating Charter's socio-economic rights. Based on its phrase 'I am, because we are; and since we are, therefore I am' that represents a collective living of African societies, this interpretive tool engages a wide range of principles and values relevant for the development of socio-economic rights in the African Charter. Reference to the African philosophy will enable the supervisory organs to engage its foundational principles including collectiveness, humanness, responsibility, and respect. Other principles include the values of human dignity, respect for the right to life, freedom, justice, democracy, democratic and good governance, freedom to use and enjoyment of natural resources equally and collectively, and individual obligations. African philosophy creates an avenue for the supervisory organs to engage human rights to life, property, family, and equality to interpret both individual and collective socio-economic rights. Application of these principles, values and rights will enable the supervisory organs to elaborate socio-economic rights in a manner that portrays African identity and understanding of these rights. These interpretive aspects help to strengthen an argument that human rights are not alien in Africa.

6.3 Engaging other interpretive tools justified by the teleological approach

The effective interpretation of socio-economic rights in the African Charter requires an engagement of a wide range of interpretive tools alongside African philosophy. As shown in the discussion above these interpretive tools include object and purpose of the African Charter, the Preamble to the Charter that engages the values of human dignity, equality, justice, and freedom. They also include interdependence of rights, and African philosophy. Other interpretive tools include the African Charter as a whole engaging the relevant rights provisions, duties provisions, drawing inspiration clauses. Others include relevant national, regional and international instruments and jurisprudence and the principle of effectiveness. As such, an effective interpretation of socio-economic rights does not require African philosophy to be applied in isolation from other interpretative tools. Other interpretative tools should be engaged to enrich the meaning, scope and content of socio-economic rights in a manner that allows international legitimacy that is, acceptance in the international sphere to create international coherence.

7 CONCLUSION

At the heart of effective protection of socio-economic rights in the African Charter lies the potential of these rights to transform socio-

economic conditions of the Africa's people and enable them to preserve their historical collective nature of living. To be attainable, this treasure hidden in socio-economic rights requires the supervisory organs to engage relevant interpretative tools in their interpretative processes. I have argued that African philosophy founded on the principles of collectiveness and togetherness of Africa's people, is a potential interpretative tool to enrich the meaning, scope and content of socio-economic rights and enable individuals to commune with others in all spheres of socio-economic activities. I have shown that despite its potential, the supervisory organs have not explored this interpretative tool fully.

To assist the supervisory organs to advance the African Charter's object and purpose embraced in socio-economic rights, that is, transforming peoples' socio-economic-conditions and enhancing their historical communal way of living, I have developed a coherent application of African philosophy in interpreting these rights. I have shown that the legal basis for the coherent application of African philosophy is centred in the teleological approach to interpretation. I have shown that while the supervisory organs have been applying the teleological approach in their socio-economic rights jurisprudence, they have not engaged African philosophy in interpreting these rights. Engaging African philosophy consistently could enable the socio-economic rights in the African Charter to be a transformative tool of the Africa's people socio-economic conditions in a manner that facilitate them to commune in all spheres of socio-economic activities effectively.

Le contradictoire devant la Cour africaine des droits de l'homme et des peuples

*Quiterie Bassonga Khiessie**
https://orcid.org/0000-0002-3574-7521

RÉSUMÉ: Principe universel, le contradictoire est mis en œuvre par toutes les juridictions internationales des droits de l'homme. La Cour africaine des droits de l'homme et des peuples ne fait pas exception, du fait que le contradictoire est aussi consacré dans la Charte africaine des droits de l'homme et des peuples, en son article 7(1)(c) ainsi que dans le Protocole y relatif portant création de la Cour, en son article 26. Néanmoins, la consécration formelle universelle du contradictoire ne garantit pas une uniformité dans sa mise en œuvre. L'objet de cette contribution est de démontrer, par le biais des méthodes exégétique et casuistique, qu'en dépit de la formulation laconique du contradictoire dans la Charte africaine des droits de l'homme et des peuples, la Cour procède à une consolidation dudit principe. Dans le système juridique africain, la particularité du contradictoire est davantage perceptible lorsqu'il est appréhendé à l'aune de l'œuvre prétorienne du juge africain des droits de l'homme et des peuples. L'examen de la jurisprudence de la Cour est révélateur de ce que le contradictoire est un principe établi et tropicalisé devant cette juridiction africaine des droits de l'homme et des peuples.

TITLE AND ABSTRACT IN ENGLISH:

Adversarial proceedings before the African Court on Human and Peoples' Rights

Abstract: As a universal principle, adversarial proceedings are implemented by all international human rights courts. The African Court on Human and Peoples' Rights is no exception, as adversarial proceedings are also enshrined in article 7(1)(c) of the African Charter on Human and Peoples' Rights and in article 26 of the Protocol establishing the Court. However, the universal formal enshrinement of adversarial proceedings does not guarantee uniformity in its implementation. The purpose of this article is to demonstrate, through exegetical and casuistic methods, that despite the laconic formulation of the adversarial principle in the African Charter on Human and Peoples' Rights, the Court is consolidating this principle. In the African legal system, the particularity of adversarial proceedings is more perceptible when viewed in the light of the jurisprudence of the African Court. An examination of the Court's case law reveals that adversarial proceedings are an established principle before the African human and peoples' rights tribunal.

MOTS CLÉS: contradictoire, Cour africaine des droits de l'homme et des peuples, Charte africaine des droits de l'homme et des peuples, droits de la défense, instance

* Docteure en Droit, Enseignante à la Faculté de droit de l'Université Marien Ngouabi; kiessigrace@yahoo.fr

SOMMAIRE:

1 INTRODUCTION

Le contradictoire est un principe universel qui est mis en œuvre par toutes les juridictions internationales. La Cour africaine des droits de l'homme et des peuples (la Cour) n'échappe pas à ce principe. La création de la Cour vient rompre avec 19 ans[1] de «paysage uni-institutionnel»[2] de protection des droits de l'homme sur le continent. Au-delà de cette considération formelle, la Cour rompt substantiellement avec le «mécanisme de l'arbre à palabre»[3] incarné par son aînée, la Commission africaine des droits de l'homme et des peuples (la Commission). Cette rupture est perceptible en ce que la Cour, contrairement à la Commission qui tend à judiciariser son office,[4] est une juridiction internationale[5] de protection des droits de l'homme. En effet,

> Ne peuvent être qualifiées de juridictions internationales de protection des droits de l'homme agissant au sein du droit international des droits de l'homme que celles qui statuent sur le fondement d'un traité normatif de protection des droits de l'homme et offrent la voie du recours individuel, directement ou indirectement.[6]

La Cour le reconnaît dans l'affaire *Jean-Claude Roger Gombert c. Côte d'Ivoire* en ces termes:

> (…) en tant que juridiction des droits de l'homme et des peuples, elle (la Cour) ne peut en principe connaître que des violations des droits des individus, des groupes d'individus ou des peuples, sur saisine des entités et personnes mentionnées à l'article 5 du Protocole (…).[7]

1 La Commission africaine des droits de l'homme et des peuples est opérationnelle depuis 1987, la Cour africaine des droits de l'homme et des peuples quant à elle l'est devenue en 2006.

2 S Yerima 'La Cour et la Commission africaines des droits de l'homme et des peuples: noces constructives ou cohabitation ombrageuse?' (2017) 1 *Annuaire africain des droits de l'homme* 358.

3 S Kowouvih 'La Cour africaine des droits de l'homme et des peuples: une rectification institutionnelle du concept de 'spécificité africaine 'en matière de droits de l'homme' (2004) 59 *Revue trimestrielle des droits de l'homme* 760.

4 L Hennebel et H Tigroudja *Traité de droit international des droits de l'homme* (2018) 276.

5 C Santulli 'Les juridictions de l'ordre international: essai d'identification' (2001) 47 *Annuaire français de droit international* 60.

6 F Sudre 'Conclusions' in J Andriantsimbazovina et al (dirs*) La protection des droits de l'homme par les cours supranationales* (2016) 249.

7 *Jean-Claude Roger Gombert c. Côte d'Ivoire* 038/2016 arrêt 22 mars 2018 para 47.

Entant que tel et dans sa fonction contentieuse, elle recourt au contradictoire.

Jean Salmon définit le contradictoire comme le «caractère d'un procès où des parties opposées comparaissent et débattent devant un juge sur un pied d'égalité des éléments du litige en cause».[8] Cette acception met en exergue l'aspect processuel du contradictoire, l'essence même du procès. En effet, ce dernier est étymologiquement «une marche, un développement, un progrès»,[9] un processus vers le jugement.[10] Le contradictoire y est considéré comme une phase inévitable du «rite processuel»,[11] lequel est rythmé par des temps de silence. Il y a entre contradictoire et silence, une sorte d'intimité ontologique. En ce sens, soutient-on, que: «[s]ans silence, il n'y a pas de contradictoire. (…). Le temps du silence de l'un est le temps de parole de l'autre».[12] Cette définition du contradictoire, qui est générale au contentieux international,[13] diffère dans le cadre spécifique du contentieux international des droits de l'homme, qui est réputé comme un contentieux subjectif.[14] Dans ce domaine, le contradictoire est perçu comme «le droit d'être informé et de répondre aux pièces et éléments de la procédure».[15] Sous cet angle, il est davantage considéré comme un droit, qui incombe en premier lieu à la défense. Cette affirmation est étayée par la doctrine qui considère le contradictoire comme l'une des garanties du procès «qui joue essentiellement en faveur de la défense. La contradiction doit y être comprise comme un droit de la défense».[16] Cette acception du contradictoire est consubstantielle au système accusatoire, dans lequel les parties à l'instance ont un rôle prépondérant et le juge y est réduit à un rôle d'arbitre.[17]

Des définitions précédentes, l'on est tenté de déduire que, tel Janus, le contradictoire comporte deux volets: un volet de droit subjectif et un volet de droit processuel. Toutefois, sans être adverses, ces deux approches du contradictoire forment, selon la doctrine, les «fonctions

8 J Salmon *Dictionnaire de droit international public* (2001) 253.

9 J-L Gardies 'Ce que la raison doit au procès' (1995) 39 *Archives de philosophie du droit* 39.

10 A-M Frisson-Roche 'La philosophie du procès, propos introductifs' (1995) 39 *Archives de philosophie du droit* 19.

11 F Zenati 'Le procès, lieu du social' (1995) 39 *Archives de philosophie du droit* 241.

12 B Le Boëdec Maurel 'Le temps du silence' (2020) 6 *Gazette du palais* 3.

13 C Santulli *Droit du contentieux international* (2015) 18.

14 S Rials 'L'office du juge' (1989) 9 *Droits Revue française de théorie de philosophie et de cultures juridiques* 18; M Afroukh 'L'objectivation du contrôle juridictionnel' in Andriantsimbazovina et al (dirs*) La protection des droits de l'homme par les cours supranationales* (n 6) 107.

15 L Sinopoli 'Le principe du contradictoire et la Cour européenne des droits de l'homme' in HR Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (2004) 81.

16 R Maison 'Le principe du contradictoire devant les juridictions pénales internationales' in HR Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (2004) 100.

17 J Pradel 'Rapport de synthèse: inquisitoire-accusatoire: une redoutable complexité' (1997) 68 *Revue internationale de droit pénal* 214; D Salas 'Le procès' (2001) 2 *Droits Revue française de théorie de philosophie et de cultures juridiques* 35.

du contradictoire», auxquelles, elle ajoute la fonction de détermination de la vérité.[18]

La Cour n'ayant pas encore connu un «recours entre Etats adhérents»,[19] cette étude se limitera à l'application du contradictoire dans le contentieux opposant l'individu à l'Etat. Au 29 novembre 2021, la Cour a reçu 325[20] requêtes introductives d'instance dans lesquelles les requérants allèguent la violation des droits. Dans ses jugements, le juge régional appréhende diversement le contradictoire. Néanmoins, l'ensemble de ses jugements constitue une jurisprudence, c'est-à-dire, qu'ils contiennent des solutions généralement données à des problèmes de droit.[21] Partant, cette jurisprudence, qui n'est pas silencieuse,[22] ne se limite donc pas à l'application du contradictoire, tel que consacré conventionnellement, mais devient aussi son complément nécessaire, son «supplément prétorien».[23]

L'approche historique révèle que les sources du contradictoire remontent au-delà de l'ordre juridique africain. Au plan universel, le contradictoire est consacré aussi bien par l'article 11(1) de la Déclaration universelle des droits de l'homme (DUDH), que par l'article 14(3)(d) du Pacte international relatif aux droits civils et politiques (PIDCP). Au plan régional, le principe du contradictoire bénéficie en Afrique d'un fondement conventionnel. Il est formulé dans la Charte africaine des droits de l'homme et des peuples (la Charte) et dans le Protocole portant création de la Cour africaine des droits de l'homme et des peuples (le Protocole). La Charte ne mentionne pas expressément le contradictoire. Ce dernier est contenu dans certaines garanties judiciaires. L'on peut lire à l'article 7(1)(c), ce qui suit: «Toute personne a droit à ce que sa cause soit entendue. Ce droit comprend: (…) le droit à la défense, y compris celui de se faire assister par un défenseur de son choix». L'on constate que cette disposition mentionne les droits reconnus à la partie défenderesse ou «les droits de la défense». Ils sont rattachés à la maxime «entendre l'autre partie», selon la formule latine *audi alteram partem*.[24] L'on peut inférer de l'argumentation précédente que le contradictoire est la manifestation du droit à la défense. Toutefois, cette approche peut s'avérer limitée, en ce que le contradictoire sert aussi à la partie poursuivante. Il s'étend au-delà du droit à la défense, car

18 E Jouannet 'Remarques conclusives' in HR Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (n 15) 178.

19 H Gaudin 'Les recours entre les Etats adhérents' in J Andriantsimbazovina et al (dirs) *La protection des droits de l'homme par les cours supranationales* (n 6) 161- 173.

20 Ces statistiques sont disponibles sur le site internet de la Cour https://www.african-court.org/cpmt/statistic (consulté le 29 novembre 2021).

21 J Hilaire 'Jugement et jurisprudence' (1995) 39 *Archives de philosophie du droit* 181.

22 SH Adjolohoun 'Les grands silences jurisprudentiels de la Cour africaine des droits de l'homme et des peuples' (2018) 2 *Annuaire africain des droits de l'homme* 24-46.

23 P Remy 'La part faite au juge' (2003) 4 *Pouvoirs* 23.

24 G Flécheux 'Le droit d'être entendu' in *Etudes offertes à P Bellet* (1991) 150.

> un droit de la défense peut n'être conçu que dans l'intérêt du défendeur, et c'est en cela que l'autonomie des droits de la défense se marque par rapport au contradictoire, qui est une charge et un bénéfice pour chacune des parties.[25]

Le Protocole mentionne expressément le contradictoire dans son article 26 relatif aux modalités de preuves. Aux termes de cet article, «[l]a Cour procède à l'examen contradictoire des requêtes qui lui sont soumises (…)». Une interprétation littérale de cette disposition permet de considérer le contradictoire davantage comme une modalité d'organisation du procès. Cette affirmation peut être confortée lorsque l'on combine la lecture de l'article 26 du Protocole et la règle 30 du Règlement de la Cour relatif aux phases de la procédure. Il en ressort que la contradiction se manifeste aussi bien dans la procédure écrite que dans celle orale.

L'on convient de ce que le contradictoire est un «principe général du procès international».[26] Dès lors, la présente contribution se propose d'examiner la problématique suivante: comment le juge africain des droits de l'homme et des peuples recourt-il au contradictoire? L'objet de cette contribution est de démontrer, qu'au travers de sa jurisprudence, la Cour africaine des droits de l'homme, procède à une appropriation du principe universel du contradictoire.

Plusieurs méthodes juridiques seront invoquées en vue de cette réflexion, à savoir l'exégèse et la casuistique. D'abord, la méthode exégétique nous permettra de procéder à l'analyse des différents instruments qui consacrent le contradictoire et au-delà, d'établir l'existence des concepts juridiques généraux sur la base de ceux existant. Ensuite, par la casuistique, l'on examinera au cas par cas les différentes décisions de la Cour afin d'apprécier la mesure dans laquelle elle appréhende le contradictoire dans chacune d'elles.

En réponse à la problématique, le juge africain recourt diversement au contradictoire selon qu'il procède au contrôle de son respect par les juridictions nationales et selon qu'il l'applique lui-même. Partant, la Cour appréhende le contradictoire comme un mode de concrétisation d'un droit subjectif universel (partie 2) et comme une modalité d'organisation régionale du procès (partie 3)

2 LE CONTRADICTOIRE: UN MODE DE CONCRETISATION D'UN DROIT SUBJECTIF UNIVERSEL

La Cour est la garante des droits de l'homme et des peuples consacrés par la Charte, dont les droits de se défendre. Ces droits se manifestent au travers du contradictoire. La Cour veille donc au contradictoire en contrôlant son respect par les juridictions nationales et en procédant à son interprétation extensive.

25 A-M Frison-Roche 'Généralités sur le principe du contradictoire (droit processuel)' Thèse dactylographiée, Université Paris II (1988) 30.

26 Santulli (n 13) 433.

2.1 Le contrôle du respect de l'article 7(1)(c) de la Charte

Les juridictions nationales peuvent être considérées comme les organes *longa manus* de la Cour. Elles sont seules compétentes, en raison du principe de subsidiarité, de mettre en œuvre les droits découlant de la Charte. La Cour quant à elle se contente de contrôler le respect par lesdites juridictions de ces droits, dont le droit à la défense et celui de se faire assister par un défenseur de son choix.

2.1.1 Le contrôle du respect du droit à la défense

Le droit à la défense relève des «droits que possède toute personne pour se protéger de la menace que constitue pour elle un procès».[27] Il s'agit en réalité d'un droit subjectif, garanti à l'individu. Cette affirmation est d'autant plus avérée que le contentieux devant la Cour est généralement un contentieux qui oppose deux sujets de droit international inégaux: l'individu, sujet immédiat de droit international[28] à l'Etat, qui en est le sujet primaire dévolu de la souveraineté.[29]

Toutefois, ce rapport déséquilibré trouve ses limites dans le contentieux international des droits de l'homme, car l'individu y bénéficie de certaines garanties, dont le droit à la défense. Dans cette optique, trouve toute sa place la thèse selon laquelle «permettre la défense, le contradictoire, c'est organiser la possibilité pour un accusé, un individu, de résister à la puissance répressive de l'Etat ou d'une collectivité. Il s'agit ici de garantir un droit individuel à la personne poursuivie face à la puissance poursuivante».[30] Cette considération est confortée par la jurisprudence de la Cour.

Dans sa jurisprudence, la Cour définit le droit à la défense et en énumère les caractéristiques. Elle estime que ce droit est fonction de certains actes préparatoires. Il implique la possibilité pour l'accusé d'accéder à certaines déclarations et de réunir des preuves et que ses moyens de défense soit considérés.

D'abord, le droit d'accéder à certaines déclarations à charge peut être considéré comme un acte préparatoire du droit à la défense. Il est corroboré par l'affaire *Thobias Mang'ara Mango et Shukurani Masegenya Mango c. Tanzanie*. Les faits à l'origine de cette affaire peuvent être résumés ainsi: les requérants sont reconnus coupables et condamnés à une peine de réclusion de 30 ans pour vol à main armé par les juridictions tanzaniennes.[31] Après plusieurs recours au terme

27 S Ngono 'Commentaire de l'article 7(1)' 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) 186.

28 P Daillier et al *Droit international public* (2009) 106.

29 J Bodin *Les six livres de la République* (1583) 74.

30 R Maison 'Le principe du contradictoire devant les juridictions pénales internationales' in HR Ruiz Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (n 15) 101.

desquels ils ont été déboutés,[32] ils saisissent la Cour en alléguant qu'ils ont notamment été privés de leur droit d'être entendu.[33] En réponse à cette allégation, la Cour rappelle que conformément à l'article 7(1)(c) de la Charte, toute personne a droit à la défense, en matière pénale, ce droit implique que les accusés soient rapidement informés des éléments de preuve qui soutiennent les accusations portées contre eux afin de leur permettre de préparer leur défense.[34] Par conséquent, elle considère que

> le refus opposé aux requérants d'accéder à certaines déclarations du témoin à charge et le retard dans la communication de celles-ci constituent une violation de l'article 7(1)(c) de la Charte par l'Etat défendeur.[35]

Cette position de la Cour est constante. L'examen de l'affaire opposant la Commission pour le compte d'un citoyen libyen à son Etat en est l'illustration. La Cour, en examinant l'allégation de la requérante, basée sur le droit à ce que sa cause soit entendue, relève que «le droit à la défense implique également (…) le droit de communiquer avec son avocat et le droit d'accès aux pièces nécessaires à la préparation de sa défense».[36]

Ensuite, le droit à la défense implique la possibilité pour l'accusé de réunir des preuves. Celles-ci sont des éléments utilisés pour soutenir une prétention.[37] Cette caractéristique du droit à la défense, corollaire du contradictoire, est inhérent au système accusatoire. Dans ce système, les preuves doivent être rapportées et discutées par les parties.[38] C'est donc à bon droit que la Cour la considère comme un élément déterminant du droit à la défense. A titre illustratif, l'on peut mentionner l'affaire Sébastien Germain *Ajavon c. Bénin* dans laquelle la Cour soutient que

> (…) l'exigence du droit de se défendre implique la possibilité pour l'accusé de proposer des preuves contraires à celles invoquées par l'accusation, d'interroger les témoins à charge ou de citer ses témoins.[39]

Elle conclut que «l'enquête telle qu'elle a été menée n'a pas permis au Requérant d'organiser sa défense».[40]

En définitive, l'article 7 de la Charte contient «un florilège de droits particuliers qui se déclinent tout au long du procès et dont il serait vain de vouloir épuiser la liste».[41] L'on convient donc du «faible degré

31 *Thobias Mang'ara Mango et Shukurani Masegenya Mango c. Tanzanie* 005/2015 arrêt 11 mai 2018 para 6.
32 *Mango* (n 31) paras 7-10.
33 *Mango* (n 31) para 11(iii).
34 *Mango* (n 31) para 76.
35 *Mango* (n 31) para 79.
36 *Commission africaine des droits de l'homme et des peuples c. Libye* 002/2013 arrêt 3 juin 2016 para 89.
37 Salmon (n 8) 874.
38 Pradel (n 17) 214.
39 *Sébastien Germain Ajavon c. Bénin* 013/2017 arrêt 29 mars 2019 para 152.
40 *Ajavon* (n 39) para 154.
41 Ngono (n 27) 186.

d'élaboration»[42] de l'article 7 de la Charte. Aussi, le juge contrôle le respect du droit de se faire défendre.

2.1.2 Le contrôle du respect du droit de se faire défendre

Assurer sa propre défense n'est pas aisé pour une victime, tant le procès est

> fondamentalement un combat. Ceux qui le pratique utilisent pour vaincre les armes pacifiques mais percutantes de la preuve, de l'argumentation et de l'éloquence dans une confrontation qui trouve son paroxysme dans les plaidoiries.[43]

Le droit de se faire défendre peut être appréhendé comme la prérogative reconnue à une personne accusée ou poursuivie de voir sa défense être assurée par un professionnel, «les notables de la robe».[44] C'est un droit fondamental que les juridictions nationales sont tenues de respecter. Cette assertion peut être confortée par la jurisprudence de la Cour. Dans l'affaire *Sébastien Germain Ajavon c. Bénin*, elle considère que toute limite à son exercice doit répondre à une exigence de nécessité.[45]

La Cour considère que le droit de se faire assister par un défenseur de son choix est un droit d'exercice obligatoire ce, que l'accusé soit absent à l'instance et *a fortiori* en considération des charges retenues contre lui.

L'absence à l'instance d'une personne poursuivie ne saurait la priver de son droit de se faire assister par un défenseur. Cette assertion, au-delà du problème de la vérité qu'elle résout,[46] justifie le fait que c'est un droit naturel et trouve son fondement dans le droit canonique. Les Ecritures Saintes rapportent que même «Dieu ne condamne pas sans entendre».[47] A l'image du «juge divin», le respect du droit d'être entendu par le «juge humain»[48] est un moyen par lequel ce dernier «s'efforce d'accéder au mystère de la divinité».[49] Cet exercice du juge régional des droits de l'homme est perceptible dans l'affaire *Sébastien Germain Ajavon c. Bénin* précitée. Dans cette affaire, le requérant allègue la violation notamment du droit de se faire assister par un conseil garanti par l'article 7(1)(c) de la Charte.[50] En effet, il soutient que

> en matière correctionnelle, le prévenu peut demander à être jugé en son absence en étant représenté par son avocat ou par un avocat commis d'office. (…) tant en matière correctionnelle qu'en matière criminelle (…) le tribunal et les Cours d'assises sont tenus d'entendre l'avocat qui se présente pour assurer la défense du

42 Ngono (n 27) 186.
43 Zenati (n 11) 241.
44 Salas (n 17) 32.
45 *Ajavon* (n 39) para 171.
46 E Jouannet 'Remarques conclusives' in HR Ruiz-Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (n 15) 180.
47 Livre de Genèse, cité par G Flécheux 'Le droit d'être entendu' (n 31) 150.
48 S Cotta 'Quidquid latet apparebit: Le problème de la vérité du jugement' (1995) 39 *Archives de philosophie du droit* 1995 221.
49 Cotta (n 48) 220.
50 *Ajavon* (n 39) para 9(iv).

> prévenu (…); qu'en l'espèce (…) il a présenté ses excuses et a fait valoir qu'il n'entendait pas comparaître.[51]

Pourtant, en dépit de sa notification, les juridictions ont refusé la constitution de ses avocats au motif que l'accusé devait au préalable être inculpé.[52] Par contre, l'Etat défendeur quant à lui soutient que devant la Cour de répression des infractions économiques et du terrorisme (CRIET), le requérant en décidant de ne pas comparaître, ne remplissait pas les conditions pour se faire représenter par un conseil en son absence.[53] Pour trancher cette question de la représentation d'un accusé par un conseil, la Cour pose un principe, en ces termes:

> le droit d'être représenté par un avocat dont la finalité est d'assurer le caractère contradictoire revêt un caractère pratique et effectif de sorte que son exercice laisse la latitude au prévenu de comparaître personnellement ou de se faire représenter. Toute limite à l'exercice de ce droit doit répondre à une exigence de nécessité.[54]

Par conséquent, elle estime que «le défaut de comparution d'un accusé dûment convoqué ne saurait le priver de son droit d'être représenté par un avocat».[55] Il en ressort que le droit de se faire défendre est un droit inhérent à un accusé.

De ce qui précède, l'on convient avec la doctrine que

> L'article 7, bien qu'étant d'importance cardinale, est si riche qu'il cache, dans les replis de ses phrases, des questions épineuses. D'où les raisons d'espérer qu'une excellente interprétation du texte sera faite par la Cour africaine des droits de l'homme et des peuples.[56]

2.2 L'interprétation prétorienne extensive de l'article 7(1)(c) de la Charte

La Cour peut être considérée comme l' «interprète authentique-autorité»[57] de la Charte et des autres instruments des droits de l'homme ratifiés par les Etats. Dans l'exercice de son office, le juge procède à une interprétation extensive du droit à la défense et de celui de se faire défendre.

2.2.1 L'interprétation extensive du droit à la défense

Le droit à la défense, tel qu'il ressort de l'article 7(1)(c) de la Charte ne met pas en exergue toutes ses potentialités. Ce constat n'est pas surprenant d'autant plus que l'on reconnait le caractère général des conventions qui ne peuvent pas mentionner, de façon expresse, tous les cas particuliers.[58] D'où l'intérêt pour le juge de procéder à l'interprétation de la norme considérée. En effet, loin d'être une simple

51 *Ajavon* (n 39) para 164.
52 *Ajavon* (n 39) para 165.
53 *Ajavon* (n 39) para 167.
54 *Ajavon* (n 39) para 171.
55 *Ajavon* (n 39) para 173.
56 Ngono (n 27) 179.
57 D Alland 'L'interprétation du droit international public' (2013) 362 *Recueil des cours de l'académie de droit international* 238.

«opération mécanique ou purement logique d'application de la loi»,[59] l'application d'une règle impose le passage du général au particulier.[60] Cette assertion va être éprouvée par un examen empirique de la jurisprudence de la Cour.

Dans l'affaire *Thobias Mang'ara Mango et Shukurani Masegenya Mango c. Tanzanie*, dont les faits sont déjà relevés *supra,* les requérants soutiennent notamment que les juridictions tanzaniennes ont poursuivi leur procès en dépit du fait qu'ils n'eussent reçu communication de certaines dépositions et même celles qui ont été communiquées, «leur ont été remises avec un retard excessif».[61] Le droit de se défendre ne se réduit pas à la possibilité accordée à l'accusé d'assurer sa défense. Son exercice effectif est subordonné à la communication prompte des documents nécessaire à sa préparation. Dans cette perspective et en réponse à l'allégation des requérants, la Cour considère que

> le refus opposé aux requérants d'accéder à certaines déclarations du témoin à charge et le retard dans la communication de celles-ci constituent une violation de l'article 7(1)(c) de la Charte par l'Etat défendeur.[62]

Il ne suffit donc pas pour les juridictions nationales de communiquer à l'accusé les documents nécessaires à la préparation de sa défense, mais elles doivent le faire avec diligence. Le retard dans la communication des pièces à la partie poursuivie pourrait être considéré comme une manœuvre dilatoire en faveur de la partie poursuivante. Cette position de la Cour avait déjà été affirmée dans un autre arrêt, l'affaire opposant *Mohamed Abubakari c. Tanzanie.*[63]

Dans cette affaire, le conseil du requérant allègue, au cours de l'audience publique, avoir plus d'une fois requis la production, devant les juridictions nationales, de la copie des actes d'accusation et des déclarations de témoins, pour être en mesure de se défendre, mais sans succès. Il a indiqué au surplus avoir dû attendre 50 jours pour recevoir la déclaration d'un seul témoin. Cinq mois plus tard, le Procureur avait admis n'avoir pu apporter les déclarations d'autres témoins faute du matériel de bureau.[64] La Cour rappelle qu'aux termes de l'article 7(1) toute personne a le droit de se défendre. L'exercice effectif de ce droit implique notamment une communication diligente des pièces. Cette exigence n'est pas mise en évidence par la lettre de l'article 7. L'on peut convenir avec la doctrine du «faible degré d'élaboration de l'article 7 de la Charte»,[65] considéré comme la norme en matière de contradictoire. Or, «juger n'est nullement l'application mécanique de normes juridiques»[66] et «toutes normes juridiques appellent une

58 E De Vattel *Le droit des gens, ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1863) para 262.

59 F Gény *Méthode d'interprétation et sources en droit positif. Essai critique* cité par D Alland (n 57) 225.

60 Alland (n 57) 269.

61 *Thobias* (n 31) para 11(v).

62 *Thobias* (n 31) para 79.

63 *Mohamed Abubakari c. Tanzanie* 007/2013 arrêt 4 mai 2016.

64 *Abubakari* (n 63) para 155.

65 Ngono (n 27) 186.

interprétation en tant qu'elles doivent être appliquées».[67] L'article 7(1)(c) n'échappe pas à cette conception kelsenienne d'application des normes. Toutefois, l'interprétation littérale de cette disposition ne permet pas d'apprécier effectivement la violation du droit de se défendre alléguée dans l'affaire sous examen. Pour se faire, la Cour, qui a compétence en vertu de l'article 3(1) de son Protocole pour interpréter les dispositions de la Charte, recourt à la technique de la «combinaison des sources» ou le «cosmopolitisme normatif»[68] pour interpréter l'article 7(1)(c). Partant, elle se réfère au Pacte international relatif aux droits civils et politiques (PIDCP) en considérant que, conformément à l'article 14(3) du Pacte, toute personne accusée d'une infraction pénale a droit notamment à «être informée, dans le plus court délai (...) et de façon détaillée de la nature et des motifs d'accusation portée contre elle (...)». Il est utile de rappeler qu'en vertu de l'article 7 du Protocole de la Charte, le PIDCP rentre dans le cadre du droit applicable par la Cour. Aussi, pour conforter sa décision, elle se réfère à la jurisprudence de la Cour européenne des droits de l'homme (Cour européenne) et de la Cour interaméricaine des droits de l'homme (Cour interaméricaine) pour soutenir que

> le droit pour l'accusé d'être complètement informé des charges portées à son encontre est un corollaire de son droit à la défense, et au-delà, un élément essentiel de son droit à un procès équitable.[69]

Il n'est pas inutile de noter qu'un tel recours à la jurisprudence de la Cour européenne et de la Cour interaméricaine participe de la «complémentarité des systèmes juridictionnels de protection des droits de l'homme».[70]

En définitive, et sur la question en discussion relativement à l'affaire *Abubakari*, la Cour africaine conclut que

> les autorités judiciaires n'ayant pas agi avec la diligence due pour communiquer en temps voulu au requérant toutes les pièces de l'accusation, l'Etat défendeur a violé son droit à la défense, tel que garanti par les articles 7(1)(c) de la Charte et 14(3) a et b du Pacte.[71]

Tout autant que le droit de se défendre, le droit de se faire défendre fait l'objet d'une interprétation extensive.

2.2.2 L'interprétation extensive du droit de se faire défendre

L'on ne peut appliquer une règle sans l'interpréter au préalable, *a fortiori* lorsqu'elle est formulée de façon laconique. Il en est ainsi du droit de se faire défendre. La Cour ne peut donc pas, en raison des

66 G Thuillier 'Probabilisme et art de juger' (2001) 2 *Droits Revue française de théorie de philosophie et de cultures juridiques* 40.

67 H Kelsen *Théorie pure du droit* (1990) 134.

68 Sudre (n 6) 254.

69 *Abubakari* (n 63) para 158.

70 E Decaux 'Concurrence et complémentarité des systèmes de protection des droits de l'homme' (2001) 4 *Cours euroméditerranéens Bancaja de droit international* 723-769.

71 *Abubakari* (n 63) para 161.

spécificités qui caractérisent chaque affaire, appliquer ce droit dans sa lettre, car «la fonction de juger implique nécessairement celle d'interpréter». Ainsi, dans son œuvre interprétative, elle procède à l'éclaircissement des zones ombrageuses du droit de se faire défendre. Cette opération est perceptible dans différents arrêts, dont la casuistique permet de relever deux considérations: le droit de se faire défendre consiste en une assistance obligatoire et sans frais et il doit être exercé à toutes les étapes de la procédure.

Premièrement, le droit de se faire assister par un défenseur de son choix implique une assistance juridique obligatoire et sans frais. Le caractère obligatoire de cette assistance se justifie en que ce droit est inhérent à toute personne poursuivie ou accusée, qu'elle en fasse la demande ou pas, *a fortiori* lorsqu'elle est indigente. Le caractère gracieux quant à lui se justifie par le fait qu'il s'agit d'un droit dont la jouissance ne peut être réservée à une certaine couche de la société. L'on peut, à titre illustratif, se référer à l'affaire *Magid Goa alias Vedastus c. Tanzanie.*[72]

Dans cette affaire le requérant, qui assure personnellement sa défense, soutient que l'Etat défendeur a violé les dispositions de l'article 7(1)(c) de la Charte pour ne lui avoir pas fourni une assistance judiciaire pendant son procès, aussi bien en première instance qu'en appel.[73] En examinant cette allégation, la Cour affirme:

> l'article 7(1)(c) de la Charte ne prévoit pas explicitement le droit à une assistance judiciaire gratuite. Toutefois, la Cour de céans a interprété ces dispositions à la lumière de l'article 14(3)(d) du PIDCP et conclut que le droit à la défense comprend celui de bénéficier d'une assistance judiciaire gratuite. (…) toute personne accusée d'une infraction pénale a droit à une assistance judiciaire gratuite sans être obligé d'en faire la demande.[74]

L'examen de cette décision permet de constater que la Cour ne se contente pas de la lettre de l'article 7(1)(c) de la Charte. Il tient compte de sa prérogative de recourir à d'autres sources du droit, à l'instar du PIDCP. Partant de cette technique de la combinaison des sources, elle procède à une interprétation *pro homine* du droit de se faire défendre. Elle reste constante dans cette démarche, car celle-ci était déjà perceptible dans un arrêt antérieur, en l'affaire *Wilfred Onyango Ngani et 9 autres c. Tanzanie.*[75]

De même dans l'arrêt déjà examiné, en l'affaire *Mohamed Abubakari c. Tanzanie,* la Cour observe que l'article 7 de la Charte ne traite pas de façon spécifique de la question de l'octroi d'une assistance juridique gratuite. Par contre,

> l'article 7 de la Charte, lu conjointement avec l'article 14 du PIDCP, garantit le droit de toute personne accusée d'une infraction pénale, chaque fois que l'intérêt de la justice l'exige, de se voir attribué d'office un défenseur, sans frais, si elle n'a pas les moyens de le rémunérer.[76]

72 *Magid Goa alias Vedastus c. Tanzanie* 006/2015 (fond et réparations) 26 septembre 2019.

73 *Vedastus* (n 72) para 66.

74 *Vedastus* (n 72) para 70.

75 *Wilfred Onyango Ngani et 9 autres c. Tanzanie* 006/2013 arrêt 10 mars 2016 para 167.

Cette technique d'interprétation extensive du droit de se faire défendre est reprise dans les arrêts du 26 juin 2020, en l'affaire *Andrew Ambrose Cheusi c. Tanzanie*[77] et en l'affaire *Kalebi Elisamehe c. Tanzanie*.[78]

Deuxièmement, le droit de se faire assister par un défenseur doit être exercé à toutes les phases de la procédure judiciaire. Cette affirmation découle de l'interprétation extensive de la Cour notamment dans l'affaire Sébastien Germain *Ajavon c. Bénin*. Dans sa requête introductive d'instance, le requérant allègue devant la Cour la violation par les juridictions nationales de son droit à la défense, précisément celui de se faire représenter par un conseil.[79] Dans son examen au fond, la Cour détermine la portée du droit à la défense en affirmant que

> (...) le domaine de l'article 7(1)(c) s'applique à toutes les étapes de la procédure d'une affaire depuis les enquêtes préliminaires jusqu'au prononcé du jugement et ne se limite pas uniquement au déroulement des audiences.[80]

En définitive, la Cour, par son œuvre jurisprudentielle, clarifie et conforte l'acception des dispositions de l'article 7(1)(c) de la Charte. Partant, l'on partage l'assertion selon laquelle, «la spécificité de la protection internationale des droits de l'homme induit une conception extensive de l'office du juge des droits de l'homme».[81] Néanmoins, le juge doit non seulement faire respecter le contradictoire, mais aussi le respecter lui-même.

3 LE CONTRADICTOIRE: UNE MODALITE D'ORGANISATION REGIONALE DU PROCES

Devant la Cour, les requêtes sont examinées de façon contradictoire, ainsi qu'il ressort de l'article 26 de son Protocole. Le contradictoire est par conséquent une modalité d'organisation africaine du procès. Il est mis en œuvre dans les deux phases de la procédure, à savoir la phase écrite et la phase orale.

3.1 La mise en œuvre du contradictoire dans la procédure écrite

La mise en œuvre du contradictoire dans la procédure écrite est perceptible dans l'examen de la jurisprudence de la Cour. Cet examen permet de relever que le contradictoire s'y manifeste par un échange obligatoire des écritures dont le respect conduit à une prorogation nécessaire des délais.

76 *Abubakari* (n 63) para 138.
77 *Andrew Ambrose Cheusi c. Tanzanie* 004/2015 arrêt 26 juin 2020 para 105.
78 *Kalebi Elisamehe c. Tanzanie* 028/2015 arrêt 26 juin 2020 para 55.
79 *Ajavon* (n 39) para 142.
80 *Ajavon* (n 39) para 149.
81 Sudre (n 6) 254.

3.1.1 Un échange obligatoire des écritures

Dans la phase écrite, le contradictoire se manifeste par des «échanges écrits»,[82] c'est-à-dire, par le «fait de s'exprimer tour à tour (…) par écrit».[83] L'on peut donc considérer qu'il a pour point de départ la notification par l'Etat défendeur à la Cour de sa réponse à la requête introductive d'instance.

Toutefois, l'on ne devrait pas se limiter au constat formel d'un échange des écritures. Faudrait-il encore, pour apprécier le caractère contradictoire de la procédure écrite, opérer un constat substantiel. En d'autres termes, il faut procéder à l'identification du contenu desdites écritures. La Cour se soumet à cet exercice dans plusieurs arrêts. L'arrêt du 26 juin 2020, en l'affaire *Fidèle Mulindahabi c. Rwanda* et l'arrêt du 3 juin 2016, en l'affaire *Commission africaine des droits de l'homme et des peuples c. Libye* sont assez illustratifs à cet égard.

Dans la première affaire, la procédure écrite peut être retracée ainsi: la Cour est saisie, en date du 24 février 2017, d'une requête déposée par Fidèle Mulindahabi. Cette requête est notifiée à la partie adverse le 31 mars 2017.[84] Le 9 mai 2017, le greffe reçoit une lettre de l'Etat contre lequel la requête est introduite dans laquelle il rappelle à la Cour le retrait de sa déclaration faite en vertu de l'article 34(6) du Protocole et l'informe qu'il ne participerait à aucune procédure. Il demande à la Cour par voie de conséquence de s'abstenir de lui communiquer toute information relative aux affaires le concernant.[85] Le 22 juin 2017, la Cour accuse réception de la correspondance du Rwanda et l'informe qu'elle lui communiquerait toutes les pièces de procédure.[86] Après plusieurs prorogations de délai[87] en vue de permettre au Rwanda de répondre aux différents actes de procédure et constatant que le Rwanda ne répond pas à la requête, la Cour clôt la procédure. L'examen de la procédure de cet arrêt est riche d'enseignements. Dans le cadre limité de la question de l'identification du contenu des écritures, l'on observe qu'il y a formellement une «communication» entre la Cour et le Rwanda. Toutefois, cet échange écrit ne suffit pas, car la contradiction «est une véritable réponse qui prend position sur les éléments fournis dans le mémoire en demande».[88] En l'espèce, le contenu des écritures du Rwanda révèle le refus de sa participation à une procédure devant la Cour.

Dans la seconde affaire, *Commission africaine des droits de l'homme et des peuples c. Libye,* l'on peut retenir ce qui suit: le 31 janvier 2013, le greffe reçoit une requête introductive d'instance dirigée contre la Libye.[89] Par lettre du 12 mars 2013 adressée au

82 Santulli (n 13) 435.
83 Salmon (n 8) 407.
84 *Fidèle Mulindahabi c. Rwanda* 004/2017 arrêt 26 juin 2020 para 10.
85 *Mulindahabi* (n 84) para 11.
86 *Mulindahabi* (n 84) para 12.
87 *Mulindahabi* (n 84) paras 13-16.
88 Santulli (n 13) 435.
89 *Commission africaine des droits de l'homme et des peuples* (n 36) para 12.

Ministère des affaires étrangères de la Libye avec copie à son ambassade à Addis-Abeba, le greffe communique au défendeur la requête et l'invite à y répondre dans un délai de 60 jours.[90] En application des articles 27(2) du Protocole et 51(1) du Règlement intérieur, la Cour rend une ordonnance portant mesures provisoires *suo motu*.[91] Celle-ci est communiquée aux parties[92] et le défendeur devait déposer son rapport de mise en œuvre desdites mesures. Le 29 mai 2013, le défendeur adresse au Conseiller juridique de la Commission de l'Union africaine une note verbale.[93] Après une transmission de ladite note à la partie requérante afin qu'elle fasse ses observations, la procédure a suivi son cours. Quelque mois plus tard, par note verbale du 16 mai 2014, l'Etat défendeur déclare soumettre à la Cour un rapport sur la mise en œuvre de l'Ordonnance du 15 mars 2013.[94] Toutefois, lors de sa 33e session ordinaire tenue du 26 mai au 13 juin 2014, la Cour examine ladite *«note verbale»* et conclut qu'elle ne constitue pas le rapport demandée.[95] Aussi, le greffe confirme que l'Etat défendeur n'a répondu ni à la requête sur le fond, ni à celle interlocutoire.[96] En bref, l'on retient de cette procédure que l'échange de documents intervenu entre les deux parties n'est pas la manifestation du contradictoire, dans la mesure où le document transmis par la Libye, n'est nullement une réponse aux actes de procédure. La volonté de la Cour de respecter le contradictoire conduit inévitablement à une prorogation des délais de la procédure.

3.1.2 Une prorogation nécessaire des délais

L'article 37 du Règlement intérieur de la Cour détermine le délai dont dispose un Etat pour répondre à la requête. Il dispose: «L'Etat défendeur répond à la requête dont il fait l'objet dans un délai de soixante (60) jours qui pourrait être prorogé par la Cour, s'il y a lieu». Ce délai, qui est dorénavant de 90 jours, conformément à la règle 44 du Règlement du 25 septembre 2020, est accordé à l'Etat défendeur pour apporter sa réponse à une requête, c'est-à-dire, à «un acte de procédure par lequel une personne introduit une instance devant un organe quasi-judiciaire»[97] ou judiciaire. Le nombre de prorogation dont peut bénéficier une partie n'est donc pas déterminé, tant «la décision de prorogation relève de l'appréciation discrétionnaire de la Cour».[98] Cette disposition des instructions de procédure est effectivement observée par la Cour dans sa jurisprudence. L'examen de cette dernière révèle, qu'en vue de respecter le contradictoire dans la procédure écrite, le juge procède au tant de fois à une prorogation des délais. Cette

90 *Commission africaine des droits de l'homme et des peuples* (n 36) para 13.
91 *Commission africaine des droits de l'homme et des peuples* (n 36) para 15.
92 *Commission africaine des droits de l'homme et des peuples* (n 36) para 16.
93 *Commission africaine des droits de l'homme et des peuples* (n 36) para 19.
94 *Commission africaine des droits de l'homme et des peuples* (n 36) para 27.
95 *Commission africaine des droits de l'homme et des peuples* (n 36) para 28.
96 *Commission africaine des droits de l'homme et des peuples* (n 36) para 32.
97 Salmon (n 8) 986.
98 Point 40 des Instructions de procédure de la Cour adoptée le 5 octobre 2012.

prorogation influe doublement sur la procédure: elle prolonge sa durée et conduit même le juge à la rouvrir lorsqu'elle était déjà close.

Premièrement, la prorogation des délais de la procédure est perceptible notamment dans l'affaire *Lucien Ikili Rashidi c. Tanzanie* du 28 mars 2019. Dans cette affaire, la requête introductive d'instance est déposée le 19 février 2015[99] et transmise à la Tanzanie le 9 juin 2015.[100] Cette dernière dépose sa réponse à la requête le 9 septembre 2015 et copie est transmise au requérant.[101] Toutefois, l'on constate que la réponse de l'Etat défendeur à la requête introductive d'instance est déposée, au-delà du délai règlementaire, sans prorogation de la Cour, 90 jours après. Partant de cette constatation, le requérant sollicite de la Cour un arrêt par défaut au motif que la réponse de l'Etat défendeur est déposée au-delà des soixante jours. Cette réponse de l'Etat défendeur appelle éventuellement une réplique, c'est-à-dire, «une réponse à la réponse».[102] Cependant, en raison de certaines difficultés de communication entre le requérant et son Conseil, la Cour proroge plusieurs fois le délai de dépôt de la réplique du requérant. Elle est finalement déposée huit mois plus tard, le 28 juillet 2016 et copie est transmise à l'Etat défendeur pour répondre aux arguments supplémentaires du requérant.[103] Le 9 août 2016, la Cour rappelle l'Etat défendeur sur le dépôt de sa réponse aux arguments supplémentaires du requérant. Après plusieurs prorogations de délai, l'Etat défendeur dépose sa duplique le 27 avril 2017, soit neuf mois après. Cette duplique est transmise au requérant qui doit y répondre dans un délai discrétionnairement fixé à 15 jours. Le requérant verse au dossier plusieurs documents additionnels à l'appui de sa requête et ceux-ci sont communiqués à l'Etat défendeur.[104] La procédure est close le 15 novembre 2017. Au terme de cette longue procédure, l'on retient que les échanges d'écritures, manifestation du contradictoire, peuvent durer aussi longtemps que de nouveaux éléments sont versés au dossier. Cette longueur de la procédure écrite pose le problème de la « nécessité de traiter un contentieux de masse dans des délais qui demeureraient raisonnable et en préservant la qualité de la jurisprudence ».[105]

Le respect du contradictoire a donc pour effet de prolonger la durée de la procédure, en l'espèce trois ans. L'on peut aussi mentionner l'affaire *Actions pour la Protection des Droits de l'Homme (APDH) c. Côte d'Ivoire,* dans laquelle l'Etat défendeur dépose son contre-mémoire au-delà des délais impartis et la Cour «a, dans l'intérêt de la justice décidé de l'accepter, bien que déposé hors délai».[106] L'intérêt de la justice dont il est question n'est que le respect du contradictoire.

99 *Lucien Ikili Rashidi c. Tanzanie* 009/2015 (fond et réparations) 28 mars 2019 para 13.

100 *Rashidi* (n 99) para 14.

101 *Rashidi* (n 99) para 15.

102 Salmon (n 8) 977.

103 *Rashidi* (n 99) para 18.

104 *Rashidi* (n 99) para 19.

105 M-L Layus et F Simonetti 'Procédure juridictionnelle: points communs et différences' (2001) 96 *Pouvoirs* 85.

Néanmoins, l'on ne doit pas perdre de vue que le respect par la Cour du contradictoire ne devrait pas conduire les parties à outrepasser les délais impartis car, de la même manière qu'elle recourt à son pouvoir discrétionnaire pour proroger les délais, la Cour peut aussi discrétionnairement décider de ne pas recevoir une écriture soumise hors délai. Il en est ainsi, à titre illustratif, dans son arrêt rendu le 28 mars 2019, en l'affaire *Collectif des anciens travailleurs du laboratoire ALS c. Mali*.[107] Ce refus ne constitue pas pour autant l'inobservation du contradictoire.

Deuxièmement, l'assertion selon laquelle la volonté manifeste de la Cour de respecter le contradictoire conduit à la réouverture d'une procédure écrite déjà close peut être étayée par l'affaire *Ngunza Viking (Babu Seya) et Johnson Nguza (Papi Kocha) c. Tanzanie* du 8 mai 2020. Dans cette affaire, la Cour doit se prononcer sur les réparations. Le 27 novembre 2018, le greffe transmet aux parties une copie certifiée conforme de l'arrêt sur le fond.[108] Le 23 août 2018, les requérants déposent leurs conclusions sur les réparations et sont transmises à l'Etat défendeur le 24 août 2018. Le 18 mars 2020, l'Etat défendeur dépose son mémoire en réponse aux conclusions des requérants sur les réparations.[109] La procédure écrite étant close le 16 décembre 2019, elle est à nouveau ouverte le 10 février 2020 à la demande de l'Etat défendeur, datée du 9 janvier 2020, aux fins de prorogation de délai pour déposer ses observations sur les réparations. L'Etat défendeur a déposé son mémoire en réponse le 18 mars 2020.[110] L'on observe qu'une fois close, la procédure écrite peut toujours être rouverte à la demande d'une partie et après une autorisation de la Cour.

Le contradictoire n'est pas seulement observée dans la procédure écrite. Elle l'est aussi dans la phase orale.

3.2 La mise en œuvre du contradictoire dans la phase orale

Dans la phase orale, la mise en œuvre du contradictoire requiert la présence des parties à l'instance. Ce n'est que lorsqu'elles sont représentées, que la Cour peut effectivement mettre en œuvre le contradictoire.

106 *Actions pour la Protection des Droits de l'Homme c. Côte d'Ivoire* 001/2014 arrêt 18 novembre 2016 para 26.

107 *Collectif des anciens travailleurs du laboratoire ALS c.* Mali 042/2016 (compétence et recevabilité) 28 mars 2019 para 10.

108 *Ngunza Viking (Babu Seya) et Johnson Nguza (Papi Kocha) c. Tanzanie* 006/2015 (réparations) 08 mai 2020 para 5.

109 *Ngunza* (n 107) para 6.

110 *Ngunza* (n 107) para 8.

3.2.1 Une mise en œuvre subordonnée à la présence des parties à l'instance

Le contradictoire ne peut être mis en œuvre que si les deux parties sont représentées. Cette assertion est d'autant plus soutenable que «(…) le procès est essentiellement un duel entre les parties, le contradictoire y devient ainsi d'autant plus central qu'il est l'image même du procès et sa transcription directe».[111] Bien qu'en vertu de l'article 26 du Protocole, la Cour soit tenue de procéder à un examen contradictoire des requêtes, cette obligation n'est pas absolue. Son Règlement intérieur relativise cet «examen contradictoire» en envisageant l'hypothèse de la non-comparution d'une partie. Partant, la Cour devrait, à la demande de la partie comparante, tirer les conséquences juridiques de cette non-comparution en rendant un jugement par défaut, tel qu'il ressort de l'article 55 du même Règlement. L'on peut inférer de ce qui précède que la non-comparution n'entraîne pas systématiquement la suspension de la procédure. Toutefois, ce droit matériel de la juridiction régionale des droits l'homme et des peuples peut être éprouvé par l'examen empirique de sa jurisprudence. Une revue des arrêts de la Cour permet de constater que dans son examen des affaires dans lesquelles une seule partie a comparu, elle n'est pas restée constante. Tantôt, elle a procédé à la suspension de la procédure, tantôt elle a rendu, à la demande de la partie comparante, un jugement par défaut.

D'une part, la non-comparution d'une partie à l'instance a conduit la Cour à suspendre la procédure. Ce constat découle de l'examen de l'affaire opposant Ingabire Victoire Umuhoza, citoyenne rwandaise au Rwanda. Dans cette affaire, la requérante allègue devant la Cour, la violation de certains droits consacrés par la DUDH, le PIDCP et la Charte tout au long de son procès devant les juridictions nationales.[112] Devant la Cour, les deux parties ont participé aux actes de la procédure écrite. Par lettre du 4 janvier 2016, le greffe informe les parties de la tenue d'une audience publique le 4 mars 2016.[113] Trois jours avant la tenue de l'audience, l'Etat défendeur notifie à la Cour le dépôt de l'instrument de retrait de sa déclaration faite en vertu de l'article 34(6) du Protocole. Dans cette lettre, il précise ce qui suit:

> La République du Rwanda demandait qu'après le dépôt dudit instrument de retrait, la Cour suspende toutes les affaires concernant le Rwanda jusqu'à ce qu'une révision de la déclaration soit faite et notifiée à la Cour en temps opportun.[114]

Après plusieurs demandes, dont le report de la date de l'audience sollicité par les conseils de la requérante, le greffe informe les parties que l'audience publique aurait lieu, comme prévu.[115] Il parait utile de

111 Jouannet (n 15) 184.

112 Ces allégations n'étant pas mentionnées dans l'ordonnance rendue le 18 mars 2016, nous avons dû recourir par projection à la décision suivante: *Ingabire Victoire Umuhoza c. Rwanda* 003/2014 arrêt 24 novembre 2017 para 9.

113 *Ingabire Victoire Umuhoza c. Rwanda* 003/2014 (ordonnance) 18 mars 2016 para 6.

114 *Umuhoza* (n 112) para 10.

115 *Umuhoza* (n 112) para 11.

préciser que l'Etat défendeur n'a soulevé aucune exception d'incompétence de la Cour et que l'audience du 4 mars porterait sur l'examen de l'affaire au fond. Lors de cette audience, l'Etat défendeur ne comparaît pas.[116] Néanmoins, la Cour entend les représentants de la requérante sur les questions de procédure.[117] Ceux-ci ont voulu, sans succès, présenter leurs arguments sur la question du retrait par l'Etat défendeur de sa déclaration faite en vertu de l'article 34(6) du Protocole.[118] Cette audience publique est restée sans suite, car la Cour rend, deux semaines après, une ordonnance dans laquelle elle suspend *de facto* la procédure.

Cette suspension implicite de la procédure est perceptible dans l'analyse de ladite ordonnance. Le juge Fatsah Ouguergouz relève dans son opinion dissidente y jointe que

> l'Etat défendeur (…) sans qu'il ait eu à comparaître à l'audience et à plaider quoi que ce soit, a obtenu de la Cour une suspension de l'examen de la recevabilité de la requête et du fond de l'affaire. La Cour (…) décide donc de différer sa décision (…) semblant ainsi vouloir sauvegarder le principe du contradictoire en faveur de l'Etat défendeur (…).[119]

Si l'on peut considérer que la suspension de l'examen de cette affaire par la Cour serait justifiée par le souci de «ménager le principe du contradictoire»,[120] cette thèse est relative dans la mesure où ladite affaire n'a pas fait jurisprudence.

D'autre part, le jugement étant la dernière étape du procès, le défaut peut être dû à deux raisons. La doctrine distingue le «défaut faute de comparaître» du «défaut faute de conclure».[121] Dans la première hypothèse, la partie au différend fait le choix de ne pas être présent à l'instance. Dans la seconde hypothèse, la partie, bien que comparante, fait le choix de ne pas faire valoir ses moyens. La Cour n'a pas encore expérimenté cette dernière hypothèse. Dans les deux situations, le jugement par défaut ne peut être rendu qu'à la réunion de trois conditions cumulatives. Conformément à l'article 55(2) du Règlement de la Cour, il s'agit de la vérification de sa compétence, de la recevabilité de la requête et du caractère fondé en fait et en droit des conclusions de la partie comparante. Aux nombres des jugements par défaut rendus par la Cour, l'on peut mentionner notamment les affaires *Fidèle Mulindahabi c. Rwanda,* du 26 juin 2020, *Rutabingwa Chrysanthe c. Rwanda,* arrêt du 4 juillet 2019, révision de l'arrêt du 11 mai 2018 et l'affaire *Commission africaine c. Libye*, rendue le 3 juin 2016.

La particularité du jugement par défaut, faute de comparaître, réside dans la présence d'une seule partie à l'instance. Partant, le contradictoire ne peut y être mis en œuvre dans la mesure où la

116 *Umuhoza* (n 112) para 14.

117 *Umuhoza* (n 112) para 15.

118 *Umuhoza* (n 112) para 16.

119 *Umuhoza* (Opinion dissidente du Juge Fatsah Ouguergouz) para 32.

120 H Werner 'L'accès de l'individu à la Cour africaine des droits de l'homme et des peuples' (2016) 2 *Revista Juridica* 845.

121 Salmon (n 8) 744.

contradiction suppose la présence de deux parties à l'instance. Dans toutes ces affaires, le jugement est l'aboutissement d'un échange entre la partie requérante et la Cour.

Le contradictoire étant considéré comme le «(…) symbole du droit d'être pris en considération (…)»,[122] cette prise en considération ne peut être effective que lorsque les parties sont représentées à l'instance.

3.2.2 Une mise en œuvre effective entre les parties à l'instance

Le contradictoire se manifeste par la prise de parole des parties pour faire valoir leurs prétentions. Il est perçu comme la faculté accordée à une partie de faire valoir ses arguments. Le choix du vocable «faculté» est justifié en ce que le contradictoire ne garantit pas une contradiction effective. L'on peut considérer qu'il s'agit d'un droit substantiel d'exercice facultatif. En ce sens, la doctrine relève ce qui suit:

> Le principe du contradictoire ne garantit pas la contradiction effective. Si les parties disposent de la possibilité de discuter les arguments développés devant le juge, il importe peu qu'elles ne saisissent pas cette opportunité, l'essentiel étant qu'elles aient été «en mesure de le faire».[123]

Cette position de la doctrine peut être confortée par la jurisprudence de la Cour, notamment: l'arrêt du 26 juin 2020, en l'affaire *Andrew Ambrose Cheusi c. Tanzanie* et l'arrêt du 28 novembre 2019, en l'affaire *Ally Rajabu et autres c. Tanzanie.*

Dans la première affaire, opposant Andrew Ambrose Cheusi à la Tanzanie, le requérant allègue plusieurs violations de droits dont celles relatives à la possibilité de présenter et défendre un alibi, du droit à l'égalité devant la loi et à une égale protection de la loi et du droit de ne pas être soumis à des traitements cruels, inhumains ou dégradants. La Cour procède à un examen contradictoire de ces différentes allégations, en accordant aux parties, à tour de rôle, le droit de faire valoir leurs prétentions. S'agissant de la première allégation, le requérant

> affirme avoir informé le Tribunal de première instance de son intention de citer un témoin afin d'invoquer un alibi, ce qui lui a été refusé. Il affirme que, de ce fait, il a été privé de son droit à un procès équitable (…).[124]

L'Etat défendeur quant à lui n'a pas répondu à cette allégation.[125] S'agissant des allégations de la violation du droit à l'égalité devant la loi et à une égale protection de la loi, le requérant soutient qu'il a été:

> (…) isolé durant la procédure d'instruction et durant l'examen de l'affaire en appel, en violation du principe d'égalité devant la loi. Il soutient que de ce fait, les droits reconnus à l'article 3(1)(2) de la Charte ont été violés.[126]

122 M-A Frisson-Roche 'Le principe du contradictoire et les droits de la défense devant l'organe de règlement des différends de l'Organisation mondiale du commerce' in HR Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (n 15) 125.

123 L Sinopoli 'Le principe du contradictoire et la Cour européenne des droits de l'homme' in HR Ruiz Fabri et J-M Sorel (dirs) *Le principe du contradictoire devant les juridictions internationales* (n 15) 83.

124 *Cheusi* (n 77) para 95.

125 *Cheusi* (n 77) para 96.

L'Etat défendeur quant à lui n'a pas répondu à ces allégations.[127] Enfin, s'agissant de l'allégation de la violation du droit de ne pas être soumis à des traitements cruels, inhumains ou dégradants, le requérant affirme entre autre que

> L'Etat défendeur a violé son droit de ne pas être soumis à des traitements cruels, inhumains ou dégradants, car il a été battu par les agents de l'Etat défendeur lors de sa première arrestation. Il affirme également avoir subi des intimidations et des tortures au poste de police durant l'enquête (...).[128]

A son tour, l'Etat défendeur n'a pas répondu à cette allégation.[129]

Dans la deuxième affaire, *Ally Rajabu et autres c. Tanzanie,* le requérant allègue la violation des droits à la vie, à la dignité et la violation de l'article 1er de la Charte qui se rapporte à l'obligation des Etats membres de respecter et de mettre en œuvre les droits de l'homme et des peuples qui y sont consacrés. La particularité de cette affaire réside dans le fait que le silence de l'Etat défendeur face aux allégations des requérants est justifié par le fait qu'il avait déjà répondu à ces allégations dans le cadre d'une ordonnance de la Cour portant mesures provisoires. Par conséquent, la Cour, sans se contenter de relever que «l'Etat défendeur n'a pas répondu à cette allégation», rappelle les arguments pertinents de l'Etat défendeur soutenus dans un jugement antérieur (ordonnance) et en rapport avec l'allégation correspondante. A titre illustratif, relativement à la violation alléguée du droit à la vie, l'Etat défendeur n'a pas répondu aux arguments des requérants. Néanmoins, la Cour relève ce qui suit:

> Dans sa réponse à l'ordonnance portant mesures provisoires rendue dans le cadre de la Requête en l'espèce, l'Etat défendeur a fait valoir que la disposition relative à la peine capitale dans sa législation est conforme aux normes internationales, qui n'interdisent pas l'imposition de cette peine.[130]

La Cour recourt au même procédé relativement au silence de l'Etat défendeur sur les violations alléguées du droit à la dignité[131] et de l'article 1er de la Charte.[132]

4 CONCLUSION

L'examen de la jurisprudence de la Cour permet d'affirmer qu'elle applique le contradictoire dans ses deux versants.

D'une part, elle contrôle effectivement le respect par les juridictions nationales du droit à la défense et celui de se faire assister par un défenseur de son choix. Ce contrôle conventionnel ne la place pas au rang d'un organe d'appel des décisions des juridictions nationales, ainsi qu'elle l'affirme dans l'affaire *Ernest Francis Mtingwi c. Malawi.*[133] Le

126 *Cheusi* (n 77) para 125.
127 *Cheusi* (n 77) para 126.
128 *Cheusi* (n 77) para 131.
129 *Cheusi* (n 77) para 133.
130 *Ally Rajabu et autres c. Tanzanie* 007/2015 arrêt 28 novembre 2019 para 93.
131 *Ally Rajabu et autres* (n 129) para 116.
132 *Ally Rajabu et autres* (n 129) para 122.

rôle joué par la Cour correspond bien à celui commun aux juridictions internationales, qui n'est pas de

> juger la conventionalité des règles de droit interne mais de savoir si une mesure appliquée *in casu* au requérant est compatible ou non avec les droits que les conventions garantissent. Leurs contrôles s'inscrivent dans une dimension subjective et concrète.[134]

Toutefois, la Cour ne se contente pas de s'approprier de ce principe universel. Elle recourt aussi au contradictoire comme modalité d'organisation du procès ce, dans les deux phases de la procédure: écrite et orale. Considéré sous ses deux versants, le contradictoire est respecté par la Cour africaine des droits de l'homme et des peuples aussi bien en faveur du requérant que du défendeur.

133 *Ernest Francis Mtingwi c. Malawi* 001/2013 arrêt 15 mars 2013 para. 14.

134 M Afroukh 'L'objectivation du contrôle juridictionnel' in Joël Andriantsimbazovina et al (dirs) *La protection des droits de l'homme par les cours supranationales* (n 6) 109.

Evaluating the (in)sufficiency of Africa's response towards economic and psychological violence against women

*Ashwanee Budoo-Scholtz**
https://orcid.org/0000-0002-9004-014X

*Lucyline Nkatha Murungi***
https://orcid.org/0000-0001-8789-2811

ABSTRACT: Violence against women is a practice that persists in all societies across the globe. The range of actions and omissions that amount to violence has evolved over time, to recognise harmful practices that do not necessarily result in physical harm. Such actions or omissions include economic and psychological forms of violence. The evolving definition of violence is reflected in many global and regional human rights instruments. However, the approach to such recognition and measures proposed to address economic and psychological forms of violence vary considerably from one instrument to another. This article assesses the extent to which economic and psychological forms of violence are addressed in the norms and standards of the African Union. A systematic review of the applicable instruments and the jurisprudence of key human rights bodies reveals that the recognition of economic and psychological forms of violence rarely goes beyond the definition clause of the respective instruments. As a result, jurisprudential engagement on, and the framing of measures for response to these forms of violence is limited. The failure to adopt a consistent, robust and purposive approach to violence, which articulates measures necessary to address all the forms of violence, undercuts the protection available to women who suffer from economic and psychological forms of violence. This article makes the case that consistent recognition and specific articulation of economic and psychological forms of violence as distinct types of violence, as in the approach of the Istanbul Treaty, is necessary to fulfil the promise of protection from 'all forms of violence'. Such express recognition in multilateral instruments is important to influence domestic law to follow suit.

TITRE ET RÉSUMÉ EN FRANCAIS:

Évaluation de l'(in)suffisance de la réponse africaine à la violence économique et psychologique contre les femmes

RÉSUMÉ: La violence contre les femmes est une pratique qui persiste dans toutes les sociétés à travers le monde. La gamme d'actions et d'omissions qui équivalent à la violence a évolué au fil des ans, pour reconnaître les pratiques préjudiciables qui n'entraînent pas nécessairement des dommages physiques. Ces actions ou omissions incluent des formes de violence économique et psychologique. L'évolution de la définition de la violence se reflète dans de nombreux instruments universels et

* LLB (Mauritius), LLM LLD (Pretoria), Programme Manager (Centre for Human Rights, UP); sheetal6189@gmail.com

** LLB (Moi), LLM (Pretoria), LLD (UWC), Senior Lecturer and Assistant Director (Centre for Human Rights, UP); nkatha.murungi@up.ac.za

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régionaux relatifs aux droits de l'homme. Toutefois, l'approche de cette reconnaissance et les mesures proposées pour lutter contre les formes économiques et psychologiques de violence varient considérablement d'un instrument à l'autre. Cet article évalue dans quelle mesure les formes économiques et psychologiques de la violence sont abordées dans les normes et standards de l'Union africaine. Un examen systématique des instruments applicables et de la jurisprudence des principaux organes des droits de l'homme révèle que la reconnaissance des formes économiques et psychologiques de violence va rarement au-delà de la clause de définition des instruments respectifs. Par conséquent, l'engagement jurisprudentiel sur ces formes de violence et l'élaboration de mesures pour y répondre sont limités. L'absence d'une approche cohérente, solide et intentionnelle de la violence, qui articule les mesures nécessaires pour répondre à toutes les formes de violence, affaiblit la protection offerte aux femmes qui souffrent de formes de violence économique et psychologique. Cet article défend l'idée qu'une reconnaissance cohérente et une articulation spécifique des formes de violence économique et psychologique en tant que types de violence distincts, comme dans l'approche du Traité d'Istanbul, est nécessaire pour tenir la promesse de protection contre "toutes les formes de violence". Une telle reconnaissance expresse dans les instruments multilatéraux est importante pour inciter le droit national à suivre le mouvement.

KEY WORDS: violence against women, economic violence, psychological violence, African Union, treaty

CONTENT:

1 INTRODUCTION[1]

Gender based violence targeting women is a perverse and pervasive practice across the globe. COVID-19 has further exacerbated this phenomenon.[2] In the African region, violence against women is acknowledged as one of the priority issues that need to be addressed to guarantee women's equality. This is evident in the adoption of treaty and soft law standards that proscribe the practice. As the principal regional treaty on women's rights in the region, the Protocol to the

1 Parts of this article are adapted from a report co-drafted by the authors titled 'Legislative review towards an Africa free of laws that perpetuate violence against women' commissioned by the Irish Embassy in Pretoria through the Office of the Presidency of South Africa.

2 NJ Dlamini 'Gender-based violence, twin pandemic to Covid-19' (2021) 47 *Critical Sociology* 4-5 583; and M Nduna & SO Tshona 'Domesticated poly-violence against women during the 2020 Covid-19 lockdown in South Africa' (2021) 66 *Psychology Studies* 347.

African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is an important reference point in this regard. The commitment to address violence against women (VAW) is also expressed in other soft law and policy standards of the African Union (AU). These include AU Agenda 2063[3] and related implementation frameworks, and the AU Strategy for Gender Equality and Women's Empowerment 2018-2028.[4]

According to the Maputo Protocol, VAW refers to 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat of such acts…'.[5] This approach to VAW has been lauded for extending the traditional preoccupation with physical and sexual forms of violence by recognising economic and psychological dimensions.[6] This characterisation notwithstanding, there is a tendency, both within the Maputo Protocol and in other soft law instruments and policy frameworks, to devote more attention and resources to addressing sexual and physical violence, and much less to psychological and economic forms of violence. There are also questions as to whether the mere recognition of the broad ambit of 'violence' suffices to ensure the protection of women from the incidence of all forms thereof, especially of the psychological and economic forms.

This article explores the extent to which the AU, through its various instruments, addresses economic and psychological violence. This is done by analysing primary instruments such as the Maputo Protocol and policies related to violence against women of the AU, specifically the AU Agenda 2063, and the AU Strategy on Gender Equality and Women's Empowerment (2018-2028). The article is structured in three main parts, with the first devoted to exploration of issues in the definitions of violence and the implications for enforcement, the second to review of normative approaches to economic and psychological violence, and the third to a critique of the normative approaches.

3 African Union Agenda 2063: The Africa We Want, https://au.int/en/agenda 2063/overview (accessed 30 January 2022).

4 AU Strategy for Gender Equality and Women's Empowerment 2018-2028 https:/ /au.int/sites/default/files/documents/36195-doc-au_strategy_for_gender_equa lity_womens_empowerment_2018-2028_report.pdf (accessed 6 February 2022).

5 Art 1(j) Maputo Protocol.

6 F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 1 79-80.

2 DEFINITION OF ECONOMIC AND PSYCHOLOGICAL VIOLENCE AGAINST WOMEN

2.1 Economic violence

Economic violence is not defined in any of the African human rights instruments, and has not yet been the subject of interpretative guidance from the African Commission on Human and Peoples' Rights (African Commission). The constituent elements thereof can however be gleaned from a variety of sources. For instance, the European Institute for Gender Equality defines economic violence to include the following:[7]

> Any act or behaviour which causes economic harm to an individual. Economic violence can take the form of, for example, property damage, restricting access to financial resources, education or the labour market, or not complying with economic responsibilities, such as alimony.

Economic violence has also been considered to occur when women are prevented from going to work,[8] when equal work is unequally remunerated; and when laws concerning 'inheritance, property rights, use of communal land and widowhood' discriminate against women.[9] Economic violence may also occur when the abuser (typically a man in a domestic relationship) has complete control over a woman's economic activities, particularly where they

> maintains control of the family finances, deciding without regard to women how the money is to be spent or saved, thereby reducing women to complete dependence for money to meet their personal needs. It may involve putting women on strict allowance or forcing them to beg for money.[10]

From the foregoing, the defining elements of economic violence can be deciphered as the deprivation of access to or control of financial and other material assets, tools, and opportunities to women, with the result or intention of harming them. The instrumentalisation of economic opportunities, tools and benefits for the purpose of violating women's rights and dignity distinguishes economic violence from general economic disempowerment that may be characteristic of particular contexts. For the economic disempowerment to amount to economic gender based violence, it would need to be based on socially ascribed (gender) differences between females and males.[11]

7 European Institute for Gender Equality 'Glossary of Definitions of rape, femicide and intimate partner violence' (2017) 46 https://eige.europa.eu/thesaurus/terms/1096 (accessed on 3 December 2020).

8 LC Casique & ARF Furegato 'Violence against women: theoretical reflections' (2006) 14 *Revista Latino-Americana de Enfermagem* 6 (unpaged).

9 L Heise, M Ellsberg & M Goheemoeller 'Ending violence against women' (1999) *Population Report Series* 1 at 11.

10 As quoted by OI Fawole 'Economic violence to women and girls: Is it receiving the necessary attention' *Trauma, Violence and Abuse* (2008) 168.

11 Gender Strategy, 62. This is also the yard stick prescribed by the CEDAW Committee in General Recommendation 19 para 6.

Nevertheless, to the extent that economic disempowerment predisposes individuals or societies to greater risks of violence, it is arguable that there is a correlation between economic disempowerment and economic violence.

It is also important to recognise that economic violence may be structural and systemic, as in the case of unequal pay and access to capital assets, or individualised as in cases where women are prevented from seeking gainful employment or where the use of their financial resources is controlled at an individual level. In both systemic and individual cases, the presence of personal laws that either allow, condone or endorse gender discrimination, exacerbate the practice.

2.2 Psychological violence

Similar to economic violence, psychological violence is not universally defined, and has not been the subject of extensive interpretive guidance. Some researchers have defined it to include practices such as verbal abuse, threats of harm, harassment or deprivation of resources, preventing victims from seeing family and friends, ongoing belittlement or humiliation, economic restrictions, violence or threats against cherished objects, and being locked out of homes.[12]

Cultural and contextual differences make it difficult to have consensus on what kind of actions constitutes psychological violence. Conduct that is normalised in some cultures, such as that related to control over women's movement, expression, or access to resources, may not be reported as abusive in such settings, yet it would meet the threshold for psychological violence in other contexts. It is possible, as in the case of community wide practices that are abusive to women as a social group, for such conduct to amount to psychological violence.[13]

2.3 Issues in the recognition of economic and psychological forms of violence

It is important to clarify that the various forms of violence are not completely distinct from each other. In most cases, a victim is likely to experience all or several forms of violence in the same instance. In practice, psychological and economic violence often occur as part of a continuum that culminates in physical or sexual violence. Nevertheless, recognising all the forms of violence widens the legal avenues for victims to enforce legal protection.

Despite the existence of violence against women throughout the history of humanity, universal condemnation of the practice is a

12 WHO 'Violence against women; a priority health issue' (1997); G Krantz & Garcia-Moreno 'Violence against women' (2005) *Journal of Epidemiology and Community Health* 819.

13 Declaration on Elimination of all Forms of Discrimination Against Women, (1993), art 2(b).

relatively recent development. For instance, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) does not have a specific provision on violence against women. Psychological and economic forms of violence are even more recently recognized as distinct forms of violence. In fact, the very reason why the Maputo Protocol was considered progressive is the wide ambit of forms of violence recognised.

The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) sought to remedy the omission of protection from violence in CEDAW by adopting General Recommendation 19, which reads violence against women into the non-discrimination article.[14] The Recommendation defines violence as acts that are directed at a woman because she is a woman, and which may inflict 'physical, mental, or sexual harm or the threat of such acts, coercion, and other deprivations of liberty'.[15] The recognition of the 'mental' dimension of violence became a precursor for further expansion of the recognised forms of violence, which the CEDAW Committee undertook 25 years later in General Recommendation 35.[16]

In the intervening period, several other documents progressively expanded the understanding of violence against women. These include the Declaration on the Elimination of Violence Against Women (DEVAW), which recognised that women face economic inequalities, but then focuses only on physical, sexual and psychological violence;[17] the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against which recognised psychological violence as a form of violence against women;[18] and the 2011 Treaty on Preventing and Combatting Violence Against Women and Domestic Violence (Istanbul Treaty), which not only recognises psychological violence as a distinct form of violence, but also devotes an article to this form of violence. The article provides that '[p]arties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised'.[19] This is by far the most emphatic provision on protection from psychological violence under international law.

Economic violence is recognised in only in a few of these instruments, particularly in the definition of violence.[20] Indeed, the approach taken to this form of violence in these instruments is that prioritising economic empowerment of women, especially through

14 CEDAW Committee, General Recommendation 19: Violence Against Women (1992)

15 As above, para 6.

16 CEDAW Committee, General Recommendation 35 on gender-based violence against women, updating General Recommendation 19 (2017).

17 Declaration on Elimination of all Forms of Discrimination Against Women, (1993), art 2.

18 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994) art 2.

19 Istanbul Treaty, art 31.

20 Istanbul Treaty, art 3; CEDAW General Recommendation 35, para 14.

measures to ensure equal access to opportunities. It is, in fact, quite telling that unlike the approach adopted in relation to psychological violence in the Istanbul Convention, economic violence is not elaborated upon in the substantive articles of the Convention. The failure of interpretative instruments such as the CEDAW General Recommendations to elaborate on the form of violence is an even more glaring omission. Economic violence is rather seen as a cause or consequence of violence against women with emphasis on economic empowerment for the eradication of violence against women. For instance, the African Development Forum has called on states to address 'underlying economic and social causes of vulnerability as women's weak legal rights to land, housing and property'.[21] It recognises that '[w]eak economic power, subordinate social status and lack of voice define women's experience across the continent'.[22] Economic conditions are thus considered as a contributor and consequence of violence against women without them being considered as a manifestation of violence against women.

As such, the prospect of accessing redress for victims of economic violence purely on the basis of this form of violation is considerably reduced. This approach is comparable to the recommendation of measures to address the psychological impact of violence in some of the instruments. For instance, the DEVAW calls for provision of psychological rehabilitation for victims of psychological violence.[23]

The forms of violence that women experience may be influenced by the life stage at which the women find themselves. For instance, psychological violence in childhood may include restricting a child's movements, denigration, ridicule, threats and intimidation, discrimination, rejection and other non-physical forms of hostile treatment.[24] Girls in particular, as a result of entrenched patriarchal norms and roles, are more likely to experience such treatment within the family and the community. Exposure to such treatment, and its normalisation within the society, socialises girls and young women to consider the psychological burden of such treatment as the ordinary cause of being a woman in the society. This accounts for later tolerance to violence against women of a psychological nature in adulthood. Similarly, women in the reproductive age (19-49) are more likely to report intimate partner and obstetric forms of violence, which may include psychological violence. Women in this age bracket are also prone to economic violence, reinforced by patriarchal norms on marriage. Older women are more susceptible to economic violence, particularly in instances where they are widowed.

21 The African Development Forum 'Action on gender equality, women's empowerment and ending violence women in Africa: From commitment to delivery – Consensus Statement and Plan of Action' (19-21 November 2008) 4-5.

22 The African Development Forum (n 21) 2.

23 DEVAW, art 4(g).

24 WHO Factsheets 'Violence against children' https://www.who.int/news-room/fact-sheets/detail/violence-against-children (accessed 20 December 2020).

3 THE NORMATIVE APPROACH TO ECONOMIC AND PSYCHOLOGICAL VIOLENCE IN AFRICA

The section below reviews the manner in which selected norms and standards within the African region have approached economic and psychological forms of violence. The Maputo Protocol is an appropriate departure point in this regard because of its position as the specialist instrument on women's rights in the region, and hence its influence on the other instruments, and related jurisprudence.

3.1 The Maputo Protocol

The full definition of violence under the Maputo Protocol is:

> ... 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 peace time and during situations of armed conflicts or of war.[25]

The Protocol further addresses protection from violence in the context of the right to dignity,[26] the right to life, integrity and security of the person,[27] during armed conflict,[28] and in the educational context.[29] In these provisions, the Protocol refers to 'all forms of violence, particularly sexual and verbal violence',[30] 'all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public',[31] 'all forms of violence, rape and other forms of sexual exploitation'[32] and 'all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices.'[33]

From a reading of these provisions, it is evident that despite the reference to 'all forms of violence', there is an emphasis on protection from sexual violence in a manner that can be interpreted to mean that the 'all' in the general definition does not extend to sexual violence. In comparison, psychological violence only features in the definition article, and nowhere else in reference to violence. The Protocol also does not explicitly mention economic violence beyond the definition provision. However, some of its articles address issues that can be considered as anticipating the threat of economic violence, both at an

25 Maputo Protocol art 1(j).
26 Maputo Protocol art 3(4).
27 Maputo Protocol art 4(2).
28 Maputo Protocol art 11.
29 Maputo Protocol art 12.
30 Maputo Protocol art 3(4).
31 Maputo Protocol art 4(2)(a).
32 Maputo Protocol art 11(3).
33 Maputo Protocol art 12(1)(c).

individual and systemic level. For instance, in the context of marriage, the Protocol protects the right of women to 'acquire [their] own property and to administer and manage it freely'.[34] In cases of separation, divorce and annulment of marriages, the Protocol imposes an obligation on states parties to ensure that 'women and men ... have the right to an equitable sharing of the joint property deriving from the marriage'.[35] The emphasis on women's right to acquire their own property and to have an equitable share in instances of separation, divorce and annulment is a safeguard against divesting women of property on the basis of culturally or socially sanctioned practices in the context of marriage that are often reinforced by personal law regimes.

The Protocol also protects women's right to 'equal opportunities in work and career advancement and other economic opportunities' including equality of access to employment; equal remuneration; transparency in recruitment; supporting women's economic activities in the informal sector; recognising the economic value of the work of women in the home; providing paid maternity leave; and equal application of taxation laws.[36]

The foregoing protections are reinforced with other tools of empowerment including the right to access equal education and training, the right to access means of food production,[37] and the right to benefit from new technologies in the context of healthy and sustainable environment so that they can use them for economic activities.[38] Women also have the right to sustainable development which includes access to and control over productive resources such as land, guarantees of the right to property, access to credit and training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among them.[39]

From the foregoing, it is clear that protection from economic and psychological violence can be inferred from the different articles of the Maputo Protocol. Such protection would be even more efficient if a specific reference to these forms of violence, including examples of the elements thereof, would have been included in the substantive articles of the Protocol.

3.2 Agenda 2063 and the AU Gender Strategy

The African Union Agenda 2063 is Africa's blueprint to inclusive and sustainable development.[40] The Agenda gives expression to the aspirations of the African Union, including those related to the

34 Maputo Protocol art 6(j).
35 Maputo Protocol art 7(d).
36 Maputo Protocol art 13.
37 Maputo Protocol art 15.
38 Maputo Protocol art 18.
39 Maputo Protocol art 19.
40 https://au.int/agenda2063/overview (accessed 21 January 2022).

realization of human rights norms,[41] as well as empowerment of women, youth and children, through amongst others goals, the attainment of full gender equality in all spheres of life by eliminating all forms of discrimination and violence against women and girls.[42]

The Agenda does not elaborate on the forms of violence that need to be addressed. However, the commitment to giving effect to human rights norms and the rule of law would imply reference to the standards articulated in the AU's own human rights instruments, particularly the Maputo Protocol. The context of the reference to protection from violence within the Agenda is significant to the interpretation of the extent of protection, and by extension the forms of violence that may be prioritized therein. Aspiration 6 is geared towards inclusive economic development, with the elimination of violence against women as a means to inclusive development, as opposed to an end in itself.

In 2018, the AU adopted its Strategy for Gender Equality and Women's Empowerment for the period 2018-2028 (AU Gender Strategy) as a plan for the realization of Aspiration 6 of Agenda 2063.[43] The Strategy also re-centres the role of the Maputo Protocol in the realisation of Agenda 2063, by recognising its ratification and domestication as one of the pillars for attainment of full gender equality as anticipated under Agenda 2063.[44] While the Agenda refers to violence against women, the Strategy defines gender based violence as

> an umbrella term for any harmful act that is perpetrated against a person's will and that is based on socially ascribed (gender) differences between females and males. The nature and extent of specific types of GBV vary across cultures, countries and regions. Examples include sexual violence, including sexual exploitation/abuse and forced prostitution; domestic violence; trafficking; forced/early marriage; harmful traditional practices such as female genital mutilation; honour killings; and widow inheritance. There are different kinds of violence, including (but not limited to) physical, verbal, sexual, psychological, and socioeconomic violence.[45]

Evidently, the Strategy recognizes psychological and socio-economic forms of violence in much the same way as the Maputo Protocol. However, even a simple literal analysis of the definition, particularly the examples given, exposes the skewing of attention in favour of physical and sexual forms of violence. In fact, the terms 'psychological', 'socio-economic violence', or even 'verbal violence' each appears only once in the whole document – in the definition clause. In comparison, 'sexual violence' is specifically mentioned in a number of instances, especially in relation to situations of conflict, while the protection of women's physical integrity is similarly specifically highlighted. In a similar approach to that of the Maputo Protocol, the Strategy seems to reference 'violence and rape' as if to suggest that rape is distinct from 'violence' as conceptualized therein.[46]

41 Agenda 2063 Aspiration 3.

42 As above, Aspiration 6.

43 Website of the African Union (https://au.int/sites/default/files/documents/36195- doc-52569_au_strategy_eng_high.pdf - accessed on 27 July 2021).

44 AU Gender Strategy, 17.

45 AU Gender Strategy, Annex B, 64.

46 AU Gender Strategy 35.

It is apparent from the analysis of the Maputo Protocol and Agenda 2063 that, while psychological and economic forms of violence are acknowledged, there is little in the form of specific measures to respond to their incidence.

3.3 Economic and psychological violence in the jurisprudence of regional human rights bodies

3.3.1 African Commission

Article 30 of the African Charter establishes the African Commission 'to promote human and peoples' rights and ensure their protection in Africa'. Article 32 of the Maputo Protocol provides that until the African Court is established, the African Commission 'shall be seized with matters of interpretation arising from the application and implementation of this Protocol'. While the Court has since been established, the competence of the Commission to interpret the Protocol has been reaffirmed in its jurisprudence, including through issuance of General Comments on the articles of the Protocol. Specifically, the Commission has stated that 'as a complementary legal instrument' to the African Charter, the Maputo Protocol 'by necessary implications falls within the Commission's interpretative scope'.[47]

The jurisprudence of the Commission on the subject under discussion can be derived from the various aspects of its mandate: findings on communications, Concluding Observations on state reports and General Comments.

The African Commission has, through its communications procedure, developed a vast jurisprudence on women's rights,[48] a few of which have a bearing on violence against women. For instance, in *Egyptian Human Rights Initiative for Personal Rights and Interights v Egypt,*[49] a number of female journalists and protesters were assaulted during political demonstrations in Egypt. The violations alleged by the complainants were of a physical, psychological and sexual nature. The complainants further alleged that these were instances of violence against women because 'there was differential treatment between men and women during the riot and that the main reason why the victims were assaulted by the authorities is basically because they [were] women and journalists.'[50] The Commission concluded that the violence experienced by the women was indeed gender based and discriminatory, and hence in violation of the Charter.

47 African Commission, *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*, para 1.

48 E Durojaye & O Oluduro 'The African Commission on Human and Peoples' Rights and the woman question' (2016) 24 *Feminist Legal Studies* 325.

49 Communication 323/06 *Egyptian Human Rights Initiative for Personal Rights and Interights v Egypt* African Commission (2011).

50 Para 124.

In particular, the Commission noted the verbal abuse consisting of insults and threats of a sexual nature targeted at the women with the intention of humiliating and demeaning them.[51] The Commission made a significant contribution in defining the elements of gender based psychological violence, such as verbal abuse and insults designed to demean a woman because of her gender, based on references to the definition of violence against women under article 1 of the Maputo Protocol. The Maputo Protocol was relied upon despite the fact that Egypt was not a state party to the Maputo Protocol, and the communication had therefore been filed on the basis of the African Charter.

Other cases such as *Equality Now and Ethiopian Women Lawyers Association v Ethiopia*[52] and *Curtis Doebbler v Sudan* presented issues of violence against women to the Commission. In these cases, however, psychological aspects of violence only arose as a consequence of violation of other rights, and not in the first place as the subject matter under consideration. The engagement of the Commission on interpreting the forms of violence presented, or redressing it, is limited. Economic form of violence did not arise in any of the communications considered thus far.

In accordance with article 62 of the African Charter and 26(1) of the Maputo Protocol, states have to submit a state report to demonstrate legislative and other measures taken to give effect to the provisions of the Maputo Protocol. After considering the state reports, the African Commission formulates Concluding Observations which are 'recommendations to guide improvements' of a state's performance.[53] The African Commission adopted Guidelines on State Reporting under article 26(1) of the Maputo Protocol to guide states in the preparation of their reports.[54] With respect to reporting on violence, the Guidelines outline specific violations, that is, to provide information on

> bodily integrity and dignity, including sexual violence, trafficking of women and medical and scientific experimentation (article 3 & 4); Practices harmful to women, including female genital mutilation (article 5); Female stereotypes (article 4(2)(c)); Sexual harassment; domestic violence (article 4(2)(a)); Support to victims of violence, including health services and psychological counselling (article 5(c)).[55]

While this approach does not preclude reporting on psychological and economic forms of violence, it is consistent with the approach of the Maputo Protocol itself and other regional policy documents discussed earlier, in emphasising physical (bodily integrity) and sexual forms of violence in the articulation of elements of violence. The absence of a specific reference or requirement for information on psychological and

51 Para 153.

52 Communication 341/2007 *Equality Now and Ethiopian Women Lawyers Association v Ethiopia* African Commission (2016).

53 F Viljoen *International human rights law in Africa* 2nd edition (2012) 365.

54 African Commission, Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa https://www.achpr.org/public/Document/file/English/Guidelines%20on%20State%20Reporting%20under%20the%20Maputo%20Protocol_2.pdf (accessed 22 July 2021).

55 Sec 2.6 of the Guidelines on State Reporting.

economic forms of violence accounts for the minimal engagement on the subject between the Commission and state parties to the Protocol. This is evident from the Concluding Observations of the African Commission related to the Maputo Protocol part of the report.[56]

In most of the Concluding Observations, the African Commission notes the progress made on laws and policies that advance women's socio-economic conditions without making direct reference to economic violence against women.[57] In some cases, the Commission notes the lack of access to economic opportunities of women, as in the case of Liberia,[58] an approach that focuses on economic empowerment without interrogating the incidence of or addressing economic violence.

With respect to psychological violence, in response to the periodic report of Mauritania, the African Commission commended the state party's collection of data on violence that included psychological violence.[59] Despite this, the African Commission did not engage with the different aspects of psychological violence in the state report. The Commission has also recommended Malawi to take steps to protect children from all forms of mental violence.[60]

Article 45(1)(b) of the African Charter mandates the African Commission to 'formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations'. As of July 2021, the African Commission has adopted seven general comments,[61] four of which are related to the Maputo

56 https://www.achpr.org/statereportsandconcludingobservations (accessed 22 July 2021).

57 For example: African Commission Concluding Observations and Recommendations on the combined periodic report of Burkina Faso, 2011-2013 (2017); *Observations finales sur le rapport periodique initial et cumule de la Republique de Cote d'Ivoire* (2012); Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya (2016); Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights (2015); Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995-2013) (2015); Concluding Observations and Recommendations on the Periodic and Combined Report of the Islamic Republic of Mauritania on the Implementation of the African Charter on Human and Peoples' Rights (2006-2014) and the Initial Report on the Maputo Protocol (2018); Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) (2016); Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa (2016); Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010-2012) (2015);

58 Concluding Observations for Liberia (n 57) para 19.

59 Concluding Observations for Mauritania (n 57) para 64.

60 Concluding Observations for Malawi (n 57) 115.

61 Website of the African Commission, https://www.achpr.org/resources (accessed 22 July 2021). The Joint General Comment on Child Marriage adopted together with the African Children's Committee in 2017 is missing from the list.

Protocol. Of these, the Joint General Comment on Ending Child Marriage adopted together with the African Children's Committee in 2017 (Joint General Comment)[62] and General Comment 6 on matrimonial property[63] address aspects of violence against women.

The Joint General Comment characterises the consequences of child marriage as economic[64] and psychological,[65] but it does not elaborate on their particular presentation. The Joint General Comment also requires states to, among others, protect the child against all forms of violence including psychological protection,[66] but also does not elaborate what 'psychological' protection refers to.

General Comment 6 adopted on article 7(d) of the Maputo Protocol represents a missed opportunity of the African Commission to lay emphasis on the protection of women from economic violence. General Comment 6, which focuses on the right to property during separation, divorce or annulment of marriage, relates to a context in which economic violence is rampant. Although the General Comment acknowledges the gendered nature of disadvantage that women experience in this context, it does not characterise actual or potential violations in this context, such as widow disinheritance or unequal distribution of matrimonial wealth at the point of separation, as forms of violence.

3.3.2 The African Court

Article 1 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) establishes an African Court. The jurisdiction of the African Court extends to 'interpretation and application' of the African Charter, the African Court Protocol and any other 'relevant human rights instrument ratified by the states concerned'.[67] Thus, read in line with article 27 of the Maputo Protocol, the African Court can receive cases under the Maputo Protocol, including on economic and psychological violence.

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 (*APDF and others v Mali*)[68] is the only case in which the Court has so far considered alleged violations of the

62 African Commission & African Committee, *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 (ACERWC) on Ending Child Marriage* (2017).

63 African Commission, General Comment 6 on the right to Property during Separation, divorce, or annulment of marriage (2020).

64 Paras 8, 10 & 12 of the Joint General Comment.

65 Paras 8 & 12 of the Joint General Comment.

66 Para 58 of the Joint General Comment.

67 Art 3 of the African Court Protocol.

68 *Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali* African Court (2018).

Maputo Protocol. The case concerns the Persons and Family Code of Mali, which, as the applicants argued, violated the protection of the minimum age of marriage for girls by allowing marriage from the age of 15, the right to consent to marriage, the right to equal inheritance, and the elimination of traditional practices and conduct harmful to the rights of women and children.[69] The case did not expressly frame the issues as either constituting or resulting in violence. However, the nature of concerns raised do, in fact, relate to protection from violence in all its forms. For instance, child marriage is accepted as a form of violence against children,[70] particularly of a sexual and psychological nature, while vitiating the women and girl's consent to marriage is tantamount to psychological violence (coercion). The unequal inheritance laws create conditions conducive to economic violence against women through disinheritance.

3.3.3 The African Committee of Experts on the Rights and Welfare of the Child

As an instrument concerned with the rights and welfare of children, the relevance of the African Charter on the Rights and Welfare of the Child (African Children's Charter) to the present discussion lies in the protection of girls from violence. The child rights sector has had significant engagement on the subject of violence against children, given the susceptibility of children to violence as a result of their young age and dependency. Indeed, a significant number of the provisions of the African Children's Charter seek to protect children from various forms of violence, some of which are of a psychological and economic nature. Examples are the protection of a child's 'honor or reputation',[71] the protection from dehumanising or humiliating parental or school punishment,[72] and protection from harmful social and cultural practices, particularly those discriminatory to the child on the basis of sex.[73] These protections exist despite the fact that the Charter does not expressly use the term 'violence'. Furthermore, save for article 21, the protection from violence in these provisions does not necessarily take into account the gendered nature of the violence.

The absence of a specific provision notwithstanding, the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child (Committee)[74] has advanced the issue of protection from violence, seemingly adopting the wide definition and recognising the gendered nature thereof. For instance, Aspiration 7 of the Africa's Agenda for Children 2040 (Agenda 2040)[75] envisions that 'every child is protected from violence, exploitation, neglect and

69 As above, para 9.
70 CEDAW General Recommendation 35, para 31(a).
71 African Children's Charter, art 10.
72 African Children's Charter, art 11(5).
73 African Children's Charter, art 21.
74 Established under art 32 of the African Children's Charter.

abuse'.[76] The Agenda enumerates practices which constitute violence, including

> corporal punishment in various settings, both public and private; forced and harmful labour practices and trafficking for forced labour; harmful practices such as female genital mutilation, child marriage, virginity testing, breast ironing and child witch killings; gender-based violence; sexual violence; sexual exploitation; pornography; and sexual trafficking.

These are not classified in the same language as the forms of violence under the Maputo Protocol. However, the specific practices listed correspond to the physical, and sexual typology. Evidently, the Agenda does not specify psychological or economic violence as distinct forms of violence, but rather as consequences of violence.

It is also significant that the Committee has adopted the definition of violence articulated by the CRC Committee in General Comment 13 of the Convention on the Rights of the Child. In its General Comment on article 27 of the African Children's Charter, the Committee references the CRC's General Comment,[77] and thereby imports the interpretation of the CRC Committee into the ambit of protection under the Charter. This is significant because the CRC General Comment defines violence as 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse' and recognizes that violence is gendered, with girls being more prone to particular forms of violence, especially those of a sexual nature.[78] An assumption can be made that 'mental' violence as used here equates to psychological violence, there is certainly no reference to economic violence under the definition.

3.4 Economic and psychological violence in the sub-regions

3.4.1 The SADC Gender Protocol

The SADC Protocol on Gender and Development[79] defines gender based violence as

75 African Union, 'Africa's Agenda for Children 2040: Fostering an Africa fit for Children' (2015) https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda_2040_for_Children_Rights_in_Africa_15x24.pdf (accessed 20 January 2022).

76 As above, 37.

77 African Children's Committee, *General Comment No 7 on article 27 of the ACRWC: Sexual exploitation*, paras 6 & 18.

78 UN CRC General Comment 13 on the right of the child to be free from all forms of violence (2011) para 4 & 72 respectively. The African Children's Committee also uses the language of 'all forms of violence' in its General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and Systems Strengthening for Child Protection, https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf (accessed 20 January 2022).

79 SADC Protocol on Gender and Development.

> all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to undertake such acts, or to undertake arbitrary restrictions on or deprivation of fundamental freedoms in private or public in peace time and during situations of armed or other forms of conflict.[80]

With the exception of the expanded application to men and boys, this definition is similar to the Maputo Protocol.[81] In the substantive provisions, the Protocol calls for domestic legislation to eliminate gender based violence,[82] and protection of girls from 'all forms of violence, including sexual violence'.[83] The Protocol further calls for measures to safeguard the equal rights of women in the context of marriage, widowhood, and access to property and resources.[84] These latter provisions are not couched expressly as related to violence, but certainly foreclose on avenues in which psychological and economic violence tends to be rife.

3.4.2 The ECOWAS Community Court of Justice

Within the Economic Community of West African States (ECOWAS), violence against women has mostly been addressed through cases in the ECOWAS Community Court of Justice.[85] The Court has the jurisdiction to determine cases alleging violation of human rights in member state.[86] The *Dorothy Njemanze & 3 Others v Nigeria* case[87] is one such matter. The plaintiffs in this case alleged the violation of article 4(2) on protection from all forms of violence against women. The plaintiffs had been arrested and accused of being prostitutes since they were found in the streets of Abuja at night. They had endured extensive verbal and physical violence while in the custody of state agents, including the use of derogatory words to describe them in a manner intended to demean them. This fact notwithstanding, neither the plaintiffs, nor the Court invoked the fact that the conduct of the Nigerian state agents was tantamount to psychological violence as defined under the Maputo Protocol, despite listing article 4 as one of the violated articles. Instead, the Court found the verbal abuse was a violation of article 5 of the African Charter, which deals with the protection of dignity.

3.4.3 The East Africa Community Gender Bill

The East Africa Community Gender Bill adopts the definition of violence against women similar to that set out in the Maputo Protocol.[88] As such, it is arguable that the Bill recognizes psychological

80 Art 2, SADC Protocol on Gender and Development.
81 As above.
82 Art 6(d), SADC Protocol on Gender and Development.
83 Art 11(1)(d).
84 Art 8, 10 & 18.
85 Art 15 of the ECOWAS Treaty.
86 Art 9 of the ECOWAS Court Protocol.
87 *Dorothy Njemanze & 3 Others v Nigeria,* ECW/CCJ/APP/17/14 (2014).

and economic forms of violence. However, the substantive article addressing violence against women adopts the terminology of 'sexual and gender based' violence,[89] and the specifics examples of violence listed are within the scope of physical and sexual violence. They include female genital mutilation, early and forced marriages, child sacrifice, and widow inheritance.[90] The subsequent EAC Gender Policy adopts a similar approach, with a few instances of recognition of 'all forms' of violence.[91]

4 CRITIQUE OF THE APPROACH TO ADDRESSING ECONOMIC AND PSYCHOLOGICAL VIOLENCE AT THE AFRICAN LEVEL

The review of instruments and corresponding jurisprudence in the foregoing section raises a number of issues that impact on the protection of women from economic and psychological forms of violence. The legacy of the understanding of violence in terms of physical violence is apparent in the analysis. As the CRC Committee has noted, 'in common parlance, the term violence is often understood to mean only physical harm and/or intentional harm.'[92] With very few exceptions, there is a pattern of recognition of 'all' forms of violence in the definition clause, in much the same way as in the Maputo Protocol, and a subsequent concentration on physical and sexual violence to the exclusion of economic and psychological forms of violence in the substantive provisions of the respective instrument. As a result, measures taken or prescribed to states parties to address violence against women tend to follow the same pattern. As a result, while an analysis of national laws is beyond the scope of this article, it can be reasonably concluded that even at the national level, legislative measures tend to adopt measures to redress the physical and sexual violence, to the exclusion of economic and psychological violence.

There is also a tendency in the reviewed instruments and jurisprudence to highlight the psychological and economic impact of violence against women, without concomitantly recognising them as actual forms of violence, in and of themselves. As a result, when psychological and economic violence occurs, the response may be targeted at redressing its consequences while failing to address the actual source of the violation. For instance, women who experience economic violence are likely to experience psychological effects, or be more susceptible to physical and sexual violence as a consequence of

88 East Africa Community Gender Bill (2016), art 2.

89 As above, art 9.

90 As above, art 6(3)(a).

91 EAC Gender Policy 2018, http://fawe.org/girlsadvocacy/wp-content/uploads/2018/12/EAC-Gender-Policy.pdf (accessed 22 January 2022).

92 UNCRC Committee General Comment 13: the right of the child to be free from all forms of violence, para 4.

the economic violence. In such cases, if psychological and economic violence are not proscribed in national law, it becomes difficult to access remedies. This approach also accounts for the call for measures to provide psychosocial support to survivors of violence, which, while important, does not suffice to redress the impact of psychological violence.

The approach to economic violence is particularly problematic in most of the instruments considered. These instruments focus on facilitating economic empowerment of women, without explicitly highlighting conduct that would amount to economic violence. By adopting this approach, the instruments leave only the option of redressing economic violence as a structural and systemic violation, and much more difficult to enforce at an individual level.

Specification of all forms of violence is important because, as is evident from the analysis of norms and jurisprudence in the preceding section, not only does it facilitate access to remedy, it also provides a basis for engagement on the subject matter by the respective interpretative and enforcement body. This is important for standard setting, because it becomes makes it possible to progressively elaborate the standards necessary to ensure optimum protection of women in respect of each form of violence. Also, whereas some of conduct constituting psychological or economic violence may be punishable under other laws at the national level, the gendered nature of the conduct ought to be a factor in the determination of appropriate responses, with the wider goal of furthering the equality of men and women in society. In this way, failure to recognise these as distinct forms of violence takes away from advancing the cause of equality.

Failure to specify economic and psychological violence as distinct forms is also at odds with the life-cycle approach to understanding violence. If indeed certain forms of violence are more prevalent at certain life stages of women, failure to provide a pathway for their enforcement excludes specific groups of women in that age group from the remedies most relevant to their experience.

In 2020, the AU began exploring the prospect of a new treaty to address violence against women and girls. The proposed treaty, dubbed the 'African Treaty on Violence Against Women and Girls' (Draft Treaty),[93] responds to the concern that despite the provisions of the Maputo Protocol and other instruments, violence against women continues to plague the continent.[94] The Draft Treaty seeks to substantiate measures necessary for meaningful implementation of protection from violence, and to elaborate accountability measures to enhance the prospect of accessing redress for affected women. While it would be premature to evaluate the draft since it is in the very early

93 N Farisè & TR Jeewa 'Yet another treaty aims to protect African Women. But how will it be enforced?' *Mail and Guardian* (9 December 2020). The draft treaty is neither final nor public. A copy of the draft treaty is on file with the authors.

94 See generally R Manjoo & R Nekura 'Does Africa need a regional treaty on violence against women? A comparative analysis of normative standards in three regional human rights systems' (2020) *Acta Juridica* 197-226.

stages of development and is likely to evolve significantly through the course of negotiations, it is nevertheless important to note that the approach taken so far mirrors the approach of most of the instruments evaluated in this article. The Draft Treaty does not yet have specific provisions prohibiting economic or psychological violence.

5 CONCLUSION

This article set out to assess the extent to which economic and psychological forms of violence are addressed in the norms and standards of the AU. From the systematic review of the applicable instruments, as well as the jurisprudence of key human rights bodies, it is apparent that the recognition of economic and psychological forms of violence rarely goes beyond the definition clause of the respective instruments. This is characterized by over-concentration of references to and responses to physical and sexual violence, and none or little on economic and psychological forms of violence. This approach undercuts the protection available to women from these forms of violence, by limiting the prospects of enforcement by individual women affected, or limiting the nature of remedies available to women who seek redress.

This article makes the case that consistent recognition and specific articulation of economic and psychological forms of violence as distinct types of violence, as in the approach of the Istanbul Treaty, is necessary to fulfil the promise of protection from 'all forms of violence'. Such express recognition in multilateral instruments is important to influence domestic law to follow suit. To the extent that domestication of these instruments is especially important in the context of ongoing discussions on the proposed African Treaty on Violence against Women and Girls.

The implementation of the Kampala Convention in Cameroon: trends, challenges and opportunities

*Steve Tiwa Fomekong**
https://orcid.org/0000-0003-2097-0568

ABSTRACT: This contribution examines the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) by relevant actors in Cameroon. It highlights the fact that there is a considerable gap between the legal provisions of the Kampala Convention and their practical application in Cameroon. On this basis, it argues that there is an urgent need to take necessary measures to reduce or close such a gap and thus improve the plight of the more than a million civilians who had been internally displaced as a result of deadly attacks by non-state armed groups in the far North region, growing violence in the English-speaking North-West and South-West regions and natural disasters. The approach envisaged to achieve this demonstration is articulated in three stages. First, the article sheds light on the huge scale of internal displacement in Cameroon and on the precarious situations of those who are victims of it. Then, through a critical approach, it discusses the limitations and difficulties that prevent the Kampala Convention from fully contributing to the improvement of the lot of IDPs in Cameroon. Finally, with an approach centred around making suggestions for law reform, the article puts forward possible solutions aimed at strengthening the implementation of the Kampala Convention in Cameroon.

TITRE ET RÉSUMÉ EN FRANCAIS:

La mise en œuvre de la Convention de Kampala au Cameroun: réalités, défis et opportunités

RÉSUMÉ: La présente contribution analyse la mise en œuvre de la Convention de l'Union africaine sur la protection et l'assistance aux personnes déplacées en Afrique (Convention de Kampala) par les acteurs concernés au Cameroun. Elle soutient qu'il existe un écart considérable entre les dispositions juridiques de la Convention de Kampala et leur application concrète au Cameroun. Partant de ce constant, l'article pose qu'il est urgent de prendre les mesures nécessaires pour réduire ou combler cet écart et, partant, améliorer le sort des plus de une million déplacés internes du fait des attaques meurtrières de groupes armés non étatiques dans la région de l'Extrême-Nord, de la violence croissante dans les régions du Nord-Ouest et du Sud-Ouest et des catastrophes naturelles. La démarche retenue pour réaliser cette démonstration s'articule autour de trois points. L'article met d'abord en lumière l'ampleur colossale du déplacement interne au Cameroun, ainsi que la situation précaire des personnes qui en sont victimes. Ensuite, à travers une approche critique, il analyse les limites qui empêchent que la Convention de Kampala contribue pleinement à l'amélioration du sort des victimes de déplacements internes au Cameroun. Enfin, dans une démarche de proposition de réforme du droit, l'article formule des pistes de solutions visant à renforcer la mise en œuvre de la Convention de Kampala au Cameroun.

* LLB (Buea) MA (Yaounde) PhD (Quebec), Lecturer at the Faculty of Law of Univerté Laval, Postdoctoral Fellow Université de Montréal; stevemartial@yahoo.fr / steve.tiwa-fomekong@fd.ulaval.ca

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KEY WORDS: Kampala Convention, implementation, internal displaced persons, Cameroon, human rights

CONTENT:

1 INTRODUCTION

Internal displacement[1] is one of the most daunting humanitarian issues of our time.[2] To address this issue, from which it suffers more than any other region in the world,[3] Africa has, under the auspices of the African Union, adopted in 2009 'the first ever international treaty for the protection and assistance of IDPs':[4] the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

The Kampala Convention, which entered into force on 6 December 2012, provides an unprecedented legal framework to address the structural factors that cause internal displacement in Africa.[5] Besides, in addition to the fact that it is the first legally binding instrument on internal displacement worldwide, the Kampala Convention is unique in its comprehensiveness. Drawing on international human rights law (IHRL) and international humanitarian law (IHL),[6] it sets out provisions to protect IDPs' rights during and after the displacement.[7] It

1 Internal displacement is defined as 'the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state border'. See Kampala Convention, art 1(l).

2 In 2020, it was estimated that over 50.8 million people were displaced worldwide, with Africa alone accounting for more than a third of these people. See IDMC, *Global report on internal displacement 2020*, (2020) 1-26. For details on the numerous challenges to which they are confronted, see, for example, ICRC, *Strengthening legal protection of victims of armed conflicts* (2011) 20-24.

3 IDMC (n 2); C Beyani 'Recent developments: the elaboration of a legal framework for the protection of internally displaced persons in Africa' (2006) 50(2) *Journal of African Law* 189.

4 J Kellenberger 'Root causes and prevention of internal displacement: the ICRC perspective' (2009) https://www.icrc.org/en/doc/resources/documents/statement/displacement-statement-231009.htm (accessed 9 July 2021).

5 A Bilak 'L'Afrique face à ses déplacés internes' (2016) 1 *Politique* Étrangère 39.

6 S Ojeda 'The Kampala Convention on internally displaced persons: some international humanitarian law aspects' (2010) 29(3) *Refugee Survey Quarterly* 58-61.

7 Kampala Convention, art 2.

also governs all types of internal displacement, including, without being limited to, internal displacement resulting from armed conflict and other situations of generalised violence, disaster-induced displacement, and development-induced displacement.[8]

However, it is widely acknowledged that any treaty, no matter how relevant, 'is merely a piece of paper'[9] if the provisions it contains are not implemented as expected.[10] Indeed, '[t]he legal norm is alive and its history does not end with its birth' (our translation).[11] On the contrary, once it has been adopted, it is important to implement it in order to ensure that the objectives it pursues are fulfilled.[12]

This contribution examines the implementation by Cameroon of the Kampala Convention which it ratified in 2015.[13] It highlights the fact that there is a considerable gap between the legal provisions of this Convention and their practical application in Cameroon. On this basis, it argues that there is an urgent need to take necessary measures to reduce or close such a gap and, thus, improve the plight of the more than 1 052 591 civilians who had been internally displaced as a result of deadly attacks by non-state armed groups in the Far North region, growing violence in the Northwest and Southwest regions (NW/SW regions) and natural disasters.[14]

The approach envisaged to achieve this demonstration is articulated in three stages. Firstly, the article analyses the plight of victims of internal displacement in Cameroon, including IDPs, returnees (former IDPs) and host communities, in order to highlight the sheer gravity of their situation, their precarious existence and vulnerabilities. Secondly, it critically discusses the limitations that prevent the Kampala Convention from fully contributing to the improvement of the lot of IDPs whose numbers are growing alarmingly and who continue to be victims of violations of their fundamental rights. Finally, with an approach centered around making suggestions for law reform, the article puts forward possible solutions aimed at strengthening the implementation of the Kampala Convention in Cameroon. The proposed solutions stem not only from the highlighted limitations in the implementation of the Kampala Convention, but also from some good policies and practices that have been tried, tested and observed in other contexts and whose application in the Cameroonian context could, in our view, contribute to improving the situation of IDPs in this country.

8 Kampala Convention, art 1(k)(l).

9 The expression is borrowed from S Cessouma, in her preface to the African Union Transitional Justice Policy (2019).

10 L Robert *La contribution de l'Union européenne au droit international des droits de l'homme* (2014) 10.

11 Robert (n 10).

12 Union académique internationale, *Dictionnaire de la terminologie du droit international* (1960) 47.

13 In accordance with Decree 2014/610 of 31 December 2014.

14 UNHCR, Cameroon Multi-Country Office (MCO) global statistics - August 2021 https://data2.unhcr.org/fr/documents/details/88518 (accessed 10 October 2021).

The proposed contribution which is at the confluence of law and sociology is of both scientific and social interest. Indeed, while there are many studies on the Kampala Convention,[15] almost nine years after its entry into force, there are still very few that are specifically devoted to analysing its implementation by states parties. Regarding Cameroon in particular, to our knowledge, no study specifically analyses the implementation of the Kampala Convention in this state. This contribution therefore aims to fill this gap in the literature. Moreover, in a context where the number of IDPs in Cameroon is constantly growing, there is an urgent need to draw the attention of policymakers to the plight of these vulnerable people.[16] In addition, this study is part of efforts to disseminate the Kampala Convention, in the hope of enabling IDPs to effectively enjoy the protections and guarantees offered to them by this Convention. But before undertaking the analysis, it is important to stress that the following discussion will mainly focus on actions taken by Cameroon because, although the Kampala Convention also imposes obligations on non-state actors,[17] the primary responsibility for its implementation rests with the state.

2 THE PLIGHT OF PERSONS AFFECTED BY INTERNAL DISPLACEMENT IN CAMEROON

Throughout its history, Cameroon has been confronted with the phenomenon of internal displacement on several occasions.[18] However, since 2013, the forced displacement of populations within the Cameroonian territory has reached unprecedented levels.[19] As of August 2021, more than 1 052 591 internally displaced persons and 466 578 returnees (ex-IDPs) were registered in Cameroon.[20] With these figures, Cameroon appears to be the second country in the Lake Chad Basin region most affected by internal displacement.[21] Moreover,

15 M Taddele Maru 'The Kampala Convention and its Contributions to International Law' (2011) 1(1) *JID* 91-130; L Groth 'Engendering protection: an analysis of the 2009 Kampala Convention and its provisions for internally displaced women' (2011) 23(2) *International Journal of Refugee Law* 221-251; A Abebe *The emerging law of forced displacement in Africa: development and implementation of the Kampala Convention on internal displacement* (2018).

16 IDMC, *Out of sight: Cameroon's downward spiral of violence and displacement* (2021) https://www.internal-displacement.org/media-centres/out-of-sight-cameroons-downward-spiral-of-violence-and-displacement (accessed 9 July 2021).

17 For details on actors involved in the implementation of the Convention, R Adeola, 'The protection and assistance of internally displaced persons under the Kampala Convention: an institutional approach' (2020) *Refugee Survey Quarterly* 1-30; K Ridderbos 'The Kampala Convention and obligations of armed groups' (2011) 37 *FMR* 36-37.

18 G Waté Sayem 'La question des déplacés forcés de la "Crise Anglophone" au Cameroun depuis 2016' (2020) 14(2) *Journal of the African Literature Association* 308.

19 Waté Sayem (n 18) 308.

20 UNHCR, Cameroon - statistics - August 2021 (2021) https://data2.unhcr.org/fr/documents/details/88520 (accessed 10 October 2021).

21 Visit https://gho.unocha.org/fr/cameroun (accessed 10 October 2021).

these figures, which continue to increase over time, would be higher if we consider that insecurity, the refusal of some IDPs to register and the lack of coordination between agencies and institutions dealing with IDPs registration sometimes hinder the efforts to register victims of forced displacement in Cameroon.[22] These large population movements are the result of repeated attacks by the armed group Boko Haram in the far North region (341 535 and almost 123 489 returnees), hostilities between Cameroonian defence and security forces (DSF), and armed groups in the NW/SW regions (711 056 IDPs and 333 900 returnees) and, to a lesser extent, natural disasters[23] (116 000 in 2020).[24]

Whether it is the ongoing armed conflict with Boko Haram in the far North region or the crisis in the NW/SW regions, human rights violations are the main cause of the internal displacement associated with these two major security challenges that Cameroon is facing.[25] The catalogue of violations committed against the population in the framework of these security crises is particularly long, that they cannot all be mentioned here.[26] Nevertheless, it can be noted that in the period January to November 2019 alone, 275 cases of homicides, including 225 cases against civilians were recorded in the far North region.[27] This figure, which relates solely to the violation of homicide, indicates that the civilian population is the primary target of the abuses committed in the context of this conflict. Similarly, in the NW/SW regions, members of armed groups scour villages and rural areas where they kill, rape and pillage the civilian population.[28] It is estimated, for example, that in the first half of 2018 alone, more than a hundred properties were destroyed by armed separatists.[29] The multiple violations of the right to education are also to be deplored. Schools have suffered and continue to suffer repeated attacks by armed gangs. In 2018, more than 120 schools were burned in the NW/SW regions, thereby depriving thousands of children of their right to education.[30]

22 C André *Why more data is needed to unveil the true scale of the displacement crises in Burkina Faso and Cameroon* (2020) https://www.internal-displacement.org/expert-opinion/why-more-data-is-needed-to-unveil-the-true-scale-of-the-displacement-crises-in (accessed 10 October 2021).

23 OIM, *Rapport sur les déplacements: région de l'Extrême Nord Cameroun Cameroun-Round 22* (2021) 10.

24 Andre (n 22).

25 OCHA, *Cameroon: humanitarian response plan* (2021) 24-25.

26 *Emergency humanitarian assistance plan for the North-West and South-West Regions (2018-2019)* (2018) 4-10.

27 Amnesty International, *Cameroon: victims of Boko Haram attacks feel abandoned in the far North* (2019) https://www.amnesty.org/fr/latest/news/2019/12/cameroon-victims-of-boko-haram-attacks-feel-abandoned-in-the-far-north/ (accessed 9 July 2021).

28 *Emergency humanitarian assistance plan for the North-West and South-West Regions* (n 26) 9.

29 *Emergency humanitarian assistance plan for the North-West and South-West Regions* (n 26) 9.

30 *Emergency humanitarian assistance plan for the North-West and South-West Regions* (n 26) 4.

Human rights' violations are not solely attributable to armed groups. Cameroonian DSF, as well as members of the vigilance committees used by Cameroon to face security challenges, have also been accused on several occasions of committing exactions against the population, even though the Cameroonian government has always tended to refute such accusations. One striking example is the Ngharbu massacre, in the context of which DSF were accused of killing 21 civilians, including 13 children and a pregnant woman in Ngarbuh neighbourhood, setting fire to five houses, looting dozens of other properties and beating up residents.[31] The Cameroonian authorities, from the outset, denied any responsibility on the part of their DSF. However, the conclusions of the Commission of Inquiry set up by the President of the Republic later confirmed that members of the FDS and a local vigilance committee had indeed committed multiple abuses against civilians.[32] This is not an isolated case.[33]

These numerous violations committed by the various armed actors involved in the ongoing crises in Cameroon have forced many people to flee their homes to find refuge not only in other towns and villages of the concerned regions, but equally in other regions of the country particularly the West, Centre and Littoral regions. The needs faced by these populations during their displacements are so many and acute that they cannot be analysed exhaustively here. An analysis of the reports of humanitarian organisations active in the field shows that the most urgent needs include basic necessities, such as food, water, shelter and medical care.[34] In order to survive, displaced populations are very often forced to consume cheaper food. Some families are forced to send members of their household to live elsewhere with relatives even if the conditions are not suitable[35] – they just need to find a place to live – while other family members engage in prostitution in order to meet the family's basic needs.[36]

Gender based gender-based violence (GBV) is another important protection need to which IDPs in Cameroon are confronted. Indeed, although Cameroon has a comprehensive legal framework to fight against GBV,[37] recent surveys show that displaced women and girls in Cameroon are exposed to multiple forms of violence,[38] including sexual exploitation, sexual violence, and assault against young girls particularly. To address this issue, Cameroon, in collaboration with

31 I Allegrozzi 'Renewed attacks on aid workers in Cameroon' (2020) https://www.hrw.org/news/2020/06/04/renewed-attacks-aid-workers-cameroon (accessed 9 July 2021).

32 HRW *Cameroon: massacre findings made public* (2020).

33 T Agbahey 'Cameroun: le procès des militaires de Zelevet, une occasion de mettre fin à l'impunité' (2020) https://www.jeuneafrique.com/899916/societe/tribune-le-proces-des-militaires-de-zelevet-une-occasion-de-mettre-fin-a-limpunite/ (accessed 9 July 2021).

34 OCHA (n 25).

35 Sayem (n 18) 314.

36 J Kouagheu 'Au Cameroun, le calvaire des déplacés des régions anglophones' (2019) https://www.lemonde.fr/afrique/article/2019/08/05/au-cameroun-le-calvaire-des-deplaces-des-regions-anglophones_5496573_3212.html (accessed 9 July 2021).

humanitarian actors, has defined a multifaceted assistance strategy built around the following elements: 'social cohesion areas for women' with the aim of offering assistance to victims in complete discretion, the establishment of dialogue, counselling and referral centres for victims of GBV and the provision of cross-sectoral care for victims with a view to their rehabilitation.[39] As important as these measures are, they are still insufficient as they are not systematically implemented and their territorial coverage does not extend to all the regions and localities where victims have sought refuge.

The right to education of children, who make up over 51 per cent of the IDP population in Cameroon,[40] is also seriously affected. Although there are no up-to-date statistics in this regard, an analysis of reports produced by humanitarian organisations shows that a significant proportion of displaced children are not enrolled in school due to lack of money from parents and lack of interest.[41] Of those who have been enrolled, some do not eat enough before going to school because the amount of food available is not sufficient for the household, while others do not have all the necessary school supplies.[42] Moreover, schools and teachers continue to be attacked by armed groups,[43] leading to the overcrowding of classrooms in areas hosting displaced children and, therefore contributing to a decline in the quality of education offered.

In addition, the persistence of attacks and hostilities in crisis areas prolongs the duration of displacement of these populations and thus prevents their return to their localities of origin. For example, in 2020, it was estimated that about 10 000 IDPs were able to return to their homes.[44] This figure represents only about 32 per cent of the number of people who had been forced to flee their homes in that region.[45] Moreover, once returned to their homes, these people still face pressing needs due to the destruction of their properties and the lack of economic opportunities resulting from the ongoing violence in their places of residence.

37 Cameroon has recently strengthened its legislative framework for the protection of women through the adoption of a new Penal Code that has broadened the range of offences against women. Such newly introduced offences include, for example, female genital mutilations, prevention of growth of an organ, sexual harassment sanctioned by the provisions of sections 277(1), 277(2) & 302(1).

38 OCHA (n 25) 24.

39 *Single report comprising the 4th, 5th and 6th periodic reports of Cameroon relating to the African Charter on Human and People's Rights and 1st reports relating to the Maputo Protocol and the Kampala Convention* (2020) 133.

40 OCHA, *Aperçu des besoins humanitaires-Cameroun* (2019) 8.

41 APDEL, *Evaluation des besoins des déplacés internes dans le Département de la Menoua* (2018) 7-12.

42 APDEL (n 41); Ministry of Basic Education and UNICEF, Évaluation des besoins d'éducation des enfants des populations déplacées internes dans quelques arrondissements des régions de l'Est, Adamaoua et Extrême-nord du Cameroun (2017) 4-17.

43 OCHA, *Cameroon humanitarian dashboard*, January to June 2021 (2021) 3.

44 OCHA (n 25) 7.

45 OCHA (n 25) 7.

Even though in some parts of the country the government and its humanitarian partners are busy distributing sleeping materials and foodstuffs, observers agree that the humanitarian assistance provided to IDPs remains largely insufficient.[46] We will come back to this later. Moreover, many IDPs feel neglected and ignored in the provision of humanitarian assistance to people in need in Cameroon.[47] Indeed, it has been reported that many IDPs accuse the government of Cameroon of being more sensitive to the situation of refugees while minimising their own.[48] The following words of an IDP from the village of Zamay in the Far North region are illustrative in this respect: '[w]e are living a paradox here. People who come from far away from Nigeria are treated better than us. People who created and exported Boko Haram are given more attention than Cameroonians'[49] (our translation). It is in this sense that the phenomenon of internal displacement in Cameroon has been described as one of the world's most neglected displacement crises.[50]

Stuck in this situation of vulnerability and precariousness, IDPs often find salvation in the camps where they hope to benefit from the services of humanitarian actors. Many others prefer to settle in host communities that have demonstrated a great capacity and sense of hospitality and solidarity towards IDPs. The host communities of IDPs are nonetheless also adversely affected by internal displacement. The influx of IDPs and their prolonged stay host localities put considerable pressure on local resources, basic social services, and thus on the resilience of host communities.[51] In fact, in a context already marked by resource scarcity, the frequent displacements of populations put further and unexpected pressure on the capacities and resources of the host communities, and consequently contributes to increasing their vulnerabilities and specific needs. Similarly, massive flows of IDPs have destabilising effects on host communities: the resulting rapid depletion of resources can lead to social tensions between IDPs and host communities. These tensions in turn fuel local violence, which can be exploited by armed extremist groups to recruit from the local population and increase their attacks.[52] Field studies also reveal that some host populations consider IDPs to be undisciplined actors, vectors of insecurity and disorder.[53]

46 A Lamarche & A Fox *Crisis denied in Cameroon: Government refusal to recognise suffering in NWSW deter donors* (2019); Sayem (n 18); A Mahamat *Déplacés et réfugiés au Cameroun: profils, itinéraires et expériences à partir des crises nigériane et centrafricaine* (2021) *Revue canadienne des études africaines* 11**;** W Samah & E Sunjo Tata *Straddled between government forces and armed separatists: The plight of internally displaced persons from the Anglophone regions of Cameroon* in R Adeola (ed) *National protection of internally displaced persons in Africa: beyond the rhetoric* (2021) 73-92.

47 Mahamat (n 46) 11-12**;** Sayem (n 18) 315-318.

48 Mahamat (n 46) 12.

49 Mahamat (n 46) 12.

50 Visit https://www.nrc.no/news/2019/june/cameroon-tops-list-of-most-neglected-crises/ (accessed 10 October 2021).

51 Sayem (n 18) 318-319.

52 A Davies *IDPs in host families and host communities: assistance for hosting arrangements* (2012) 7-11.

Thus, people affected by internal displacement in Cameroon, and in particular IDPs, are in a particularly worrying situation of vulnerability. This is indicative of weaknesses in the implementation of the Kampala Convention, which aims to prevent arbitrary displacement and improve the lot of those affected by it.

3 FLAWS IN THE IMPLEMENTATION OF THE KAMPALA CONVENTION

Cameroon's ratification of the Kampala Convention has opened up new prospects for the prevention of forced displacement in this country and the protection of persons who are victims of it. However, more than five years after its entry into force for Cameroon, it is regrettable to note that the Kampala Convention is still slow to produce its full effects in this country, particularly in view of the mass forced displacements that continue to be observed there and the critical situation in which the people who are victims of these displacements find themselves. The following discussion identifies and analyses the main limitations to the full achievement of the objectives of the Kampala Convention in Cameroon.

3.1 The inconsistency of Cameroon's legal framework on internal displacement

The Kampala Convention requires state parties to incorporate their obligations under the Convention into domestic law by enacting or amending relevant legislation on the protection of, and assistance to IDPs.[54] Despite having ratified the Kampala Convention more than six years ago, Cameroon still does not have specific national legislation on internal displacement. In its initial report on the implementation of the Kampala Convention, Cameroon mentions a long list of national laws and decrees that are said to form part of the national legal corpus on internal displacement.[55] However, after due analysis, it appears that none of these texts specifically deal with internal displacement.

In recent years, important national instruments have been added to the legal framework for the protection of human rights in Cameroon. These include Law No 2016/007 of 12 July 2016 on the Penal Code (revised Penal Code), Law No 2017/12 of 12 July 2017 to lay down the Code of Military Justice (Code of Military Justice) and the National Action Plan for the Promotion and Protection of Human Rights in Cameroon (2015-2019). While these major texts contain specific provisions in favour of certain categories of vulnerable persons such as children and women, it is regrettable to note that none of them provides for special protections in favour of IDPs who also have specific

53 Mahamat (n 46) 4.
54 Kampala Convention art 3(2)(a).
55 *Periodic Reports of Cameroon* (n 39) 157-158.

protection needs and vulnerabilities that are not yet adequately covered by national legislation. The drafting of these texts could indeed have been an appropriate opportunity to include in Cameroonian national legislation the provisions set out in the Kampala Convention. Moreover, the revised Penal Code and the Code of Military Justice criminalise and reinforce the punishment of many acts that may cause arbitrary displacement,[56] but regrettably, they do not specifically criminalise arbitrary displacement per se as required by the Kampala Convention.[57]

It is true that the Cameroonian legal system being a monist system,[58] the Kampala Convention automatically became binding domestic law when it entered into force for Cameroon. Yet, despite this fact, there is still a need for specific regulatory measures related to internal displacement for several reasons. Firstly, some provisions of the Kampala Convention are not self-executing and therefore require that legislative incorporation measures be adopted in the first place. This is particularly the case with the penal provisions of the Kampala Convention, which leave it to each state to define the appropriate penalty to be applied in case of violation of the prohibition of arbitrary displacement and the specific protections granted to IDPs.

The adoption of national measures can also be a great opportunity to go beyond the protections set out in the Kampala Convention by providing more generous protection measures that take into account the specificity of internal displacement in Cameroon.

Additionally, domestic law is relevant for establishing institutions and mechanisms responsible for ensuring implementation of and compliance with the Kampala Convention. Domestic instruments are indeed the ideal frameworks within which to clearly define the responsibilities of the different governmental entities that would be involved in managing situations of internal displacement, as well as the modalities for the provision of assistance by international agencies.[59] In the same vein, a national instrument can also serve as a basis for effective cooperation and coordination of all parties concerned. It is for this reason that the Kampala Convention requires states to designate an authority or body, responsible for coordinating activities aimed at protecting and assisting IDPs and, and for cooperating with relevant

56 For example, the new Penal Code has consolidated protection of the physical integrity of the person. The scope of the criminal responsibility of the author of torture has notably been extended to include traditional leaders (Section 277(3)). It also contains new provisions on child and women protection against violence. Henceforth, the following offences are provided for and punishable under the corresponding sections of the Penal Code: interference with the right to education and training (Section 355(2)), genital mutilation (Section 277(1)), and prevention of growth of organ (Section 277(2)). As for the Code of Military Justice, it clearly establishes the jurisdiction of Cameroonian military courts to try genocide, war crimes and crimes against humanity as defined in the international instruments ratified by Cameroon.

57 Kampala Convention art 4(6).

58 See art 45 of the Constitution of Cameroon.

59 ICRC, *Translating the Kampala Convention into practice: a stocktaking exercise* (2006) 38.

organisations and stakeholders.[60] However, this has not yet been undertaken by Cameroon. Prevention of internal displacement, as well as the protection and assistance to IDPs are currently provided by a multitude of government actors whose actions are uncoordinated, fragmented and *ad hoc*. This is not conducive to effective planning of state activities and attribution of priorities in terms of prevention of internal displacement and support to IDPs. For example, in accordance with the provisions of the Kampala Convention, which requires states to devise early warning systems in areas of potential displacement in order to prevent population displacement,[61] Cameroon has an early warning system whose purpose is to anticipate forced displacements, or to mitigate as far as possible the risks of them occurring. This system includes the National Council for Civil Protection, the National Risk Observatory, the Emergency Flood Control Project, the National Contingency Plan, the National Platform for Disaster Risk Reduction and the National Observatory on Climate Change. However, it is regrettable that the existence of such a comprehensive system has not made it possible to prevent, or at least mitigate, the consequences of the recurrent natural disasters observed in Cameroon in recent years. The overlapping of competences and the absence of a real synergy between these multiple actors can explain this.[62]

3.2 Incomplete and insufficient assessment of the needs of people affected by displacement

In order to ensure that the needs of IDPs and their host communities are duly taken into account and met as effectively as possible, it is essential that they be previously identified and assessed in a clear, adequate and rigorous manner.[63] The availability of solid data on internal displacement leads to more effective and targeted responses, translating into better assistance and protection for the displaced.[64] The Kampala Convention adequately addresses this issue, which further demonstrates its progressive nature and the practicality of its provisions. In particular, it requires state parties to 'assess or facilitate the assessment of the needs and vulnerabilities of IDPs and host communities, in cooperation with international organisations or agencies'.[65]

In practice, however, the needs of IDPs and their host communities in Cameroon are not always fully and systematically assessed. When assessments are undertaken, they are very often focused either on

60 N Krynsky Baal L Kivelä & M Weihmayer, 'Improving IDP Data to help implement the Guiding Principles' (2018) 59 *FMR* 21.

61 Kampala Convention art 4(2).

62 E Ziemine Ngoumou 'Prévention des catastrophes: les techniques s'affirment' https://www.cameroon-tribune.cm/article.html/26834/fr.html/prevention-catastrophes-les-techniques-saffirment (accessed 9 July 2021).

63 Kampala Convention art 5(5).

64 ICRC (n 59) 38.

65 OCHA (n 25) 8.

sectoral needs, or on the needs of IDPs who have taken refuge in a locality that is in the same crisis-affected region. Yet many displaced populations have taken refuge in other major cities in regions other than those experiencing crisis.[66] As a result, the IDPs whose needs are generally addressed and met are mainly those in localities surrounding the crisis areas. IDPs in other areas, however, also face urgent and significant humanitarian needs.[67] Though efforts are being made by a multitude of actors, including host communities, to assist these people, it must be recognised that the responses to the challenges they face are largely *ad hoc*, fragmented and uncoordinated because they are insufficiently planned.

Moreover, the assessments undertaken are sometimes fragmentary, piecemeal and inaccurate in some respects. For example, the Emergency Humanitarian Assistance Plan for the North-West and South-West Regions does not provide an estimate or figures on the quantity of water and sanitation, health care and shelter needs of IDPs.[68] The needs for which estimates are provided are not accompanied by information on how the resources to be mobilised will be distributed according to the sites or departments in which IDPs are located. Nor is there a distribution of people in need and targeted by status, gender and age. In addition, it is not clear whether IDPs communities were properly consulted in the assessment of their humanitarian needs. Furthermore, it is regrettable that no detailed and coherent information on the monitoring of the implementation of this plan is available in the public arena, especially as states are obliged to monitor and evaluate the effectiveness humanitarian assistance provided to IDPs.[69]

Several factors could explain these shortcomings, including the absence of an institutional mechanism with an explicit mandate, and the human, technical and financial resources required to undertake and carry out needs assessments and monitoring of responses. In addition, insecurity generated by the activism of armed groups, as well as the advanced state of disrepair of the main and secondary roads, hinders access to the areas where IDPs are located, which does not facilitate the assessment of the needs of these people on the ground.[70]

Humanitarian organisations in Cameroon, and in particular the specialised UN agencies, are doing their best to support the state of Cameroon in assessing the humanitarian needs of vulnerable populations. The Displacement Tracking Matrix (DTM) tool launched in November 2015 by the International Organization for Migration (IOM) with the aim of providing regular, accurate and up-to-date information on displaced populations in the Far North region of the country is to be commended in this regard.[71] However, the assessments

66 OCHA (n 25) 8.

67 For a review of their needs OCHA (n 25) 8.

68 *Emergency humanitarian assistance plan for the North-West and South-West Regions* (n 26) 18.

69 Kampala Convention art 9(2)(m).

70 OCHA (n 25) 5.

conducted through this mechanism, as well as other assessments undertaken by other humanitarian organisations, still focus far too much on the needs of IDPs in the Northern regions of Cameroon, and in particular those in the Far North, to the detriment of those in other regions.

3.3 The lack of sufficient resources and various other constraints

The effective management of internal displacement in Cameroon is hampered by insufficient resources and various other bottlenecks. From the outset, it should be noted that, in addition to the issue of internal displacement, Cameroon is currently facing several other humanitarian challenges, all of which are equally important.[72] The resources available to respond to these challenges are however largely insufficient. For example, in 2020, of the $391 million required in the revised 2020 Humanitarian Response Plan to reach 3.4 million people in need of humanitarian assistance, including IDPs, only 50 per cent was funded.[73] This situation makes the UN coordinator in Cameroon, M Naab, say that '[i]f the chronic underfunding of the humanitarian response in Cameroon is not addressed, millions of people will continue to be left without vital humanitarian assistance and protection'.[74]

The reconstruction project, which would facilitate the return and resettlement of IDPs, is also undermined by the lack of resources. For example, the provisional budget for the Plan for Reconstruction and Development of the North West and South West was estimated at $161 535,000. Of this budget, only $18 876,000 were collected a year later to finance the implementation of this plan.[75] It goes without saying that this reality is delaying the implementation of rehabilitation and reconstruction activities that are supposed to promote the safe, and voluntary return of IDPs to their regions of origin as required by the Kampala Convention.[76]

The delivery of humanitarian assistance also faces significant challenges in practice. These include the volatility of the security situation, which creates significant logistical constraints, such as intermittent and unpredictable access to populations in need, damage to roads and infrastructure through which humanitarian aid should be delivered, rising prices in the transport market, the continuous use of improvised explosive devices which exposed humanitarian actors to high risks and hindered their free movements, attacks and abductions

71 Visit https://dtm.iom.int/cameroon (accessed 9 July 2021).

72 For details in this regard, see OCHA, *Cameroon: humanitarian needs overview 2021* (2021).

73 OCHA (n 25) 5.

74 OCHA (n 25) 5.

75 CRTV televised Newscast of 18 May 2021.

76 Kampala Convention art 11(1).

of humanitarian actors, as well as reluctance of IDPs to receive humanitarian assistance for fear of reprisals by armed groups.[77]

Delays in the operationalisation of mechanisms in charge of implementing measures for IDPs are also to be deplored. In order to restore peace in the crisis areas, and therefore facilitate the voluntary and safe return, integration or resettlement of IDPs, the Government of Cameroon organised from 30 September to 4 October 2019, a Major National Dialogue whose objective was to find ways and means to silence the arms in the NW/SW regions in particular, and in Cameroon in general. At the end of this Major National Dialogue, it was decided to set up a committee charged with the follow-up of the implementation of the recommendations of this important national meeting, including those related to the protection of IDPs. However, it took almost six months for the Decree laying down the establishment, organization and functioning of this committee to be issued.[78] After the adoption of this Decree, it took another six months for the committee to meet for the first time.[79] Moreover, according to the same Decree the said committee 'shall meet at least once every six months and as when convened by its chairperson'.[80] However, the second working session of this Committee, which has just ended,[81] was held more than one year after the first,[82] that is six months late than the periodicity set by the abovementioned Decree. These long delays are not conducive to regular and effective monitoring of the implementation of the major national dialogue's recommendations, including those relating to IDPs.

It is also regrettable that displaced populations and their host communities are not always systematically consulted and actively involved in decision-making processes on actions undertaken on their behalf. For example, the Committee to Follow up the Implementation of the recommendations of the major national dialogue does not include a representative of IDPs, whereas they are among the main actors concerned by the recommendations that the Committee is monitoring. Moreover, the Decree establishing the Committee provides that it shall 'record opinions and suggestions likely to facilitate the implementation of the recommendations of the major national dialogue'.[83] It is, however, not clear how these opinions and suggestions are to be collected or submitted. A concerned person who would like to make suggestions for better assistance to IDPs would

77 OCHA, *aperçu des besoins humanitaires-Cameroun* (n 40) 40; Kouagheu (n 36).

78 Decree No 2020/136 of 23 March 2020 to lay down the establishment, organization and functioning of the Committee to Follow up the implementation of the recommendations of the major national dialogue.

79 A Mbohou 'Résolution du grand dialogue national: il y a du concret' (2020) https://www.cameroon-tribune.cm/article.html/34713/fr.html/resolutions-du-grand-dialogue-national-il-y-du-concret (accessed 9 July 2021).

80 Art 4 of the Decree.

81 The second meeting of this committee held on the 22 September 2021. For details, see E Teke 'Major national dialogue: Follow up committee charts parts to recovery' (2021) https://www.crtv.cm/2021/09/major-national-dialogue-follow-up-committee-charts-path-to-recovery/ (accessed 4 October 2021).

82 The first meeting was held on 4 September 2020.

83 Art 2 of the Decree.

unfortunately not know clearly where to turn, especially since the Committee does not even have a Facebook or Twitter account. In this digital age, this can be seen as a lack of rigour.

4 IMPROVING IMPLEMENTATION OF THE KAMPALA CONVENTION

By ratifying the Kampala Convention, Cameroon has voluntarily undertaken to implement it. Consequently, and in accordance with the principle of *pacta sunt servanda*, it is bound to carry out the provisions of this Convention in good faith.[84] In order to enable victims of internal displacement in Cameroon to effectively enjoy the protections due to them under the Kampala Convention, the limitations mentioned above must thus be adequately addressed. The following discussion analyses the main measures to be considered in this regard.

4.1 Strengthening the national legal framework on internal displacement

Cameroon should transpose its obligations under the Kampala Convention into its domestic laws and policies. This implies that specific legislation relating to the status of IDPs be adopted, as was done several years ago for refugees, in application of the provisions of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[85] At the same time, the content of some existing national legislation should be amended to include specific provisions related to the prevention of internal displacement and the protection of IDPs. This is the case in particular for the Penal Code and the Code of Military Justice, which should at least criminalise arbitrary displacement as defined by the Kampala Convention. Similarly, the future National Action Plan for the Promotion and Protection of Human Rights in Cameroon, which is currently being drafted, should include specific provisions that take into account the specific needs of IDPs. Clearly, Cameroon would have to adapt its internal legislation to the requirements of the Kampala Convention. The positive stakes of such an approach having already been mentioned above, we will not dwell on them here.

In order to have a comprehensive and effective national law on internal displacement, the Cameroonian authorities could seek support from the African Union Commission, which has developed a draft Model Law on the issue[86] and has already advised several states on its implementation.[87] In addition, it may be useful to seek the expertise of

84 See Vienna Convention on the Law of Treaties art 26.

85 Law No 2005/6 of 27 July 2005 relating to the status of refugees in Cameroon.

86 African Union model law for the implementation of the African Union Convention for the protection of and assistance to internally displaced persons in Africa (2018).

specialised international organisations such as Internal Displacement Monitoring Centre or Norwegian Refugee Council, which have also assisted many states in developing effective laws and policies on internal displacement.[88]

In addition to provisions for the protection of and assistance to IDPs, the legislation suggested here should establish a permanent body to coordinate action in favour of IDPs. The example of Niger could serve as a model in this regard. Through its Law No 2018-74 of 10 December 2018 on the protection and assistance to internally displaced persons, this country has created a National Coordination Committee for the protection and assistance to IDPs. The Decree establishing the organisation and functioning of this Committee describes in detail the mandate of this committee, the modalities for coordinating action in favour of IDPs at both national and local levels, as well as the modalities for financing these activities.[89] This approach could usefully be followed by Cameroon.

As it is widely recognised that national implementation of the Kampala Convention requires an inclusive approach,[90] it should be ensured that all relevant authorities and stakeholders are represented in this Committee. In the case of Cameroon, the Committee could be placed under the authority of the Ministry of Territorial Administration, as this is the line ministry responsible for civil protection activities. It would also include representatives of all other relevant ministries, representatives of the national early warning, representatives of civil society, international humanitarian partners including UNHCR as observers, and representatives of IDPs and their host communities. Such a composition would ensure the participation of all key actors in consultations, information sharing and decision-making. Ultimately, this would prevent delays in one or more points in the domestic implementation process of the Kampala Convention.

4.2 Promoting better respect for human rights

There is now some consensus that violence and violations of IHL and IHRL are among the main drivers of forced displacement.[91] Since the

87 ICRC (n 59) 24.

88 See, for example, IDMC *Workshop Report – Domesticating the Kampala Convention: Law and policy making* (2014) on supporting Liberia's national process of ratification and implementation of the Kampala Convention.

89 Décret No 2020 297/PRN/MAH/GC du 17 avril 2020 déterminant l'organisation et les modalités de fonctionnement du comité de coordination nationale de protection et d'assistance aux personnes déplacées internes.

90 ICRC (n 59) 25.

91 V Amos 'Preventing displacement' (2012) 41 *Forced Migration Review* 4; ICRC, *Displacement in times of armed conflict: how international humanitarian law protects in war, and why it matters* (2019); S Healy & S Tiller 'Be near a road: humanitarian practice and displaced persons in North Kivu' (2016) 35 *Refugee Survey Quarterly* 56-78; K Ivashchenko-Stadnik *The Impact of the current military conflict on migration and mobility in Ukraine* (2015); PW Fagen *Refugees and IDPs after conflict: why they do not go home* (2011).

link between violations of the law and forced displacement seems obvious, it seems equally obvious to assume that respect for the law could significantly reduce or prevent forced displacement.[92] The Kampala Convention duly takes into account this reality by explicitly requiring states to respect and ensure respect for their obligations under IHRL and IHL, so as to prevent and avoid conditions that might lead to the arbitrary displacement of people.[93] In addition, it requires states to 'refrain from, prohibit and prevent arbitrary displacement'.[94] Though the Convention does not go so far as to impose positive obligations on armed groups in this regard,[95] it also expressly prohibits them from carrying out arbitrary displacement.[96] The acts considered arbitrary and therefore prohibited include acts contrary to IHRL and IHL, most of which are classified as crimes against humanity, war crimes, or genocide.[97] The aim here is to address what analysts qualify as 'immediate causes' of internal displacement.[98]

Hence, if all parties involved in the ongoing crises in Cameroon respected the basic rules of IHRL and IHL, much of the displacement and suffering caused to IDPs and other affected people could be prevented. Preventing violations of these bodies of law is therefore, logically, the best means of preventing displacement from occurring in the first place. Similarly, better compliance with the rules of these legal frameworks can help to limit the level of destruction and deterioration of services during hostilities, and therefore facilitate the return of IDPs once peace is restored.

This is not to suggest that compliance with IHRL and IHL requirements alone would help put an end to internal displacements. Of course, effective and sustainable prevention of forced displacement requires a wide range of activities of a different nature to address both the immediate and root causes of displacement.[99] However, as situations of crisis and armed conflict are generally conducive to displacement, the immediate focus is on refraining from violations in order to reduce and contain the extent of displacement.[100] This does not preclude the identification, diagnosis and treatment, in the meantime, of the root causes of displacement, which can be long-term activities given their complexity.

To improve respect for human rights, and therefore limit forced displacement, it is important to strengthen the dissemination of human rights norms applicable in Cameroon, including those set out in the

92 ICRC (n 2) 19.

93 Kampala Convention art 4(1).

94 Kampala Convention art 3(1)(a).

95 Ridderbos (n 17) 36.

96 Kampala Convention art 7(5)(a).

97 Art 4(4).

98 JM Mangala 'Prévention des déplacements forcés de population-possibilités et limites' (2001) 83(844) *Revue internationale de la Croix-Rouge* 1077-1078; UNHCR *Les réfugiés dans le monde. L'enjeu de la protection* (1993) 23.

99 JM Mangala *Le déplacement forcé de population comme nouvelle dimension de sécurité: rôle et responsabilités de l'OTAN* (2001) 24-27.

100 Mangala (n 99).

Kampala Convention. We will come back to this later. In the meantime, it should already be noted that the considerable efforts made by Cameroon to strengthen the training of various national actors in IHRL and IHL should be continued, perpetuated and reinforced. Efforts undertaken in this regard should be extended to vigilance committees to which Cameroon resort to face security challenges. This could be done by setting up mobile teams, in collaboration with local organisations and other international partners, to provide basic human rights training to members of these committees.

The dissemination of human rights norms must be accompanied by the systematic sanctioning of violations of these norms. Indeed, although repressive measures come into play *a posteriori*, they are important, not only to deter others from committing violations, but also to highlight the reprehensible nature of the acts committed and thus to promote greater respect for the rule of law.[101] Hence, the sanctioning of abuses committed by both the DSF and members of armed groups can contribute to the dissuasion of other violations, and thus help prevent situations that could lead to the arbitrary displacement. In this sense, the recent initiatives that consisted in the sanctioning of some members of the DSF responsible of human rights violations are also to be welcomed,[102] even if the investigations that led to some of these sanctions were undertaken after much pressure from the national and international community. It is suggested here that there should be a move towards the implementation of a firm policy of zero tolerance which would consist of systematically investigating when violations occur and applying appropriate disciplinary, administrative, and judicial sanctions. The sanctions applied as a result of these procedures should also be widely disseminated in order to strengthen the deterrence of future violations.

4.3 Widespread dissemination of the Kampala Convention

Cameroon should take steps to increase awareness of the Kampala Convention among all relevant actors. Capacity-building activities in human rights have, admittedly, been reported.[103] However, such activities have so far been mainly conducted from a far too general perspective and only very rarely take into account specific rights. Even when specific rights are taken into consideration, the focus seems to be more on women's and children's rights.[104]

101 AM La Rosa 'Sanctions as a means of obtaining greater respect for humanitarian law: a review of their effectiveness' (2008) 70:870 *International Review of the Red Cross* 221-247; Robert Cryer 'The role of international criminal prosecutions in increasing compliance with international humanitarian law in contemporary African conflicts' in H Krieger & JL Willms (eds) *Inducing compliance with international humanitarian law lessons from the African Great Lakes region* (2015) 188-216.

102 *Periodic Reports of Cameroon* (n 39) 11.

103 *Periodic Reports of Cameroon* (n 39) 8-9.

It is true that by virtue of the principle of non-discrimination, IDPs are equally entitled to all the protections set out in all other human rights instruments as reaffirmed in the Kampala Convention. However, taking into account the specific needs with which IDPs are faced, the Kampala Convention sets out special protections for them, which Cameroon should disseminate, in accordance with its obligation to respect and ensure respect of the Convention.[105]

Therefore, relevant Cameroonian authorities should also undertake public education and capacity building activities specifically related to the Kampala Convention. This would help foster greater respect for the rights of IDPs. In this regard, the Department of Human Rights and International Cooperation of the Ministry of Justice should consider systematically including a specific rights-based approach for IDPs in its human rights awareness-raising and training activities for magistrates and prison staff.

Instruction of DSF, as well as military manuals, should also explicitly incorporate aspects related to the prevention of arbitrary displacement and the protection of IDPs. The specific integration of such aspects into military manual and practice could indeed have a positive impact on the field behaviour for example, through the issuance of doctrine, procedures that incorporate these aspects, legal advisers advising commanders on IDPs rights during military or peacekeeping operations, and training on internal displacement commensurate with individuals' military duties and responsibilities.[106]

The dissemination of the protection measures set out in the Kampala Convention should not be limited to the relevant public authorities. It must be extended on a wider scale to include the populations who are the main beneficiaries. It is indeed essential that these populations have a good knowledge of their rights in order to be able to claim them. Information on rights and services are especially important for IDPs, who find themselves in a new place, often deprived of their usual support network and without access to information that is essential for them to enjoy their rights and access basic services.[107] According to the information provided by Cameroon in its national report on the implementation of the Kampala Convention, as of December 2018, Cameroon's national courts had not yet been seized of any case of violations of the provisions of the Kampala Convention. This implies that, as of the date under consideration, the Kampala Convention had not yet been the subject of a case law, let alone perhaps, invoked in the context of national litigation related to the protection of

104 JC Tcheuwa 'Le cadre normatif et institutionnel national de promotion et de protection des droits des migrants au Cameroun: état critique des lieux et recommandations' (2012) https://welcomebackcameroon.wordpress.com/2012/04/01/les-droits-des-migrants-au-cameroun-sont-garantis-par-notre-constitution-et-lois-selon-pr-jean-claude-tcheuwa/ (accessed 9 July 2021).

105 Kampala Convention art 3(1).

106 ICRC *Bringing IHL home: guidelines on the national implementation of international humanitarian law* (2021) 35-36.

107 A Cotroneo & M Pawla 'Local communities: first and last providers of protection' (2016) 53 *FMR* 38.

human rights. If we consider that victims of human rights violations do not seize the courts because, among other reasons, they are not aware of their rights and the remedies available to them,[108] it is possible to argue that the lack of case law in relation to the Kampala Convention can be explained by the fact that this Convention, as well as the protections it sets out, remain little known to the population as a whole, including judicial actors. Consequently, a wide dissemination of this Convention could contribute to reversing this trend and thus reinforcing the visibility and effectiveness of the Kampala Convention.

Several possibilities are available or can be envisaged to reinforce the dissemination of the Kampala Convention. The activities generally organised by both the Cameroonian Government and civil society organisations on the commemoration of international days and national holidays such as International Women's Day, International Day of the World's Indigenous Peoples, African Children's Day, Refugees' Day, or Youth Day could, for example, provide a great opportunity to raise awareness of the national community about the specific rights of IDPs. Similarly, the specific rights of IDPs could be duly taken into account in radio and television broadcasts, as well as in written material on human rights produced by certain ministries and the National Commission on Human Rights for the population. Furthermore, in the context of awareness-raising programmes on peaceful cohabitation between IDPs and host communities, emphasis could be placed on the rights of IDPs. This could be done by involving experts on the protection of IDPs in the teams responsible for implementing these activities. Finally, in the long term, the translation of the Kampala Convention into local languages should be considered.

4.4 Strengthening the implementation of measures adopted for victims of internal displacement

A swift and effective implementation of the measures undertaken for the prevention of internal displacement, the protection of IDPs and the facilitation of their return or resettlement would contribute to improving the situation of these people. In this regard, and more broadly, the various plans, procedures and other mechanisms for IDPs should be fully operationalised and implemented, sufficient budgetary allocations should be devoted to their implementation, and the delays and other administrative burdens mentioned above should be reduced.

More specifically, four measures are suggested here to enhance the effectiveness of measures undertaken to prevent forced displacement and improve the plight of those who are victims of it. Firstly, the strengthening of the national early warning system, in order to improve the prevention and management of natural disasters and other crises. '[p]revention is, without a doubt, better than cure'.[109] 'There is some consensus that rather than waiting for a population to be displaced and

108 La Rosa (n 101) 238.
109 Kellenberger (n 4).

to have found refuge in another part of the country before taking action [...], the causes of displacement should be addressed' (our translation).[110] Strengthening the national early warning system in Cameroon will allow for better diagnosis of displacement risks, more accurate identification and monitoring of potential displacement areas, and timely transmission of relevant information to the competent authorities to facilitate the implementation of appropriate measures to prevent or contain forced displacement. Two specific measures could be considered to this effect. First, a review of the texts laying down the organisation, the missions and the functioning of the existing bodies and mechanisms mentioned above, in order to better articulate their fields of competence, and thus strengthen synergy, coordination and complementarity between their various interventions. Next, the finalisation of the operationalisation of the National Network of Emergency Operations Centres,[111] which will make it possible to have a functional national telecommunications network capable of ensuring better coordination of disaster preparedness and response operations. In addition to these measures, it is believed that the government of Cameroon and humanitarian organisations should assist populations in potential displacement areas to set up or strengthen their own local early warning systems and reduce some of the risks associated with flight, such as family separation and loss of essential documents. Such an approach has been successfully followed in other contexts similar to Cameroon. For example, in Irumu, Democratic Republic of Congo, where armed group incursions, violence and looting were common in 2011, traditional early warning systems included banging pots or using whistles when people became aware that bandits were near.[112] Also, in 2011 in Cauca, Colombia, the ICRC helped communities exposed to imminent displacement to preserve their belongings. Families were given boxes in which to store their most valuable possessions, which were then stored by a local NGO in a safe area.[113] The development and implementation of similar self-protection strategies in the Cameroonian context would contribute to empowering people to analyse and respond to threats and, as a result, reduce their exposure to risks and build their resilience.

Secondly, IDPs should be more extensively involved in the process of finding solutions for them. Taking into account the expectations and aspirations of these populations is indeed a guarantee for the success of measures envisaged in their favour, since they are best placed to know and describe their needs. To achieve this, the remarkable approach of Nigeria could be followed, by creating the functions of IDPs camp or community chairpersons through which IDPs would actively participate in decisions regarding the protection offered to them.[114] In

110 Mangala (n 98) 1071.

111 Of the 10 centres that are supposed to form this system, only two are currently operational, one in Yaoundé for the Centre region and the other in Douala, for the Littoral region.

112 R Nunn 'Effective community-based protection programming: lessons from the Democratic Republic of Congo' (2016) 56 *FMR* 41.

113 Cotroneo & Pawla (n 107) 38.

this regard, and considering specifically the situation of IDPs as a result of the crisis in the NW/SW regions, it is notable that the Organic framework for the implementation of the Plan for the Reconstruction and Development of the North-West and South-West Regions includes representatives of youth and women's associations.[115] However, it would be appropriate to make this Organic framework more inclusive by considering a modification of the Order establishing it so as to add to its composition representatives of IDPs communities, who constitute the critical mass of victims of this crisis. Alternatively, a mechanism could be put in place, albeit informal, for consultation between the regional coordinators of this Framework who are closer to the people. The regional coordinators could then convey the expectations and recommendations of the populations concerned to the Organic framework central authorities.

Thirdly, it would be important to strengthen the dissemination of information about measures put in place for IDPs in order to enable them to have continuous access to information on these measures and to make use of them. Television and radio stations should be more widely used to this end. In particular, the production of reports, documentaries or debates based specifically on these measures could be envisaged. Similarly, the opportunities for visibility offered by the new information and communication technologies should be more widely exploited. To this end, the various programmes and other mechanisms competent to deal with challenges that concern IDPs should have a Facebook and Twitter account.

Fourthly, ongoing cooperation with humanitarian actors and development partners should be strengthened. Increased cooperation with these actors offers more opportunities for the state to benefit from their experience and resources. It also helps to facilitate the coordination of interventions and improve access for the provision of humanitarian assistance to IDPs communities.[116] One of the priority areas where cooperation should be strengthened in this regard is that of IDPs needs assessment. As noted above, the adequate coverage of IDPs needs is largely dependent on their comprehensive and consistent assessment. In this respect, it is suggested that negotiations should be engaged with the IOM to explore the possibility of extending the operationalisation of the above-mentioned DTM tool to other regions where IDPs are located. In addition, calls for multi-, cross-, intra- and inter-sectoral partnerships should be increased in order to raise the resources needed to finance the various emergency plans developed to improve the situation of IDPs. Humanitarian partners already present in the field and who are fully aware of the inadequacy of available resources in the face of the scale of the needs of populations in distress should support Cameroon in this process in order to strengthen advocacy aimed at drawing the attention of funding partners and other

114 Cotroneo & Pawla (n 107) 39.

115 Order N0 031/CAB/PM OF 03 AVR 2020 to lay down the organic framework for the implementation of the Presidential plan for the reconstruction and development of the North-West and South-West Regions, art 5 and 12.

116 ICRC (n 59) 41.

humanitarian actors to this situation. In a context of scarcity of available resources, the permanent pooling of contributions and energies is essential to meet the colossal challenge of protecting and assisting all people affected by internal displacement in Cameroon.

5 CONCLUSION

This article has shown that much still needs to be done to ensure that the objectives of the Kampala Convention are fully achieved in Cameroon. Having established this, we argued that the dissemination of human rights standards, the incorporation of the provisions of the Kampala Convention into Cameroon's national legislation, and the strengthening of cooperation could go a long way to filling the gaps identified. But beyond these measures, it is first and foremost important to reinforce respect for the rules of IHRL and IHL. It cannot be said enough, if these rules were better respected, internal displacement could to a large degree be prevented from happening in the first place. Besides, the situation of internal displacement in Cameroon cannot be durably resolved until the challenges of effective humanitarian response and peacebuilding are adequately addressed, as both issues are interrelated. Without continuous commitment to tackle the root causes of situations of armed violence, there is a risk of repeated patterns of internal displacement and humanitarian crisis, and unless IDPs are effectively stabilised through adequate protection and assistance, there can be little hope of achieving sustainable peace in Cameroon.

The role of human dignity in the jurisprudence of the African Commission on Human and Peoples' Rights

*Tsega Andualem Gelaye**
https://orcid.org/0000-0002-1635-6349

ABSTRACT: Human dignity is a concept that is often mentioned in core human rights treaties and national constitutions as the foundation of human rights. At its core it demands respect for the life and integrity of the human person, recognition of the equal worth of human beings and respect for their autonomy or self-determination. Many national and supra-national courts also use the concept to explicate the meaning and limitations of human rights. The constitutional court of Germany, South Africa and the European Court on Human Rights are notable in this regard. In recent years, the US Supreme Court has also increasingly used the concept in resolving hard cases and expanding the scope constitutional rights. Though, the role and application of human dignity has received considerable scholarly attention, it is mainly confined to the European constitutional orders and the US constitutional system. With respect to regional human rights systems, scholars have largely focused on examining the role of human dignity in the jurisprudence of European Court of Human Rights and the Inter-American Court. As such, little is known about what role human dignity is playing or could play in the interpretation of rights in the African human rights system. This is alarming considering the poor status of protection of human rights and weak constitutional right jurisprudence in many countries of Africa. Accordingly, this article seeks to fill the lacuna by examining the role of human dignity in the African human rights system by exploring its place in religious and cultural value systems of different African societies.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le rôle de la dignité humaine dans la jurisprudence de la Commission africaine des droits de l'homme et des peuples

RÉSUMÉ: La dignité humaine est un concept souvent mentionné dans les principaux traités des droits de l'homme et les constitutions nationales comme étant le fondement des droits de l'homme. Elle exige essentiellement le respect de la vie et de l'intégrité de la personne humaine, la reconnaissance de l'égale valeur des êtres humains et le respect de l'autonomie ou de l'autodétermination des êtres humains. De nombreux tribunaux nationaux et supranationaux utilisent également ce concept pour expliquer le sens et les restrictions des droits de l'homme. Les Cours constitutionnelles d'Allemagne et d'Afrique du Sud et la Cour européenne des droits de l'homme sont remarquables à cet égard. Ces dernières années, la Cour suprême des États-Unis a également eu de plus en plus recours à ce concept pour résoudre des affaires complexes et étendre la portée des droits constitutionnels. Bien que le rôle et l'application de la dignité humaine aient fait l'objet d'une attention considérable de la part des chercheurs, ils sont principalement limités aux ordres constitutionnels européens et au système constitutionnel américain. En ce qui concerne les systèmes

* LLB, LLM (Addis Ababa University) LLM, SJD (Central European University), Assistant Professor, Ethiopian Civil Service University, School of Law and Federalism; tsega.andualem@gmail.com

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régionaux des droits de l'homme, les chercheurs se sont principalement concentrés sur l'examen du rôle de la dignité humaine dans la jurisprudence de la Cour européenne des droits de l'homme et de la Cour interaméricaine. En conséquence, on n'en sait pas trop sur le rôle que la dignité humaine joue ou pourrait jouer dans l'interprétation des droits dans le système africain des droits de l'homme. Cette situation est préoccupante si l'on considère le faible niveau de protection des droits de l'homme et la faible jurisprudence en matière de droits constitutionnels dans de nombreux pays africains. En conséquence, cet article cherche à combler cette lacune en examinant le rôle de la dignité humaine dans le système africain des droits de l'homme. Il explore sa place dans les systèmes de valeurs religieux et culturels de différentes sociétés africaines.

KEY WORDS: human dignity, equality, cultural value systems, human rights system

CONTENT:

1 HUMAN DIGNITY AS AN AFRICAN CULTURAL CONCEPT

The essence of human dignity is attribution of respect to a human person and the recognition of their superior value in comparison to other creatures.[1] This idea is commonly believed to have originated from the teachings of Christianity or the exposition of European philosophers such as Immanuel Kant.[2] In contrast, the idea is portrayed as unknown and alien to the African continent and its inhabitants. This is partly due to the writings of philosophers such as Hegel who seem to have a very condescending view of Africa and the capacity of its people, which seems to have contributed a great deal to the general misconception about the continent for generations to come.[3] Hegel describes Africa as 'land of childhood' and underscores the uncivilised status of the African people by noting that 'the Negro exhibits the natural man in his completely wild and untamed state'.[4] It does not take much effort to infer from these statements his equation of an African person with that of a child in his thinking and behaviour, not having any manner or rules for conducting his relationship with others. He also emphasises the 'wildness' and 'savagery' of the African people

1 M Mahlmann 'Human dignity and autonomy on modern constitutional orders' in M Rosenfeld & A Sajó (eds) *The Oxford handbook of comparative constitutional law* (2012) 370-396.

2 MD Cohen 'A concept of dignity' (2011) 44 *Israel Law Review* 11-17.

3 B Camara 'The falsity of Hegel's theses on Africa' (2005) 36 *Journal of Black Studies* 82-96; M Mutua 'Savages, victims and saviors: the metaphor of human rights' (2001) 42(1) *Harvard International Law Journal* 201- 202; OS Nwosu 'Morality in African traditional society' 26(2) *New Political Science* 205.

4 F Hegel *The philosophy of history* (2001) 109.

which necessitates their domestication or taming by the higher beings (the Europeans). If what Hegel is saying is taken at face value, it might seem plausible to contend that human dignity has no roots in Africa (a wholly foreign concept that Africans need to learn from others for its goodness), because its very inhabitants are savages having neither the capacity nor the time to contemplate about it. Yet, it is important to also note that while European philosophers like Hegel were discussing human dignity, European society and culture rarely practiced this in their treatment of European foreigners, people of other races, women, children, criminal suspects, people with disabilities, and the poor.[5] European society of the period was savage and wild and had no interest in humane considerations.

Further, it was assumed that Africans are not capable of entertaining any abstract thought and their state of mental development does not allow them to think about how they should treat each other and treat their fellow beings with respect.[6] Their ability to entertain ideas of God and religion is accordingly limited. Beside the account of European philosophers, Christian missionaries who sought to spread Christianity to Africa also contributed their part for the characterisation of African tradition and culture as barbaric devoid of any notion of human dignity in it.[7] Hence, the dominant (pre) colonial narrative about Africa and Africans in the past was that they are 'brutes', 'cannibalistic', 'crude', 'primitive', 'dark', 'savages', 'pagan', 'ignorant' with no contribution for human history or civilisation.[8]

Here, it might help to examine why this line of thought/picture of Africa and Africans was propagated. Discovering the reason for such characterisation of Africa is not that sophisticated. It is chiefly to provide a justification or an excuse for the colonisation of African by the West and all the evils that happened the name of 'civilizing' or 'humanizing' Africans.[9] Hence, in order to subjugate Africans to control by the Europeans, their portrayal as beasts and savages is crucial because it gives the impression that the colonisers are doing Africans a favour by controlling and guiding them because Africans lack the intelligence to govern themselves. In contrast, if the African culture and its people are considered to be civilised and their value system acceptable, the colonisers would lack the ground for controlling them other than for the sheer selfish desire of looting resources. Beside the

5 M Foucault *Discipline and punish: the birth of the prison* (1995) 3-31; VC Fox 'Historical perspectives on violence against women' (2002) 4(1) *Journal of International Women's Studies* 15-34; I Marini et al *Psychosocial aspects of disability insider perspectives and strategies for counselors* (2018) 3-31; T Cribelar 'From sin to laziness: early modern views of the poor and poor relief' https://www.eiu.edu/historia/cribelar.pdf (accessed 11 September 2021).

6 N Emeghara 'The dignity of the human person in African belief' (1992-1993) 14 *Theology Annual* 126-137.

7 Emeghara (n 6) 137.

8 Emeghara (n 6) 137.

9 B Bowden 'In the name of civilization: war, conquest, and colonialism' (2019) 23 *Pléyade* enero-junio 73-100; A Fatima 'Othering of Africans in European literature: a postcolonial analysis of Conrad's 'Heart of darkness' (2015) 3(5) *European Journal of English Language and Literature Studies* 40-45.

issue of resources, painting the African traditional religion and belief system as savage and ridiculous, also gives advantage to religions such as Christianity and Islam to get followers in Africa. One of the most effective strategies to make people abandon a certain value system is to depict it as evil and barbarous.[10] This seems to be what the missionaries did to traditional African religions and succeeded in making the people believe what they say is true and win them over.

The next important issue worthy of examination is whether what people like Hegel and the missionaries are saying about Africa and Africans is plausible? More specifically, whether the claim that Africans are alien to the ideals of human dignity is indeed true or it is something that is based on sheer misconception and ignorance about African way of life. Before analysing this subject, it is important to raise one important concern with respect to how one should approach the genealogy of dignity in different cultural traditions. A person may follow different methodologies in an attempt to discover the presence or absence of human dignity in a certain community. The most common approach is to look for the word 'human dignity' in written texts and laws of the community.[11] If one follows this narrow approach of finding human dignity, one may be easily led to the conclusion that dignity is alien to the society simply because the word is absent from written documents. This is particularly relevant for the study of African history and value systems since most of the written pieces were destroyed by the colonisers and the African people largely relied on oral tradition.[12] As such, a person genuinely interested in the discovery of the notion of human dignity in Africa must be sensitive to this reality.

This in turn requires a more nuanced method of discovery which is not merely confined to searching for the word 'dignity' in written form. Instead, it requires inquiring into whether a given society has the ideal of treating human beings as creatures of special worth/value and looks for manifestations of such ideas in the right places.[13] These places include oral traditions, songs, their way of life, conception of religion and its practice, manners of treating individuals, as well as the duty and privileges of individuals in the community among others. In general, a holistic consideration of the community culture and value system must be considered to arrive at a sound conclusion. The adoption of such approach in the writer's view, will affirm the idea that human dignity is not an alien concept to Africa and its marks are found in different cultures of African pre-colonial communities. Yet, it is also important to bear in mind that African culture is not homogenous and like any other society there are practices which are incompatible with the idea of human dignity. In subsequent paragraphs of the article, an attempt

10 F Nkomazana & S Doreen 'Missionary colonial mentality and the expansion of christianity in Bechuanaland Protectorate' 1800 to 1900' (2016) 29 *Journal for the Study of Religion* 29-55.

11 M Mahlmann 'The good sense of dignity: Six antidotes to dignity fatigue in law and ethics' in C McCrudden (ed) *Understanding human dignity* (2014) 593-614.

12 K Wiredu 'An oral philosophy of personhood: comments on philosophy and orality' (2009) 40 *Research in African Literatures* 8-10.

13 Mahlmann (n 11) 595.

is made to demonstrate how some African societies recognise and respect human dignity by examining the anthropological and philosophical studies conducted on three indigenous African people, namely, the Igbo, the Akan and the Bantu people.

1.1 The Igbo and human dignity

The Igbo people are one of Africa's indigenous peoples in the present-day Nigeria. According to a study by Emeghara, a closer look at their conception of human creation, mode of worship and community life provides ample evidence to the respect traditional African societies had for human person which lies at the centre of the modern notion of human dignity.[14] To begin with their view of human origin, they believe that every human being is the work of Chukwu (God). What makes human beings more valuable than any other creature is the possession of *chi* (soul) which they believe is an imprint of God's nature. As such, they believe that God is within every human person through his *chi*.[15] This view of human beings and their worth is akin to the Christian conception of *imago dei* that ascribes dignity to human beings because they were made in God's image. However, the Igbo also identified other factors which may trigger respect for human beings beside their creation by God. The understanding of human beings as spiritual beings and recognition of their volition could be mentioned as an example in this regard.[16] To begin with spirituality, the Igbo believe that human life continues in a spiritual form, and it is not extinguished at death. Hence, the immortality of human soul/spirit may be interpreted as a conception of a special value of human beings that make them stand out from others. This may also explain the ascription of an important status to the dead members of the community commonly known as ancestors whose implicit presence is recognised and respected. Further, the possession of free will and volition in human heart/nature is also believed by the Igbo as distinguishing marks of a human being. As such, the capacity in human heart to do good and evil is recognised. This understanding of the Igbo resembles the position of some European philosophers like Kant emphasising the unique limited properties of human beings as a justification for bestowing dignity on them.

A closer look at the manner of worship and way of life in Igbo community also displays the respect they have for human life and human person. According to Obasola, life 'is a primary value and highly esteemed among the Africans'.[17] The community manifests its concern for human life in the names it gives for children and in the manner, it seeks to protect human life. For instance, names like '*Ndubuisi* (life is

14 Emeghara (n 6) 126-137.

15 Emeghara (n 6) 126-137.

16 Emeghara (n 6) 126-137.

17 KE Obasola 'Ethical perspective of human life in relation to human rights in African indigenous societies' (2014) 8 *International Review of Social Sciences and Humanities* 29-35.

the primary value)', and *Nduka* (life is the greatest thing) are common in Igbo people.[18] Several beliefs and rules of the Igbo community also demonstrate the respect they have for human life from their perspective. To illustrate, one can mention the absolute prohibition of taking one's own life. The community shows its disdain against such practice by not burying and mourning for the person who committed suicide.[19] This shows the modern debates about assisted suicide and its controversies are not new to the African mind and culture. Further, the community respects the value of human life even at its earliest stage of development. This could be seen from the way the Igbo handle the death of pregnant women in the past. When such incident happens, the Igbo conduct a surgery on the women to extract the fetus and arrange a separate burial for both.[20] This may be interpreted as a barbaric and absurd practice with no logical justification. But from the other side, it could also be interpreted to show how the Igbo respect human person in a fetus form by their attempt to value it through a separate burial. Moreover, respect for human life and its value, is always present in Igbo prayers.[21]

The most visible manifestation of the Igbo respect for human dignity is found in their communal life, manner of treating each other and their value system.[22] Like for many African communities, communal way of life and the duty of the individual to further the common good of the community is a cherished matter. More specifically, the central prescription of Igbo community is the requirement for every individual to show respect for other members by displaying hospitality, supporting the weak and displaying solidarity.[23] At the core of these practices lies respect for a human person and recognition of his unique worth. To show hospitality and friendly treatment to another human being is nothing but affirmation of his special value. It is also a complete opposite of hatred and unfriendly treatment that denies the value of certain human beings. Thus, one does not need to find a detailed philosophical account about dignity in a written form to appreciate the existence of notion of human dignity in a certain community. The way it treats its fellow beings gives enough testimony to a person with an open eye to see if human dignity is there. Likewise, support for the weak and the fortunate, underscore the belief of the community of according equal concern and appreciation of the value for human beings irrespective of their status or circumstances. Hence, the Igbo had a notion of human dignity.

18 Obasola (n 17) 29-35.

19 Obasola (n 17) 29-35.

20 Obasola (n 17) 29-35.

21 OS Nwosu 'Morality in African traditional society' (2004) 26(2) *New Political Science* 205-229.

22 Emeghara (n 6) 126-137.

23 Emeghara (n 6) 126-137.

1.2 The Dinka and human dignity

The Dinka are African indigenous people living in the present day of South Sudan, the eastern part of Africa. Like the Igbo, one can find the traces of notion of human dignity in the Dinka culture and value system. Francis Deng, an anthropologist and lawyer, has spent a considerable time and energy in studying the Dinka way of life and its relation to the modern conception of human rights that is primarily grounded on the notion of human dignity. His study reveals one of the misconceptions about societies in pre-colonial Africa. Commonly, African communities are perceived as having no value system for ordering their society and all one can find is endless chaos and war. The falsity of this assumption could be seen if one examines the culture of the Dinka.

According to Deng, the Dinka have a moral ideal/vision of a society they want to create and maintain. These notions are embodied in the Dinka concept called *Cieng* which embodies 'values of dignity, respect, loyalty and care for human person among others'.[24] The *Cieng* is a moral code of conduct that every member of the Dinka community must adhere to and observe. As noted above, its ultimate aim is ensuring respect for human a person through the prescription of treatment that goes with it. As such, for the Dinka an ideal society is one where the dignity of every member of the community is valued. The *Cieng* also imposes a duty on each member of the community to care for the wellbeing of others. These moral prescriptions preserve the essence of human dignity as we understand it today. Hence, the ideals of human dignity are not foreign to the Dinka and one could infer this from their moral code of conduct and its prescription.

The strength of their commitment to the *Cieng* is demonstrated by the consequences attached to the violation of the moral law. Like the Igbo, the Dinka also believe that the ancestors are the guardian of the Dinka moral order.[25] Thus, an individual who breached the *Cieng* will be punished by them. Beside their central moral code of conduct, the *Cieng*, other traditions and practices of the Dinka also affirm the recognition of human dignity and human worth. For instance, in making a decision or taking a certain course of action that affects the community, the Dinka give priority for persuasion over the use of force or violence or coercion.[26] This practice could be interpreted to indicate the value the Dinka give for the opinion of every person and the degrading nature of getting something done by forcing or compelling someone against his free will. Such an interpretation approximates the modern understanding of human dignity that demands the treatment of every person as an end not as a means.

24 F Deng *The Dinka of the Sudan: case studies in cultural anthropology* (1972) 14-24; F Deng et al *Human rights: southern voices* in W Twininng (eds) (2009) 4-15.

25 Deng (n 24) 4-15.

26 F Deng *Identity, diversity and constitutionalism in Africa* (2008) 77-100.

Further, one can also infer the war ethics of the Dinka and see their attempt to ensure respect for a human being irrespective of the fact that he is an enemy. According to the Dinka culture, a wounded enemy fighter must be treated and taken care of by the women.[27] Such gesture towards the enemy could be inferred as having its source in respect for humanity or the human person. Another interesting practice in Dinka tradition is the *dheeg*.[28] Although exact translation of the practice to English is a challenge, it basically refers to social dignity of a person in the Dinka community. According to Deng, individuals could attain the respect of the community in three ways.[29] The first is the acquisition of dignity by birth or marriage. As such, a person will assume an elevated status in the community if he is born out of a class esteemed by the community or joins such family by means of marriage. But this is not the only way of acquiring societal respect in the Dinka. An individual also earns his respect in the community, if he owns cattle which is the most revered thing for the Dinkas or conforms to the moral prescription of the *Cieng*. Thus, a poor person is treated with respect in the community if he is an adherent to the requirements of the *Cieng* and displays a friendly and respectful behaviour towards other members of the community. Finally, social dignity could also be ascribed in a person by virtue of his physical appearance or beauty. Beauty and the body of the human person are treasured in the belief of the Dinka.

1.3 The Bantu conception of human dignity: ubuntu

One of the most widely known indigenous African value systems (in relative terms) that is often associated with the notion of human dignity is the ubuntu tradition of African people of Bantu descent. These people mainly live in Southern and Eastern parts of Africa and ubuntu is central to their societal organisation and day to day life. It is difficult to capture the whole essence of ubuntu with one single definition. But at its core lies the idea '*Umuntu Ngumuntu Ngabantu'*, which can be translated as "a person is a person because of or through others".[30] The centrality of society in the definition of personhood is evident from this statement. As such, an African world view of individual and their link to the community is different from that of the West. In western philosophical discourse, the status of the individual and their humanity is found internally and located within the person themselves (inheres within).[31] Hence, the role of the community in the acquisition of personhood or humanity is not often emphasised. As such, interaction with the community seems not to add anything to the human quality of

27 Deng (n 26) 77-100.

28 Deng (n 26) 77-100.

29 Deng (n 26) 77-100.

30 D Cornell & N Muvangua *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* (2012) 5.

31 IA Menkiti 'Person and community in African traditional thought' in RA. Wright (ed) *African philosophy: an introduction* (1984) 171-181; JE Lassiter 'African culture and personality: bad social science, effective social activism, or a call to reinvent ethnology?' (2000) 3(3) *African Studies Quarterly* 1-15.

the individual nor diminish it. Hence, personhood or humanity is rather internal than external.

The view of humanity and personhood in ubuntu thought is the complete opposite of this thinking. As such, a person acquires personhood or humanity only through their relation with their peers and the community.[32] A corollary of this belief is that what makes the person a human is not his mental or bodily attributes or features. Rather, it is their friendly and cooperative interaction with others that leads to their transformation to state of a human being. Some authors contend that for an African, personhood is something which a person may not succeed in achieving.[33] This means unless a person receives the assistance of others they will not be able to develop to a full human being by their own effort and will. Further, depending on the degree of interaction and good relation with others a person may become more or less of a person.[34] As such, when they show respect and concern for others and strive for their wellbeing, a person is regarded as having an ubuntu. In contrast, they will be considered as lacking ubuntu when they attempt to promote their wellbeing at the expense or in disregard of the interest of others.

As the previous paragraphs demonstrate, interdependence is a supreme good in the philosophy of ubuntu. Hence, an individual is expected to flourish as a person by receiving the support of others and has the duty to do the same for others to flourish or develop.[35] Thus, the person relies on others for their development and others can rely on them to achieve their destiny or wellbeing. Beside the emphasis on interdependence and community centred personhood, ubuntu sets certain standards and guidelines on how individuals should treat each other or relate. The core prescription in this regard is treating every person with respect, concern and friendliness.[36] It is only such kind of treatment that conforms to the ubuntu philosophy and leads to personal and communal development. Unfriendly treatment of others and lack of concern for their wellbeing is contrary to the value of ubuntu.

The other point which requires further analysis is the similarity of ubuntu with the understanding of human dignity in western philosophical thought. Some writers warn us of the danger of conflating human dignity and ubuntu, for the reason that such approach deprives us the opportunity to benefit and appreciate the unique features and addition of ubuntu.[37] One difference that is often noted in the ubuntu

32 T Metz 'African conceptions of human dignity: vitality and community as the ground of human rights' (2012) 13 *Human Rights Review*19-37; T Metz 'Human dignity, capital punishment, and an African moral theory: toward a new philosophy of human rights' (2010) 9 *Journal of Human Rights* 81-99.

33 Metz (n 32) 81-99.

34 Metz (n 32) 81-99.

35 Metz (n 32) 81-99.

36 Metz (n 32) 81-99.

37 D Cornell 'A call for a nuanced constitutional jurisprudence: South Africa, *Ubuntu*, dignity, and reconciliation' in D Cornell & N Muvangua *Ubuntu and the law African ideals and post-Apartheid jurisprudence* (2012) 324-333.

scholarship is the focus of Kantian understanding of dignity on the autonomy of the individual contrary to the relationship centered view of humanity in ubuntu.[38] As such, it is argued that what is central about the human person in Kant's philosophy is the autonomy or the ability of the individual to make free choice. This does not seem to be the emphasis in ubuntu which seems to value friendly relationship between individuals more than individual capacity for choice.[39] However, since Kant talks about freedom under moral law, the complete differentiation of his thought with that of ubuntu should not be over emphasised.

These findings also demonstrate that non-western cultural traditions are not always incompatible with the basic conception of human dignity and human rights as it is often perceived. Rather the essence of these values is also present in the cultural traditions of various African communities.[40] Thus, no particular culture has a monopoly or ownership over human dignity. Respect for human dignity at a basic level is rather a value shared by all societies and there is a wide range of cross-cultural consensus on it. This also means that radical universalistic understanding of human dignity is problematic because it completely dismisses the relevance of cultural values in validating and shaping conceptions of human dignity.[41] Such position is incompatible with the reality and it may not also support the cause of human rights. The better approach is to use cultural values to further promote and legitimise respect for human dignity instead of rejecting them in their entirety. However, radical cultural relativist approaches, which make culture the sole determinant of any value and reject the existence of any universal value at any level, are also problematic.[42] They may also serve to justify gross violations of human dignity by invoking their compatibility with the conception of human dignity accepted in a particular cultural tradition. The challenge here is to strike a delicate balance between the universal and local understanding of human dignity, without one completely eliminating the other. As long as the culture of a certain community upholds basic respect for human dignity shared at universal level, it may be legitimate to allow it to add its own conceptions or variation of human dignity. This would further enrich human dignity and entrench respect for it at a deeper level instead of undermining it. To illustrate, in many African societies communal interaction and harmony is an important value. Such way of thinking must not be necessarily identical to the western approach that gives central place for individual autonomy. Further, such variation in itself it is not a violation or danger for respect for human dignity, as long

38 T Metz 'Dignity in the Ubuntu tradition' in Marcus Düwell and others (eds) *The Cambridge handbook of human dignity: interdisciplinary perspectives* 310-317.

39 Metz (n 38) 310-317.

40 F Deng 'A cultural approach to human rights among the Dinka' in AA An-Na'im & FM Deng (eds) *Human rights in Africa: cross cultural perspectives* (1990) 261-289.

41 J Donnelly 'Cultural relativism and universal human rights' (1984) 6(4) *Human Rights Quarterly* 400-419; J Donnelly *Universal human rights in theory and practice* (2013) 108-110.

42 Donnelly (n 41) 108-110.

as the respect for communal life does not destroy or eliminate the autonomy of the individual.

2 THE ROLE OF HUMAN DIGNITY IN THE JURISPRUDENCE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights (African Charter) gives explicit recognition to human dignity. Reference to dignity is made three times, in the Preamble and in a specific article of the Charter.[43] To begin with the Preamble, the notion is invoked in relation to the then Organisation of African Union (OAU) Charter which states that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'.[44] The African Charter reiterates the importance of these objectives through direct quotation from the constituting document of the OAU. Beside this, the Preamble also mentions dignity by linking it to the issue of colonialism. Africa was a victim of colonial ambition of the European powers. At the time of the adoption of the African Charter, some African states were still struggling to regain their independence. Cognisant of the gross indignity that colonisation has inflicted on African people and the severity of the problem, the Charter underscores the need to support people fighting for their dignity and work towards the elimination of all manifestations of indignity be it discrimination or Apartheid. A similar statement is also reiterated in the Constitutive Act of the African Union. The act celebrates the 'heroic' fight of the African people for their 'dignity' and independence; underscores the need for preserving these ideals in the African continent.[45]

Here one may ask what significance is of an express incorporation of dignity in the preamble of the African Charter. The scholarship on treaty interpretation underscores the importance of statements incorporated in preambles. Accordingly, one of the core functions of preambles is to specify the purpose that specific provision of the treaty seeks to achieve.[46] As such, they serve as guidance in the interpretation of treaties by judicial bodies. This helps to minimise the misapplication of specific provisions of the treaty. If preambles have such a role, the presence of human dignity in the African Charter is a positive development, since the adjudicatory bodies will have the mandate to use the concept in the discovery, explication, application and limitation of rights in it. Hence, it could be argued that human dignity is a value that shapes the interpretation of human rights in the African Charter.

43 African Charter on Human and Peoples' Rights (1986) Preamble & art 5.

44 African Charter (n 43) art 5.

45 Constitutive Act of the African Union (2000) Preamble.

46 MH Hulme 'Preambles in treaty interpretation' (2016) 164 *University of Pennsylvania Law Review* 1300

Beside the preamble, article 5 of the African Charter is dedicated to the right to dignity and combating several manifestations of its violations. The article provides that 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.[47] It recognises an enforceable right to dignity in the African Charter. In this sense, it is different from the reference to dignity in the preamble which is more of a value that informs all the rights incorporated under the Charter. Further, the article unequivocally perceives dignity as something that is embedded within every human person. Such understanding of human dignity resonates with the provisions of several human rights instruments such as the Universal Declaration of Human Rights. Moreover, the provision has also attempted to exemplify circumstances where the right to human dignity may be violated. These include among others denial of legal status to a human person, slavery, torture and inhuman treatment.[48] The list here is only illustrative and there is a room to include more acts within this article through interpretation, as long as the inherent dignity of human beings is seriously undermined by the practice in question.

Thus, arguably human dignity is recognised in the African Charter as an interpretative value and enforceable right. A closer look at the preamble and article 5 of the Charter supports such conclusion. If this is the case, it means adjudicatory bodies of the African Charter as well as the domestic courts of states which have ratified the African Charter, have the duty to elaborate and apply human dignity in the interpretation of human rights incorporated within the charter. The following paragraphs of the article examine the dignity jurisprudence of the African Commission and the overall place of dignity in the African human rights system. Before doing that, it may be important to say a few things about the institutional framework. The African Commission on Human and Peoples' Rights (African Commission) is the main body in the African human rights system that is entrusted with the mandate of human rights promotion and protection in the continent.[49] Yet, its decisions are usually not enforced and its power of enforcement seems to be confined to reporting to the assembly of head of states.

That being said about the institutional structure, let us examine the human dignity jurisprudence of the African Commission so far. Accordingly, only the respect for integrity and equal worth aspects of human dignity are recognised in the decisions of the Commission. The number of human dignity inspired decisions are also few. Two of them deal with physical and emotional integrity. Three other cases focus on the equal worth aspect dealing with non-discrimination. To begin with the physical and emotional integrity aspect, the first important case is *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard*

47 African Charter (n 43) art 5.
48 African Charter (n 43) art 5.
49 African Charter (n 43) art 30.

Kobedi) v Botswana.[50] The case concerns the execution of the death sentence in Botswana on a person convicted of killing a police officer. In this application, the violation of article 5 of the African Charter was alleged on a number of grounds. The first involves the health condition of the applicant as he was suffering from a heart condition. Here, the argument was that the failure of courts to consider the health condition of the applicant and the order of execution by hanging is a cruel and inhuman treatment.[51] The second ground is on the failure of the court to notify the family of the applicant of the day of the execution. This in the view of the advocate deprived the applicant a dignified farewell.[52]

The decision of the Commission on this case is interesting and problematic from the perspective of human dignity. First, the Commission decided that the claim that execution by hanging causes severe suffering on the accused is speculative and insufficiently proved.[53] What makes the case interesting is that the Commission did not ask whether the very act of the death penalty is compatible with the intrinsic worth of a human person. That aside, the Commission even failed to find a violation on the cruelty of the manner of execution. Given the health condition of the accused, it would have been difficult to allow death by hanging if the Commission followed a strictly digniterian approach of interpretation. Surprisingly, the commission found violation of article 5 for the second ground which is the failure of the Botswanan court to provide information about the date of execution. This in the Commission's view violates the human dignity of the applicant. In the view of the writer, this is a very weak conception of human dignity. The only plausible explanation for the conclusion the Commission arrived at could be the fact that the applicant was executed before it rendered the decision.

A related case of inhumane treatment where the issue of dignity was decisive is Institute for *Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*.[54] The case concerns the deportation of Gambian miners legally working in Angola subsequent to the adoption of a policy of expelling foreigners. In the course of this process, the applicants alleged the commission of arbitrary detention and maltreatment on the basis of their origin. They were also kept as prisoners in a house that is filled with animal waste since animals used to live in it before the prisoners moved into it.[55] In addition, the prison was not big enough to accommodate all prisoners. Thus, they had to sleep, eat and take bath in the same place. They did not also receive a sufficient amount of food, water and medical aid. For instance, only two buckets of water were provided for 500 prisoners per day.[56] Based on all these facts, the prisoners alleged the violation of a

50 *Spilg, Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* Communication 277/03.

51 *Splig v Botswana* (n 50).

52 *Splig v Botswana* (n 50).

53 *Splig v Botswana* (n 50).

54 *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola,* Communication 292/04.

55 *IHRD v Angola* (n 54).

number of rights recognised under the African Charter including the right to dignity. The Commission, without much reasoning ruled in their favour by noting that the treatment they have received is clearly a violation of article 5 of the African Charter since such a treatment cannot be called anything but degrading and inhuman.[57] In arriving at this conclusion, the Commission also referred to the dignity jurisprudence of the UN Human Rights Committee.

Another decision of the African Commission is *Purohit and Moore v Gambia*.[58] The case concerns mentally ill patients detained in Gambian hospitals. The communication particularly challenges provisions of the Lunatic Detention Act of Gambia (LDA).[59] One of the most problematic aspects of the law is its failure to specifically define who a 'lunatic' is and on what criteria their status is determined. This is problematic considering the fact that a person declared lunatic is susceptible to indefinite detention in a medical detention centre and the process of determination lacks clarity or review.[60] The applicants in this case alleged the violation of their right to dignity recognised under article 5 of the African Charter.

The Commission began its decision on the issue by noting that 'human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination'.[61] In addition, the Commission expressly mentioned the duty to 'respect' and 'protect' the right to dignity as an obligation enshrined under the African Charter. It further ruled that 'under the LDA, persons with mental illness have been branded as 'lunatics' and 'idiots', terms, which without any doubt dehumanise and deny them any form of dignity in contravention of article 5 of the African Charter'.[62] Through this decision, the Commission affirmed the need to respect the intrinsic worth or value of every human person irrespective of his mental or physical disability, which is a step in the right direction. In other words, the Commission's decision in this case shows that a human person will not lose his respect or dignity, by virtue of his disability. Rather he is valued or respected as any other member of human family.

On the equal worth aspect of human dignity, the first important case is that of the *Nubian Community in Kenya v Kenya*.[63] It concerns person of Nubian decent living in Kenya. The Nubian community used to live in Sudan originally but the British colonisers forced some members of the community to join the British army and reside in Kenya. During the colonial time, the Nubians did not have any legal

56 *IHRD v Angola* (n 54).
57 *IHRD v Angola* (n 54).
58 *IHRD v Angola* (n 54).
59 *Purohit & Moore v Gambia*, ACHPR communication no 241/2001.
60 *Purohit v Gambia* (n 59).
61 *Purohit v Gambia* (n 59).
62 *Purohit v Gambia* (n 59).
63 The *Nubian Community in Kenya v The Republic of Kenya* ACHPR communication 317/06.

status. They were neither British nor Kenyan citizens. When Kenya got its independence the issue of the Nubian community was not resolved. Later, the Kenyan government came up with a stringent procedure for issuing identity documents such as National IDs and passports to individuals of Nubian decent residing in Kenya.[64] These procedures include the payment of an application fee, the need to bring the ID card of their grandparents (which they cannot produce) and delayed processing of their application which is not applicable to other applicants. As such, the denial of legal status and the difficulty of acquiring identity documents made the life of the Nubians in Kenya very cumbersome and prevented their full participation in the life of the Kenyan community.[65]

In its decision the Commission noted that 'the respect of the dignity inherent in the human person informs the content of all the personal rights protected in the Charter'.[66] This is very important as it shows African Charter's conception of dignity as a permeating value across all rights and not just a single enforceable right. It further reasoned that the Kenyan law that regulates the acquisition of identity documents for Nubians is blatantly discriminatory and arbitrary. The Commission further remarked that there is 'a clear indication that Kenyan Nubians are unfairly discriminated against in the acquisition of identity documents solely on account of their ethnic and religious affiliations, which assails their dignity as human beings who are inherently equal in dignity'.[67] It further invoked article 2 of the Charter dealing with equality and unfair discrimination by underlining that 'differential treatment on the basis of ethnic and religious affiliations is specifically prohibited … they have historically been misused to oppress and marginalise peoples with these attributes, thereby demeaning the humanity and dignity inherent in them'.[68] Here, the Commission made an interesting connection between dignity and equality, using the former to inform the latter. In other words, it used dignity as a guide to determine whether discrimination or differential treatment is fair, which resembles the approach of the Constitutional Court of South Africa.

A similar issue was entertained by the African Commission in the case *Open Society Justice Initiative v Côte d'Ivoire*.[69] The case concerns a challenge to the 'ivorite' policy of the Ivorian government which was introduced on the eve of the 2000 presidential election. Its main aim was to grant Ivorian nationality to persons born from an Ivorian mother and father. This policy was particularly designed to exclude the then Presidential candidate Mr Outaraa a member of the Douala ethnic group of a Burkinabe descent.[70] Pursuant to this policy,

64 *Nubian v Kenya* (n 63).
65 *Nubian v Kenya* (n 63).
66 *Nubian v Kenya* (n 63).
67 *Nubian v Kenya* (n 63).
68 *Nubian v Kenya* (n 63).
69 *Open Society Justice Initiative v Côte d'Ivoire,* ACHPR Communication 318/06.
70 *Open Society v Côte d'Ivoire* (n 69).

the Ivorian Supreme Court prohibited Mr Outara from competing in the election and the incumbent president Gbagbo won the election. Subsequent to this incident, the government intensified the harsh treatment against the Doulas living in the northern part of Ivory Coast, which are predominantly Muslim. Members of the Douala ethnic group faced numerous difficulties in the course of acquiring Ivorian nationality and they were asked to pay a fine for getting citizenship which is not a requirement for other people residing in Ivory Coast.[71] The consequence of denial of legal status and citizenship for the Doulas was too burdensome, which caused the problem of statelessness and their effective exclusion from assuming rights and obligations. In other words, the denial of a legal status entailed the denial of their very existence and a heavy burden on their day to day life.[72] In their communication, the applicants alleged the violation of article 5 of the African Charter which guarantees the right to human dignity and right to a legal status.

In its decision the African Commission ruled in favour of the applicants and found a violation of article 5. Its reasoning also reflected the importance of human dignity in the African Charter beside this specific issue. In this regard, the commission noted that 'Dignity is … the soul of the African human rights system and which it shares with both the other systems and all civilised human societies. Dignity is consubstantial, intrinsic and inherent to the human person. In other words, when the individual loses his dignity, it is his human nature itself which is called into question, to the extent that it is likely to interrogate the validity of continuing to belong to human society … when dignity is lost, everything is lost. In short, when dignity is violated, it is not worth the while to guarantee most of the other rights'.[73]

This is so far the strongest statement of the African Commission on human dignity. It endorsed the centrality of human dignity to the corpus of the African Charter and reaffirmed the fact that human dignity is not alien to African societies rather it is something which they share with 'all civilised human societies' though it did not provide details by making reference to African cultural and religious value systems. It also underscored the intrinsic character of human dignity and its direct relation to human nature. As such, when the dignity of a person is threatened their human nature is also challenged. More importantly, it emphasised the importance of securing human dignity if we are genuinely committed to further the protection of human rights in Africa.

Having made these statements as a premise, the Commission underlined the strong bond between human dignity and legal status. In doing so it referred to the jurisprudence of the European Court of Human Rights and the Inter-American Court.[74] The Commission noted

71 *Open Society v Côte d'Ivoire* (n 69).
72 *Open Society v Côte d'Ivoire* (n 69).
73 *Open Society v Côte d'Ivoire* (n 69).
74 *Open Society v Côte d'Ivoire* (n 69).

that, respect for human dignity presupposes the recognition of the legal status of the person which enables him/her to assume rights and duties in the society. If this status is denied, the individual will not be able to live with dignity. As such,

> the Commission considers that failure to grant nationality as a legal recognition is an injurious infringement of human dignity. Such an infringement seriously affects the legal security of the individual, particularly due to the undermining of a set of consubstantial rights and privileges to the enjoyment of fundamental legal and socio-economic privileges. Ultimately, it is the very existence of the victim which is vitally compromised.[75]

With this reasoning, the Commission found a violation of article 5 of the African Charter.

The cases discussed above show that though human dignity is a core value and right in the African Charter, the commission's jurisprudence so far mainly focused on the integrity and equal worth aspects of human dignity. Even for these aspects, the Commission has not done anything tangible to abolish the death penalty or combat discrimination against sexual minorities on the basis of their sexual orientation through a dignity centred interpretation of the Charter. Hence, the Commission needs to do more in concretising and entrenching human dignity centred interpretation of rights in Africa by starting from within. In this regard, much is expected from the African Commission and the African Court on Human and Peoples' Rights to examine African culture and traditions, in the process of concretising the concept. This is important because human rights do not function in cultural vacuum.[76] They will not become universal simply because we want them to be. The task needs a greater level of commitment to trace the roots of the concept in African local tradition.

In addition, the African Commission can gain insights about the meaning and application of human dignity from national and international courts. The Commission has an express legal mandate to 'draw inspiration' from international law in the interpretation of the Charter.[77] It is also empowered to utilise as subsidiary sources 'other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine'.[78] The Commission has invoked these provisions when it made reference to the dignity jurisprudence of the Constitutional Court of South Africa and the European Court on Human Rights in the few dignity cases it has determined so far. This mandate of the Commission also enables various conceptions of human dignity to travel from one jurisdiction to the other. This is because the African Charter has a supreme status in many African constitutional orders and the interpretation of rights in the domestic system needs to conform to it.

75 *Open Society v Côte d'Ivoire* (n 69).

76 F Deng et al *Human rights southern voices* in W Twininng (ed) (2009) 4-15.

77 African Charter (n 43) art 60.

78 African Charter (n 43) art 61.

Thus, the Commission could be a venue where legal concepts like human dignity are concretised and made ready to transfer to another jurisdiction. In other words, it could serve as a market place for the exchange of constitutional ideas such as human dignity. Yet, the performance of the African Commission so far is not satisfactory. Even if the Commission refers to international and national court in rendering it decisions, it neither critically engages with them nor justifies its choice of jurisdictions. This needs to be improved if the Commission is to serve as a good platform for the migration of human dignity centered interpretation of rights within Africa in the future.

3 CONCLUSION

One of the core conclusions of this article is that human dignity is a concept that occupies a central place in religious, philosophical and cultural worldviews of various African societies. More importantly, the anthropological and religious study conducted on some indigenous African communities such as the Dinka, Zulu and the Igbo demonstrates that the idea of respect for human dignity is not alien to Africa. It is rather expressed and manifested in different forms. Yet, the notion is not sufficiently concretised and used by many courts in Africa to interpret and apply human rights. Thus, cultural values of African communities could serve as input to further enrich and entrench the idea of human dignity. The other point worth noting is that despite the explicit presence of human dignity in the African Charter as a value and a right, the human dignity jurisprudence of the Commission is underdeveloped. This could be inferred from the few human dignity inspired decisions of the commission and their richness. In the future, the Commission needs to develop and strengthen its human dignity jurisprudence by engaging in dialogue with advanced national systems within the region such as South Africa and serve as a site for the development and migration of human dignity centred interpretations of rights to other African systems. This may contribute its part in potentially transforming the rights protection system in the continent.

Framing a human rights approach to communication surveillance laws through the African human rights system in Nigeria, South Africa and Uganda

*Tomiwa Ilori**
https://orcid.org/0000-0002-2765-3103

ABSTRACT: Today, in any society where crime is possible, communication surveillance is a necessary evil. This is because technologies now offer faster means of preventing crime while they are also capable of undermining the right to privacy. However, protecting privacy should not be mutually exclusive of ensuring public safety. This article argues that while communication surveillance may be permissible under narrow and limited circumstances, the laws made to regulate it in Nigeria, South Africa and Uganda do not comply with international human rights standards. In demonstrating this, this article analyses the major laws in these countries alongside the various international human rights principles that must be complied with in framing a rights-respecting law on communication surveillance. The major contribution of this article is that communication surveillance laws can be designed in compliance with international human rights standards in the countries under focus. These include Nigeria, South Africa and Uganda carrying out specific legal reforms targeted at problematic laws on communication surveillance in order to bring them in line with international human rights standards. This can also be supported by developing a more robust set of comprehensive guidelines through the African Commission and Human and Peoples' Rights and ensuring that Nigeria, South Africa and Uganda embark on critical and strategic training for stakeholders involved in the enforcement and implementation of communication surveillance laws in these countries.

TITRE ET RÉSUMÉ EN FRANCAIS:

Définir une approche des droits de l'homme à la législation sur la surveillance des communications à travers le système africain des droits de l'homme au Nigeria, en Afrique du Sud et en Ouganda

RÉSUMÉ: Aujourd'hui, dans toute société où la criminalité est possible, la surveillance des communications est un mal nécessaire. Alors que les technologies offrent désormais des moyens de prévention des crimes plus rapides, elles demeurent tout autant capables de porter atteinte au droit à la vie privée. Cependant, la protection de la vie privée ne devrait pas être incompatible avec la sécurité publique. Cet article soutient que si la surveillance des communications peut être autorisée dans des circonstances étroites et limitées, les lois adoptées pour la réglementer au Nigeria, en Afrique du Sud et en Ouganda ne sont pas conformes aux normes internationales en matière de droits de l'homme. Pour le démontrer, cet article analyse les principales lois de ces pays ainsi que les différents principes internationaux des droits de l'homme qui doivent être respectés dans l'élaboration d'une loi sur la surveillance des communications respectueuse des droits. La principale contribution de cet article est que les lois sur la surveillance des communications peuvent être conçues en

* LLB (Hons); LLM (Pretoria); Doctoral candidate, Centre for Human Rights, Faculty of Law, University of Pretoria; tomiwailori@gmail.com

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conformité avec les normes internationales des droits de l'homme dans les pays sous examen. Il s'agit notamment pour le Nigeria, l'Afrique du Sud et l'Ouganda de mener des réformes juridiques spécifiques visant les lois problématiques sur la surveillance des communications afin de les rendre conformes aux normes internationales en matière de droits de l'homme. Cela peut également être soutenu par le développement d'un ensemble plus robuste de lignes directrices complètes par la Commission africaine des droits de l'homme et des peuples et en s'assurant que le Nigeria, l'Afrique du Sud et l'Ouganda s'engagent dans une formation critique et stratégique des parties prenantes impliquées dans l'application et la mise en œuvre des lois sur la surveillance des communications dans ces pays.

KEY WORDS: communication surveillance, lawful interception, privacy, human rights approach, legal reforms, Nigeria, South Africa, Uganda

CONTENT:

1 INTRODUCTION

At no time has the phrase 'information is power' become more resounding than the turn of the last century. Access to technologies has since increased in many parts of Africa while also bringing with them renewed hopes of political, social and economic liberation.[1] However, as the promises of these technologies becomes bolder, especially in Africa, their threats to human rights have also increased due to human rights violations by state and non-state actors.[2] In addition to these threats, global needs, both in technological developments and maintaining peace and security, have also challenged the meaning of human rights protection especially in the digital age.[3] While in the past,

1 M Manacorda & A Tesei 'Liberation technology: mobile phones and political mobilization in Africa' (2020) 80 *Econometrica* 564; C Dendere 'Tweeting to democracy: a new anti-authoritarian liberation struggle in Zimbabwe' (2019) 38 *Cadernos de Estudos Africanos* 179-187; D Mwambari 'Can online platforms be *e-Pana-Africana Liberation Zones* for pan-African and decolonization debates?' (2021) 5 *CODESRIA Online Bulletin*.

2 H Dube, MA Simiyu & T Ilori 'Civil society in the digital age in Africa identifying threats and mounting pushbacks' (2020) Centre for Human Rights, University of Pretoria https://media.africaportal.org/documents/Civil_society_in_the_digital_age_in_Africa_2020.pdf (accessed 23 April 2021).

3 E Marmo 'Human rights in the digital age: challenging issues in the UN agenda' *Global Policy Forum* 6 April 2020 https://www.globalpolicywatch.org/wp-content/uploads/2020/04/20200406-UN-Monitor-14-Human-Rights-Digital-Technologies.pdf (accessed 5 May 2021).

states have been known more for their roles in deploying communication surveillance,[4] today, they are joined by an entire economy of innovative ideas, emboldened by non-state actors that thrive on predicting human interaction as a source of revenue.[5] The kind of communication surveillance we know originally as state-designed 'backends' now include blatant manipulation of human online behaviour and snooping on private communication by online platforms. As a result, digital technologies have not only brought new challenges, the idea of socio-political power which drives today's democratic developments is now concentrated in fewer private behemoths.[6] Most actors justify communication surveillance on the basis of the need to ensure public safety, prevention of crime, protecting the rights of others, and ensuring national security, while they downplay the negative impacts these justifications have on human rights like privacy.[7]

In most African countries, despite state parties' obligations under international human rights system especially on the use of communication surveillance, there is no comprehensive set of rules on the subject both at the regional and domestic level. While a number of global and regional human rights instruments provide direction on the major principles state parties must consider in the deployment of communication surveillance, currently, most state parties do not have a comprehensive, primary and human rights-compliant laws on communication surveillance.[8] For the state parties who have such laws, while they may appear comprehensive and made by the national parliaments, they are not compliant with respect to internationally set principles on communication surveillance.[9]

In framing a human rights basis for communication surveillance within the African context, this article considers the major principles under the African human rights system. It analyses how these principles are complied with by three state parties: Nigeria, South Africa and Uganda. It then considers the gaps in the major laws that regulate communication surveillance in these countries and gives

4 T Weller 'The information state: a historical perspective on surveillance' in K Ball, KD Haggerty, & D Lyon (eds) *Routledge handbook on surveillance studies* (2012) 57-63.

5 S Zuboff 'Surveillance capitalism and the challenge of collective action' (2019) 28 *New Labor Forum* 10-29.

6 As above.

7 J Wirth, C Maier & S Laumer 'Justification of mass surveillance: a quantitative study' (2019) *14th International Conference on Wirtschaftsinformatik, February 24-27, 2019, Siegen, Germany* 1346-1348; JB Rule '"Needs" for surveillance and the movement to protect privacy' in K Ball, KD Haggerty & D Lyon (eds) *Routledge handbook on surveillance studies* (2012) 54-71.

8 Collaboration on international ICT policy in East and Southern Africa (CIPESA) 'Mapping and analysis of privacy laws and policies in Africa: summary report' (2021) https://cipesa.org/?wpfb_dl=454 (accessed 5 September 2021).

9 Under the analysis under section 6, South Africa's surveillance law seems to fare better compared to other laws in Nigeria and Uganda given the recent 'cure' by the South African Constitutional Court's recent judgment in the *Amabhungane* case. However, despite this judgment, the law does not provide for other aspects needed for human rights protection. See section 6 below.

recommendations on how these countries can bring their communication surveillance laws in line with international human rights standards. It is important to note that this article is neither a conclusive position on communication surveillance and human rights in Africa nor a presentation of exhaustive solutions to the challenges being faced in ensuring human rights-complaint laws with respect to communication surveillance. Rather, it is an exercise in fortitude and strategy for necessary reforms in the area of communication surveillance in Africa — to have major stakeholders rethink the growing need to protect the right to privacy, specifically, and human rights, in general, in the face of intrusive and invasive digital technologies.

In considering these issues, this article analyses academic literature, international human rights treaties and mechanisms and various laws especially on how they intersect with the deployment of communication surveillance. Particularly, it draws on the recently revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (revised Declaration) on how state parties should design policies on communication surveillance.[10] It also considers various reports and studies by international organisations, newspapers and other reliable sources.

In terms of structure, this article is divided into seven sections. The first section provides a background for the article while the second section provides a brief overview of communication surveillance especially within the African context and what it means when considered alongside other terms like surveillance, lawful and unlawful interception of communication. The third section examines current international human rights law on communication surveillance after which it focuses its analyses on the African context. The fourth section highlights the relationship between the revised Declaration and an elaborate set of 13 principles for framing a human rights approach to communication surveillance.

The fifth section analyses communication surveillance, especially through various lawful interception laws in Nigeria, South African and Uganda to draw out the need for a more comprehensive, primary and human rights-compliant policies on communication surveillance practices. The sixth section makes recommendations on ways forward and how state parties can frame and ensure their compliance with internationally-set standards on communication surveillance in the region. The final section concludes that while laws that regulate communications surveillance in Nigeria, South Africa and Uganda may be non-compliant with internationally set standards, there are ways to bring them into line with these standards to achieve the twin-objective of using communication surveillance and protecting the right to privacy.

10 African Commission 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2019) https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf (accessed 23 July 2021).

2 PLACING COMMUNICATION SURVEILLANCE IN CONTEXT

Communication surveillance is broader in scope than lawful interception of communication just as surveillance is broader in scope than communication surveillance.[11] However, these aspects of surveillance all form an arc that bends towards the right to privacy. In general, communication surveillance includes lawful or unlawful access to electronic communication.[12] Lawful access to electronic communication largely refers to the legal and legitimate basis for monitoring and gaining access to private communications. In other words, it would qualify as lawful interception of communication if gaining access to such private communication has a high possibility of forestalling an irreparable harm to life and property. Some of the reasons for communication surveillance include the need to ensure public safety, prevention of crime, protecting the rights of others and even mutual assistance between countries with respect to fighting crime.

Due to the nature of communication surveillance, especially in its use by governments, it often requires a level of secrecy. As noted by Smith:[13]

> Most varieties of surveillance operation are governed by stringent secrecy directives, companies seemingly as keen to extract and capture informational flows as they are to prevent and prohibit everyday work practices from being directly inspected and made transparent.

Such secrecy includes instances where the government must carry out investigation with respect to reasonable suspicion of crime and notifying either the subject(s) of investigation or the general public of such surveillance might jeopardise the investigation. However, this need seems to have obscured the need for accountability and transparency which as a result leads to violations of privacy rights specifically and human rights in general.[14]

A report by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression defines 'communications surveillance' as 'the monitoring, interception, collection, preservation and retention of information that has been communicated, relayed or generated over communications network'.[15] The report also noted that issues such as national security and criminal

11 Media Policy and Democracy Project 'The surveillance state: communications surveillance and privacy in South Africa' (2016) https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/sa_surveillancestate-web.pdf (accessed 23 July 2021); LA Abdulrauf 'The challenges for the rule of law posed by the increasing use of electronic surveillance in sub-Saharan Africa' (2018) 18 *African Human Rights Law Journal* 368.

12 HW Gebreegziabher 'The right to privacy in the age of surveillance to counter terrorism in Ethiopia' (2018) 18 *African Human Rights Law Journal* 401.

13 GJ Smith 'Surveillance work(ers)' in K Ball, KD Haggerty & D Lyon (eds) *Routledge handbook on surveillance studies* (2012) 109.

14 AD Moore 'Privacy, security, and government surveillance: wikileaks and the new accountability' (2011) 25 *Public Affairs Quarterly* 15.

activity may justify the exceptional use of communications surveillance technologies and what this suggests is that lawful interception of communication as a major component of communication surveillance could be an accepted basis for limiting the right to privacy.[16] Due to the nature of communication surveillance, states are enjoined to ensure that such limitation is based on the principles of international human rights law.

3 INTERNATIONAL HUMAN RIGHTS LAW AND COMMUNICATION SURVEILLANCE IN AFRICA

The international human rights system as organised at the level of the United Nations (UN) and various other regional human rights systems have provided guidance on how states who have the primary responsibilities of protecting human rights can develop rights-respecting policies on communication surveillance.[17] On the relationship between the right to privacy under the International Covenant on Civil and Political Rights (ICCPR) and communication surveillance, Diggelmann and Cleis argue that the primary aspects of the right focus on freedom from society and privacy as dignity,

> the drafting history of the right to privacy does not allow for the conclusion that one of the two competing ideas can claim the status of the primary idea. Rather, it seems to support the view that the very concept of privacy is inextricably linked to more than one idea.[18]

In understanding communication surveillance as being inextricably linked to the right to privacy, in its the General Comments 16 on article 17 of the ICCPR by the Human Rights Committee, 'surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.'[19] In the commentary that provides an in-depth analysis of the ICCPR, privacy, under international human rights law 'covers all forms of communication over distance, i.e., by telephone, telegram, telex, e-mail, and other mechanical or electronic means of communication.'[20]

15 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, United Nations Human Rights Council (17 April 2013), UN Doc A/HRC/23/40 (2013).

16 Report of the Special Rapporteur on the right to privacy, United Nations Human Rights Council (6 September 2017) UN Doc A/HRC/23/40 (2017); United Nations Human Rights Council (n 15) 3.

17 Privacy International 'Guide to international law and surveillance 2.0' (2019) https://privacyinternational.org/sites/default/files/2019-04/Guide%20to%20International%20Law%20and%20Surveillance%202.0.pdf 3-5 (accessed 23 July 2021).

18 O Diggelmann & MN Cleis 'How the right to privacy became a human right' (2014) 14 *Human Rights Law Review* 458.

19 The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, UN Human Rights Committee, CCPR General Comment 16: Article 17 (Right to Privacy).

With respect to the ICCPR, article 17 provides for the right to privacy as follows:

> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks.

In addition to this, article 4(2) of the ICCPR makes provisions for rights that may be derogated from in case of public emergency which may also include the right to privacy. It has also been noted that in limiting the right to privacy, the limitative tests like legality, legitimacy, proportionality and necessity provided for other rights like the right to liberty of movement and freedom to choose residence; freedom of thought, conscience and religion; peaceful assembly; and freedom of association would apply.[21] The four jointly applicable requirements for limitation of privacy rights with respect to communication surveillance are that such need must not be:

> (a) arbitrary and must be provided for by law;
>
> (b) for any purpose but for one which is necessary in a democratic society;
>
> (c) for any purpose except for those of 'national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others'; and,
>
> (d) [dis]proportionate to the threat or risk being managed.

This means that for a legislative framework on communication surveillance to be rights-respecting, it must be provided for by law, be necessary, legitimate and proportionate to the harm sought to be managed.

The African Charter on Human and Peoples' Rights does not provide explicitly for the right to privacy as a substantive right.[22] However, its framing of the right and its necessity given the challenges posed by the digital age and communication has demonstrated the need to read the right and its various aspects into both the promotional and protective mandates of the implementing institutions within the African human rights system. For example, the right is provided for by various thematic human rights instruments like article 10 of the African Charter on Rights and Welfare of the Child,[23] article 7 of the African Youth Charter[24] and Chapter 2 of the African Union Convention on Cybersecurity and Personal Data.[25]

In addition to these, the African Commission on Human and Peoples' Rights revised the Declaration of Principles of Freedom of

20 M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) 401.

21 United Nations Human Rights Council (n 15) para 28.

22 African Charter on Human and Peoples' Rights (1981) https://www.achpr.org/legalinstruments/detail?id=49 (accessed 24 June 2021).

23 African Charter on Rights and Welfare of the Child (1990) https://www.achpr.org/public/Document/file/English/achpr_instr_charterchild_eng.pdf (accessed 22 June 2021).

24 African Youth Charter (2006) https://au.int/sites/default/files/treaties/7789-treaty-0033_-_african_youth_charter_e.pdf (accessed 22 June 2021).

Expression and Access to Information in Africa (revised Declaration).[26] The revised Declaration is a 'soft law' instrument which is developed to guide states on major topical issues including developing laws and policies with respect to the right to freedom of expression, access to information and the right to privacy in Africa.[27] Additionally, the body of international human rights instruments expatiated on in the report by Privacy International above[28] can be received into the African human rights system by virtue of provisions of article 60 of the African Charter that allows the African Commission to read international human rights instruments into its jurisprudence and activities.

While a number of human rights like freedom of expression, association and assembly are interconnected with the use of communication surveillance, the right to privacy seem the most proximate. This is because 'being watched' whether in real-time or indirectly through retained data impact on the right of an individual or a group of people to be without unwarranted interference. In this regard, Principles 40-42 of the Revised Declaration has provisions on how states must protect not only the right to privacy but also its other aspects in the digital age like communication surveillance and protection of personal information. Principle 41 of the revised Declaration provides for the responsibilities of states with respect to communication surveillance and protection of privacy rights:

(1) States shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person's communications.

(2) States shall only engage in targeted communication surveillance that is authorised by law, that conforms with international human rights law and standards, and that is premised on specific and reasonable suspicion that a serious crime has been or is being carried out or for any other legitimate aim.

(3) States shall ensure that any law authorising targeted communication surveillance provides adequate safeguards for the right to privacy, including:

(a) the prior authorisation of an independent and impartial judicial authority;

(b) due process safeguards;

(c) specific limitation on the time, manner, place and scope of the surveillance;

(d) notification of the decision authorising surveillance within a reasonable time of the conclusion of such surveillance;

(e) proactive transparency on the nature and scope of its use; and

(f) effective monitoring and regular review by an independent oversight mechanism.

In the analyses carried out by the Electronic Frontier Foundation (EFF) and article 19, both civil society organisations focused on the impacts of communication surveillance on human rights.[29] It was noted that 'all information relating to a person's private communication should be considered to be 'protected information,' and should accordingly be

25 African Union Convention on Cybersecurity and Personal Data (2014) https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf (accessed 22 June 2021).

26 African Commission (n 10).

27 African Commission (n 10) Preamble.

28 Privacy International (n 17).

given the strongest legal protection. The analyses, which were based on international human rights law with respect to communication surveillance, identified at least 13 major principles that must be considered in designing human rights policies on communication surveillance.

These 13 principles for a human rights approach to communication surveillance are directly sourced from the four jointly applicable requirements for limitation of rights under the ICCPR. These four basic principles are further elaborated through 13 principles which are legality; legitimate aim; necessity; adequacy; proportionality; competent judicial authority; due process; user-notification; the right to an effective remedy; transparency; public oversight; integrity of communication and systems; safeguards for international cooperation; and safeguards against illegitimate access. These principles justify their relevance through 'case law and views of a range of international human rights bodies and experts, such as UN special rapporteur.'[30] Due to the interrelationship and interdependence of these principles, they are applicable jointly and compliance with one does not mean compliance with the entire standards as established under international human rights law.

While only Morocco has not ratified the African Charter,[31] Nigeria, South Africa and Uganda have various obligations under treaties to ensure the implementation of the rights contained in instruments especially with respect to communication surveillance and privacy. In many instances, communication surveillance is regulated through laws on lawful interception. In framing communication surveillance with a human rights approach, not only must policies be compliant with specific obligations like the four-part test, they should ensure transparency and accountability.

29 Electronic Frontier Foundation (EFF) & art 19 'Necessary & proportionate international principle on the application of human rights to communications surveillance: Background and supporting international legal analysis' May 2014 https://www.article19.org/data/files/medialibrary/37564/N&P-analysis-2-final.pdf (accessed 25 May 2021).

30 EFF & art 19 (n 29) 10.

31 United Nations Human Rights, Office of the High Commissioner 'Status of ratification' https://indicators.ohchr.org/accessed 25 May 2021; Ratification Table: African Charter on Human and Peoples' Rights https://www.achpr.org/ratificationtable?id=49 (accessed 25 May 2021).

4 THE REVISED DECLARATION AND FRAMING A HUMAN RIGHTS APPROACH FOR A COMMUNICATION SURVEILLANCE FRAMEWORK

The goal of this section of the article is to make a firmer connection between the four-part test for permissible restriction of the right to privacy, Principle 41 of the revised Declaration on states' responsibility with respect to communication surveillance and a set of 13 carefully developed elaborate principles for ensuring rights-respecting laws for communication surveillance. This connection foregrounds how a human rights approach to laws on communication surveillance within the African context can be framed. The significance of the strong relationship between the four-part test, the revised Declaration and the 13 principles is seen in how it could assist states in finding the conceptual and contextual relevance of international human rights law to communication surveillance in African countries.

This is because states have often criticised the broadness of international human rights principles especially when compared to its specific application on the ground in their respective systems.[32] For example, in what ways can communication surveillance be employed in the midst of pressures of insecurity? Here, a more robust set of legal principles on communication surveillance would assist states to understand when their legislative policies on lawful interception does not comply with international human rights law. This will not only assist with conceptual clarity on what such compliance means, it would also assist with contextual application in order to assess the compliance of the law with international human rights standards.

On a closer look, Principle 41 has striking similarities with both the four jointly applicable requirements for limitation of rights under the ICCPR and the 13 major principles for designing a legal framework on communication surveillance. Starting with the legality principle, in order to fulfil the requirement of it being clear and sufficiently precise, it has seven sub-principles that a framework on communication surveillance must comply with. These sub-principles also find expression in the provisions of Principle 41 of the revised Declaration. In order for a law on communication surveillance to comply with the principle of legality, it must define the offences and activities where surveillance may be carried out; provide for the categories of people that may subject to surveillance; prescribe a time-limit on surveillance operations; ensure due process; ensure examination, use and storage of surveillance data; provide for precautions with respect to sharing surveillance data with third party; provide for destruction or erasure of surveillance data; and provide for independent supervisory authority appointed by and responsible to the legislature.[33]

32 F Viljoen 'Contemporary challenges to international human rights law and the role of human rights education' (2011) 44 *De Jure* 209.

There are at least five examples of where it could be permissible to limit the right to privacy based on the principle of legitimacy with respect to communication surveillance. They are public safety; prevention of crime; ensuring public morals; protecting the rights of others; ensuring national security and economic well-being of individuals. This could be the basis provided for under Principle 41(2) of the revised Declaration which could also be referred to as the basis for the requirements of necessity, adequacy and proportionality.

In determining proportionality and necessity, there are also the requirements for judicial overview and due process which are further subdivided into prior authorisation; retroactive authorisation; and internal judicial checks for *ex-parte* orders which may all be connected to the provisions of Principle 41(3)(a) of the revised Declaration. Prior authorisation may be regarded as the general rule for communication surveillance where the approval of a designated judge is obtained before surveillance is carried out. There are instances where it is clearly impossible to obtain an approval of a designated judge before carrying out interception of communication due to imminent threats to lives and properties. In such instances, a law enforcement agency may carry out such surveillance but must immediately inform such designated judge within a particular period for approval or otherwise for such interception. In addition to this, due to the nature of communication surveillance especially in relation to the surveilled subjects and obtaining a designated judge's approval, there are chances that such request for surveillance would be heard *ex parte* – in the absence of the surveilled subject. Therefore, it is necessary that a legal practitioner should be appointed to argue for the interests of the surveilled subject, hence the need for internal judicial checks for granting such surveillance requests.

Additionally, user-notification, that is, the need for a surveilled subject to be informed of when they have been surveilled and the right to effective remedy are principles that a law for lawful interception must provide for. User-notification ensures that in instances where the privacy rights of a surveilled subject has been violated, they are in a position to make a decision as to whether they would seek effective remedy for such violation or not. There is also the requirement for transparency where states must ensure that the laws are clear especially in how it is implemented and providing accessible means for monitoring such implementation. Such laws should also allow for public oversight where not only the information on surveillance is shared by states with the public but also should be mandated by service providers. Both requirements for user-notification and transparency may also be found in the provisions of Principle 41(3)(d) and (f) of the revised Declaration respectively.

A law on communication surveillance should also provide for the integrity of communications and systems which is in line with Principle

33 Principle 41(5); Principle 41(4) & Principle 41(6)(c); Principle 41(6)(c); Principle 41(4); Principle 41(3); Principle 41(4); and Principle 41(6)(f) of the revised Declaration.

41(3) of the revised Declaration. In addition, there should be adequate guidelines in instances where states must engage in international cooperation that is not only mutual in terms of interests but mutual because of the need to protect human rights in line with Principle 41(5) of the revised Declaration. Finally, laws should provide safeguards against illegitimate access of communications at least in three major ways. First, by not requiring that service providers to facilitate interceptable communications in line with Principle 41(1) of the revised Declaration, second by not requiring the decryption of communications in line with Principle 41(2) of the revised Declaration and third by ensuring that illegally obtained interception is not admissible in a court proceeding as provided for under Principle 41(4) of the revised Declaration. These principles, fleshed out and elaborate, demonstrate internationally-set basic principles laws on communication surveillance must provide for. However, as it would be shown in the subsequent sections, some of these principles are not provided for in Nigeria, South Africa and Uganda.

5 AN ASSESSMENT OF COMMUNICATION SURVEILLANCE LAWS IN NIGERIA, SOUTH AFRICA AND UGANDA

5.1 An overview of communication surveillance landscape in Nigeria

In Nigeria, aside from the provisions of section 37 of the 1999 Constitution on the right to privacy, there are a number of other laws that impact on the right to privacy especially through their provisions on communication surveillance. The major laws are the Cybercrimes (Prohibition, Prevention) Act, 2015, the Nigerian Communications (Enforcement Process, etc) Regulations, 2019, Guidelines on Provision of Internet Services, the NCC Act, section 26(1) of the Terrorism (Prevention) Act, 2011 (as amended) and section 13 of the Mutual Assistance in Criminal Matters Within the Commonwealth (Enactment and Enforcement) Act, 2019.[34] The Lawful Interception of Communications Regulations, 2019 (Regulations) is the most comprehensive law with respect to communication surveillance law in Nigeria.[35] Most of these laws provide for lawful interception especially as it relates to their various objectives. For example, the Terrorism Act

34 Sec 38, The Cybercrimes (Prohibition, Prevention) Act, 2015; Regulation 8(2)(a) Nigerian Communications (Enforcement Process, etc) Regulations, 2019; Guideline 6(c) Guidelines of Provision of Internet Services; Section 148(1)(c) Insert NCC Act; Section 26(1) Terrorism (Prevention) Act, 2011 (accessed 18 March 2020), Section 13 Mutual Assistance in Criminal Matters Within the Commonwealth (Enactment and Enforcement) Act, 2019, (accessed 22 June 2020).

35 Lawful Interception of Communications Regulations, 2019 (Regulations) https://www.ncc.gov.ng/accessible/documents/839-lawful-interception-of-comunications-regulations-1/file (accessed 22 June 2020).

provides for interception of communications with respect to investigating terrorist activities. It is important to note that while most of these laws provide for the powers of law enforcement to intercept communications, they rarely provide for accountability, transparency or any specific steps towards human rights protection in the exercise of such powers.[36]

This is particularly problematic in that in a report which considers the investment of the Nigerian government on surveillance equipment between 2014-2017, the government has spent ₦127,000,000,000.00 (approximately US$308 582 187,00) without any clear guidance as to the deployment of these equipment.[37] In addition to these investments, there have also been recent reports that Nigeria is one of the seven African countries heavily invested in the use of spyware and intrusive technologies.[38] This report corroborates other reports on how the Nigerian government surveils journalists and political opponents.[39] These can be attributed to lack of transparency and accountability on lawful interception in Nigeria.

5.1.1 The Lawful Interception of Communications Regulations, 2019 (Regulations)

The provisions of the Regulations are made pursuant to the provisions of sections 70, 146 and 147 of the Nigerian Communications Act, 2003 with respect to the powers of the Nigerian Communications Commission (NCC) to publish regulations on provisions of the Act, general duties of licensees and interception of communications respectively. This makes the Regulations a secondary law on surveillance in Nigeria. The objectives of the Regulations 'included to ensure that the privacy of subscribers' communication as provided for in the Constitution of Nigeria is preserved'.[40]

The Regulations are divided into six sections: scope, objectives, regulations; interception of communications; protected or encrypted communications; interception capabilities; administration of lawful interceptions of communications; and miscellaneous. Considering the Regulations' compliance with respect to international human rights standards, there are a number of issues on how they may pose threats to the right to privacy through communication surveillance.

36 Out of these laws, only the Regulations provide for some oversight responsibilities in the Attorney-General of the Federation. None of the laws make any adequate provisions with respect to human rights protection. See section 5.1.2 on more analysis on the Regulation.

37 T Ilori 'Status of surveillance in Nigeria: refocusing the search beams' (2017) https://paradigmhq.org/wp-content/uploads/2021/04/Policy-Brief-009-Status-of-Surveillance-in-Nigeria.pdf (22 June 2020).

38 B Marczak & others 'Running in circles: uncovering the clients of cyberespionage firm Circles' 1 December 2021, https://tspace.library.utoronto.ca/bitstream/1807/106212/1/Report%23133--runningincircles.pdf (accessed 23 June 2021).

39 J Rozen 'How Nigeria's police used telecom surveillance to lure and arrest journalists' 13 February 2020, https://cpj.org/2020/02/nigeria-police-telecom-surveillance-lure-arrest-journalists/ (accessed 1 July 2021).

40 Regulation 2.

In terms of legality of the Regulations under international human rights law, using the revised Declaration, the offences and activities for which surveillance may be carried out are spelt out under Regulations 7(3)(a) to (e) and 16. In addition to this, the categories of people who may be subject to surveillance and time-limit on surveillance operations are provided for under Regulations 4(a)(b) and 14 respectively. In terms of due process, Regulations 17, 18 and 6 deal with examination, use and storage of surveillance data respectively. Regulation 6 also provides for the destruction or erasure of surveillance data while Regulation 19 provides for an oversight function in the Attorney General of the Federation (AGF) but not an independent supervisory authority appointed by and responsible to the legislature. Under the Regulation, the AGF who is a member of the Executive is reported to in terms of surveillance updates in Nigeria. There were also no provisions with respect to precautions that must be taken in cases where surveillance data are found with third parties.

A closer look at the principle of legality and the provisions of the Regulations show that requirements such as definition of offences and activities where surveillance may be carried out, the categories of people that may be surveilled, the time-limit for surveillance operations, due process, and destruction or erasure of surveillance data are provided for. However, the precautions that must be adhered to when surveillance data is with third parties, such as the securitisation of information, is not provided for under the Regulations. In addition to this, there is no independent supervisory authority which is appointed by and responsible to the legislature. Rather, the report to be prepared by law enforcement on surveillance will be submitted for supervision to the AGF and not a legislative committee.

In general, the provisions of Regulation 7(3) provide for various legitimate aims which the judge may rely on in granting of a surveillance request. Some of this includes the grounds of ensuring public safety, prevention of crime, protecting the rights of others, ensuring national security and protecting the economic well-being of Nigerians.[41] Regulation 12 empowers a judge to determine the necessity, adequacy and proportionality of surveillance requests before granting them. While the Regulation provides for both prior and retroactive judicial authorisation with respect to a surveillance request under 12(1), (2), (3) and (4), it does not provide for internal judicial checks. However, Regulation 20 provides for the right to remedy.

There are no clear provisions with respect to transparency and public oversight under the Regulations as only the AGF is to be reported to and not any other independent supervisory authority. Regulations 9 and 11 also require licensees to provide for interception and decryption capabilities. In addition to these, while the Regulations provide for surveillance on the basis of international cooperation under Regulation (7)(3)(e), there are no specific guidelines with respect to such cooperation and how it protects the privacy right of Nigerians. Even though Regulation 5 criminalises unlawful interception of

41 Regulations 7(3)(d), 7(3)(b), 7(3)(a) & 7(3)(d).

communications, Regulation 13(1)(d) could be used to encourage unlawful interception where the judge later grants a retroactive surveillance request.

5.1.2 Assessment of the provisions of the Lawful Interception of Communications Regulations, 2019 (Regulations)

The Regulations may be considered to comply with aspects of international human rights principles with respect to communication surveillance. For example, on the principle of legality, there are provisions for offences and activities when communication surveillance can be carried out; the categories of people that may be surveilled; the time-limit for a surveillance operation; due process safeguards like examination, use and storage of surveillance information and destruction or erasure of surveillance data. However, the Regulation does not provide for safeguards for precautions when surveillance data is handled by third parties as required under Principle 41(3)(d) of the revised Declaration. It also does not provide for independent supervisory authority which is appointed by and responsible to the legislature as required under Principle 41(3)(f) of the Declaration. While some aspects of the principles may have been complied with, non-compliance with the outstanding aspects means that the principle of legality is not complied with.

The Regulations also cover the legitimate grounds for carrying out lawful interception and necessity, adequacy and proportionality requirements in line with the Principle 41(2) of the revised Declaration. They provide for international cooperation and integrity of communications and systems. With respect to the latter, however, the Regulations mandates the use of interceptable systems by service providers and decryption of messages where necessary. These run contrary to the provisions of Principles 41(1) and (2) of the revised Declaration. However, while they provide for prior and retroactive judicial authorisation, there are no provisions as to internal judicial checks with respect to surveillance requests. There are also no clear provisions as to the requirements of user-notification, transparency, public oversight, and safeguards against illegitimate access. A cumulative assessment of the Regulations alongside international human rights standard on a rights-respecting framework on communication surveillance shows that the Regulation falls short of the necessary requirements of adequately protecting the right to privacy.

In a related judgment on communication surveillance in 2018, the Nigerian Court of Appeal in *Paradigm Initiative & Others v Attorney General of the Federation and others*,[42] considered the constitutionality of section 38 of the Cybercrime Act. The provision gives law enforcement agencies powers to request communication data from service providers without any meaningful checks for such powers.

42 *Paradigm Initiative & others v Attorney General of the Federation and others* CA/L/556/2017 (*Paradigm Initiative* case).

However, while the Court did not find merit in the case of the appellant that the provisions of the section were unconstitutional, Georgewill JCA noted that the provisions of subsections 2(b) and 3 of the Act were problematic. The learned Justice stated:[43]

> There is an overriding need to observe at all times the rights of the citizens to privacy of their communication and any derogation therefrom should be one under due process and adequate legal checks to safeguard the rights of citizens.

While these thoughts by the learned Justice are useful in setting the tone for a rights-respecting law in Nigeria, they partly address the challenges of non-compliance of laws on communication surveillance with international human rights standards in Nigeria. For example, the provisions expressly referred to by the learned Justice focused on just the requirements of prior and retrospective judicial authorisation for surveillance requests. There are several other international human rights law requirements that are yet to be complied with by the provision which also points to the reason why a communication surveillance law that seeks to be rights-respecting ought to be primary, debated before the National Assembly and comprehensive, elaborated on in one single, accessible and sufficiently clear law. The appellate court's decision has however been appealed to the Supreme Court.[44]

5.2 An overview of communication surveillance landscape in South Africa

In addition to section 14 of the Constitution of South Africa that provides for the right to privacy, a number of laws from various sectors also touch on communication surveillance.[45] However, this article focuses more on the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (RICA).

In terms of surveillance practices, there were reports that in 2005, political opposition of the government were indiscriminately surveilled.[46] In other instances, journalists have been at the receiving end of government's arbitrary use of surveillance. In 2010, two journalists Hofstätter and wa Afrika, both of the newspaper *Sunday Times,* were indiscriminately surveilled by the government on the pretext of gun

43 *Paradigm Initiative* case (n 42) 36.

44 D Adeniran 'CSOs head to Supreme Court over Cybercrimes Act' *Order Paper* 2 August 2018 https://www.orderpaper.ng/csos-head-to-supreme-court-over-cyber-crimes-act/ (accessed 16 June 2021).

45 Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (RICA); Protection of Personal Information Act (Act 4 of 2013) (POPI); the Financial Intelligence Central Act of (Act 38 of 2001) (FICA); the Intelligence Services Oversight Act (Act 40 of 1994) (ISOA); the CyberCrimes and CyberSecurity Act (2015) (CAC); The Electronic Communications and Transactions Act (Act 25 of 2002) (ECTA); the General Intelligence Laws Amendment Act (act 11 of 2013) (GILAB); the Criminal Procedure Act (Act 51 of 1977) (CPA) the Films and Publications Act (Act 65 of 1996) (FPA).

46 H Swart 'Secret state: how the government spies on you' *Mail & Guardian* 14 October 2011 https://mg.co.za/article/2011-10-14-secret-state/ (accessed 1 July 2021).

running but facts showed that the surveillance was as a result of how both journalists exposed government corruption.[47] In addition to this, it was reported that two journalists, Marianne Thamm[48] and Jeff Wicks,[49] both working for *Daily Maverick*, a South African investigative newspaper, were being indiscriminately surveilled by the government. This was allegedly due to their work in exposing the corruption within Crime Intelligence, a division of the South African Police Service that tracks criminal offenders.

Thamm and Wicks's surveillance came after the historic decision on communication surveillance delivered by the Constitutional Court of South Africa in the *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*.[50] The case was brought by amaBhungane Centre for Investigative Journalism NPC. Its manager, Sam Sole, was a subject of government surveillance under the provisions of the RICA. The Court found that the RICA did not provide for user-notification; ensure judicial independence of the designated judge; provide internal judicial checks on *ex-parte* orders; provide for use, examination, storage and destruction of surveillance data and make special requirements for certain categories of people like practising lawyers or journalists. The provisions of the law were declared unconstitutional.

5.2.1 The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (RICA)

In South Africa, RICA is the most comprehensive and primary law on communication surveillance. The law is divided into ten chapters: the introductory provisions; prohibition of interception of communications and provision of real-time or archived communication-related information and exceptions; applications for, and issuing of, directions and entry warrants; execution of directions and entry warrants; interception capability and compensation; interception centres, office for interception centres and Internet Service Providers Assistance Fund; duties of telecommunication service provider and customers; general prohibitions and exceptions; criminal proceedings, offences and penalties; and general provisions. Its objectives include regulation of 'interception of certain communications; to regulate the making of

47 J Duncan 'Communications surveillance in South Africa: The case of the Sunday Times newspaper' (2014) *Global Information Society Watch* https://giswatch.org/en/country-report/communications-surveillance/south-africa#_ftn6 (accessed 21 June 2021).

48 A Mitchley 'Sanef condemns alleged illegal surveillance of News24 journalist by Crime Intelligence' *News 24* 8 March 2021 https://www.news24.com/news24/southafrica/news/sanef-condemns-alleged-illegal-surveillance-of-news24-journalist-by-crime-intelligence-20210308 (accessed 21 June 2021).

49 J Etheridge 'Sanef demands that Crime Intelligence stop 'bugging' journalists' *News 24* 19 March 2021 https://www.news24.com/news24/southafrica/news/sanef-demands-that-crime-intelligence-stop-bugging-journalists-20210319 (accessed 21 June 2021).

50 2021 (3) SA 246 (CC).

applications for and the issuing of directions authorising the interception of communications.'

Assessing the various principles under international human rights law on communication surveillance and this law, there are a number of gaps with respect to the compliance of the latter with the former. Considering the seven sub-principles under the requirement for legality, the RICA complies with them only in part. For example, section 16(5)(i) to (v) provides for the specific offences and activities where surveillance may be carried out and information intercepted while section 2 provides for the category of people whose communication may be intercepted. Section 16(2)(f) also provides for the need to indicate a time-limit in a surveillance request while section 30 provides guidance on the examination, use and storage of surveillance data. However, there are no provisions for the necessary precautions for having surveillance data with third parties, destruction or erasure of surveillance data and an independent supervisory authority appointed by and responsible to the legislature.

In terms of a legitimate aim upon which communication surveillance may be carried out, the RICA provides for public safety; the need for prevention of crime; protection of the rights of others; national security and economic well-being.[51] There are also the provisions of section 16 which empowers a designated judge to determine the necessity, adequacy and proportionality of surveillance requests before granting them. Sections 16(1) and 7(4) provide for prior and retroactive judicial authorisation of surveillance requests, respectively. However, the RICA has no provisions with respect to internal judicial checks for *ex-parte* orders.

In addition to this, the RICA does not provide for the right to remedy for a person who has been illegally surveilled under the Act. There are also no provisions in terms of the requirement for transparency which ensures that the law is clear and could be easily monitored by the public for its compliance with the rule of law. For public oversight for surveillance in South Africa, section 37(3) of RICA makes provision for the director of the interception centres established under chapter 6 to coordinate the reports from heads of interception centres which is then submitted to the executive through the Minister and to the legislature through the Chairperson of the standing committee on intelligence.

Section 30(2)(ii) also provides for the integrity of communications and systems which must be provided for by the service provider. Section 16(5)(iv)(a) also provides for international cooperation among states to ensure mutual assistance. Under section 47(1), there is no safeguard against illegitimate access to surveillance data because illegally intercepted communication can still be admissible before the court if it finds it relevant.

51 Sections 16(5)(a)(ii); 16(5)(a)(i)(iv)) of RICA; 16(5)(a)(i-v); 16(5)(ii)) of RICA.

5.2.2 An assessment of the RICA

The judgment of the Constitutional Court in the *Amabhungane* case has been instructive especially with how it sets a jurisprudential tone with respect to rights-respecting laws and communication surveillance. The judgment has provided a springboard for the application of international human rights law in the framing of communication surveillance laws in local contexts. However, in examining the *Amabhungane* case more closely, it appears that while the Court's judgment arrived at impactful judicial orders with respect to the RICA's compliance with international human rights standards, it still missed a number of RICA's other shortcomings.

In terms of its reference to copious aspects of international human rights law, the judgment mirrored the applicable international human rights law that may also be found in the revised Declaration on user-notification;[52] judicial independence;[53] internal judicial checks on *ex-parte* orders;[54] use, examination, storage and destruction of surveillance data;[55] and special requirements for certain categories of people like practising lawyers or journalists.[56] However, it failed to consider in detail the impacts of other inadequacies such as the necessary precautions for the handling of surveillance data with third parties;[57] provision for an independent supervisory authority appointed by and responsible to the legislature;[58] right to effective remedy;[59] transparency and public oversight;[60] and safeguards for illegitimate access to surveillance data.[61] All of these points to the gaps in the RICA in terms of compliance with international human rights standards on laws on communication surveillance.

5.3 AN OVERVIEW OF COMMUNICATION SURVEILLANCE LANDSCAPE IN UGANDA

In the past, Ugandan laws that seek to regulate digital technologies have been criticised as being non-compliant with international human rights standards.[62] They include the Regulation of Interception of Communications Act, 2010 and the Anti-Terrorism Act, 2002. In terms of surveillance practices in Uganda, in June 2020, Uganda's Defence Ministry stated that it would use 53 per cent of its budget on 'classified expenditure.' It defined such expenditure as 'spending under the

52 Principle 41(3)(d)(e) of the revised Declaration.
53 Principle 41(3)(a) of the revised Declaration.
54 Principle 41(3)(a) of the revised Declaration.
55 Principle 41(1) of the revised Declaration.
56 Principle 41(3) of the revised Declaration.
57 Principle 41(3) of the revised Declaration.
58 Principle 41(3)(f) of the revised Declaration.
59 Principle 41(3)(d) of the revised Declaration.
60 Principle 41(3)(f) of the revised Declaration.
61 Principle 41(3) of the revised Declaration.

military's covert undertakings.' It is not immediately clear what this means under any law in Uganda. The Ministry is also alleged to have spent close to Shs4 trillion (approximately US$1 125 468 000,00) on classified expenditure and may spend up to Shs1.55 trillion (approximately US$281 367 000,00) on 'defence equipment' in the coming year.[63] In 2019, there were reports that the government of Uganda was actively tracking political opposition in the country.[64]

These reports have been preceded by allegations of surveillance against the Ugandan government. In 2011, state institutions conducted intrusive surveillance on major key opposition leaders and private individuals through a secret operation codenamed *Fungua Macho* which means 'open your eyes' in Swahili.[65] Documents obtained by Privacy International, an international organisation working on privacy rights, have shown the heavy involvement of the Ugandan government in the use of spyware and mass surveillance equipment. In a report published by the organisation in 2015, there were verifiable information on how Ugandan government officials visited Gamma International GmbH headquarters in Munich in 2012. Gamma International is a company that manufactures *FinFisher* – a spyware that has far-reaching privacy intrusive capabilities.[66]

5.3.1 The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2010 (RICA)

In Uganda, the Regulation of Interception of Communications Act, 2010 is the most elaborate law with respect to communication surveillance. One of the major objectives of the Act is to 'provide for the lawful interception and monitoring of certain communications in the course of their transmission through telecommunication.' The law is divided into five major parts and a schedule: the preliminary provisions; control of interception and establishment of a monitoring

62 Unwanted Witness 'Repressive: Uganda's worst cyber laws threatening free expression and privacy', https://www.unwantedwitness.org/download/uploads/REPRESSIVE-UGANDA-WORST-CYBER-LAWS_2.pdf (accessed 21 June 2021); Privacy International 'State of privacy in Uganda' 26 January 2019 https://privacyinternational.org/state-privacy/1013/state-privacy-uganda (accessed 21 June 2021).

63 BH Oluka 'Govt Spends Shs 200bn on Spying Gadgets' *Observer Uganda* 19 October 2019 https://www.observer.ug/news-headlines/40521-govt-spends-shs-200bn-on-spying-gadgets (accessed 21 June 2021).

64 S Solomon 'In Uganda, dissidents adapt to evade Huawei assisted government spying' *Voice of America* 14 November 2019 https://www.voanews.com/africa/uganda-dissidents-adapt-evade-huawei-assisted-government-spying, (accessed 16 June 2021); J Parkinson, N Bariyo, J Chin 'Huawei technicians helped African governments spy on political opponents' *The Wall Street Journal* 15 August 2019 https://www.wsj.com/articles/huawei-technicians-helped-african-governments-spy-on-political-opponents-11565793017 (accessed 1 July 2021).

65 Privacy International 'For God and my President: state of surveillance in Uganda' October 2015 https://privacyinternational.org/sites/default/files/2017-12/Uganda_Report_1.pdf (accessed 21 July 2021).

66 As above.

centre; application for lawful interception of communications; postal articles; and general provisions.

In terms of its compliance with international human rights law, there are a number of aspects of the Act that complies with the principle of legality. For example, the Act provides for the offences and activities where lawful surveillance may be carried out and time-limit for a surveillance operation under sections 5 and 4(3)(e). Other requirements for legality such as provision for the category of people who may be subjected to surveillance; examination, use and storage of surveillance data; the necessary precautions that should be taken when surveillance data is handled by third parties; destruction or erasure of surveillance data and an independent supervisory authority appointed by and responsible to the legislature are not provided for under the Act.

For the principle of legitimate aim, the Act provides for justifications that could lead to surveillance which include public safety (section 5(1)(d)), prevention of crime (section 5(1)(b)), protection of the rights of others (section 5(1)(a)), national security (section 5(1)(c)) and economic well-being (section 5(1)(d)). Sections 5 and 6 of the Act make provisions for a designated judge to apply the principles of necessity, adequacy and proportionality.

While the law provides for the requirement of prior judicial authorisation for surveillance requests, it does not provide for a retroactive judicial authorisation. In addition, it does not provide for user-notification and internal judicial checks. The Act also does not make provision for the right to effective remedy, transparency, and public oversight. However, it provides for integrity of communications and systems which must be at the expense of the service provider. It provides for international mutual assistance as a basis for interception under section 5(e) but does not adequately protect against illegitimate access safeguard especially when the provisions of section 8 of the Act is considered.

5.3.2 An assessment of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2010 (RICA)

In terms of compliance with international human rights law standards, Uganda's RICA only provides for two out of the seven sub-principles of legality. It also does not provide for retroactive judicial authorisation (Principle 41(3)(a)), user-notification (Principle 41(3)(d)(e)), internal judicial checks with respect to *ex parte* orders (Principle 41(3)(a)), right to effective remedy (Principle 41(3)(d)), transparency and public oversight (Principle 41(3)(f)), examination, use and storage of surveillance data (Principle 41(1)), necessary safeguards when surveillance data is handled by third party (Principle 41(3)), destruction or erasure of surveillance data (Principle 41(1)); and an independent supervisory authority appointed by and responsible to the legislature (Principle 41(3)(f)). These gaps show that the Ugandan RICA is not in compliance with international human rights law on communications surveillance.

6 FRAMING RIGHTS-RESPECTING LAWS ON COMMUNICATION SURVEILLANCE IN NIGERIA, SOUTH AFRICA AND UGANDA

In terms of compliance with international human rights law, using the revised Declaration, Nigeria, South Africa and Uganda do not comply with the requirement of legality. The Ugandan RICA for example does not make provision for the category of people who may be subjected to surveillance; examination, use and storage of surveillance data; the necessary precautions that should be taken when surveillance data is handled by third parties; destruction or erasure of surveillance data and an independent supervisory authority appointed by and responsible to the legislature. In the case of the laws on lawful surveillance for South Africa, they do not provide for the principles of necessary precautions that should be taken when surveillance data is handled by third parties; destruction or erasure of surveillance data and an independent supervisory authority appointed by and responsible to the legislature. In the case of Nigeria, the law does not provide for the principles of necessary precautions that should be taken when surveillance data is handled by third parties and an independent supervisory authority appointed by and responsible to the legislature.

All three countries seem to provide for legitimate aims under the various laws. Most of these aims are those that justify communication surveillance due to the need for ensuring public safety, prevention of crime, protecting the rights of others, ensuring national security and protecting the economic well-being of their people. In addition to these, there seems to be an opportunity for a judge to consider the principles of necessity, adequacy and proportionality of a surveillance request before granting it in each of the laws. With respect to judicial overview and due process, none of the laws provide for user-notification after surveillance and internal judicial checks for *ex-parte* orders. While the laws in Nigeria and South Africa provide for the requirement of both prior and retroactive authorisation of a judge in the approval of a surveillance request, Uganda only provides for prior authorisation.

Out of the three countries under assessment, only Nigeria provides for the right to remedy where a surveilled subject feels aggrieved. With respect to the transparency requirement and public oversight, neither Nigeria nor Uganda provides for the former while only South Africa has a considerable provision with respect to the latter. In terms of integrity of communications and systems, Nigeria mandates its licensees to provide for interception and decryption capabilities while Uganda mandates just the former. South Africa does not have such provision contained in the RICA. All of the three countries provide for international cooperation, that is, mutual legal assistance in fighting crime but without adequate guidelines on what such assistance would entail with respect to surveillance. In the same vein, each country provides for the admissibility of illegally intercepted information that could be relevant to a court proceeding. This leaves room for potential abuse by law enforcement agencies who could as a result of these provisions engage in mass and unlawful surveillance.

Given that these requirements are jointly applicable and that part-compliance with them does not suffice, the laws in Nigeria, South Africa and Uganda do not comply with applicable provisions of international human rights law. Drawing from these assessments, there are three major needs that should be met for laws on communication surveillance to be rights-respecting and be framed from a human rights approach.

First, there is a need for an elaborate set of standards with respect to communication surveillance, human rights protection and the responsibilities of states. There have been a number of examples in the past where the African Commission has developed model guidelines and laws with respect to human rights issues.[67] This will improve the prospects of rights-respecting communication laws in the African region in two major ways. One, it will provide an opportunity for the African human rights system to set the tone on an important aspect of human rights in the digital age while also setting clearer directions for states to adapt broad principles of international human rights law to their national legislative frameworks on communication surveillance. Two, it will provide non-state actors with standards to hold states responsible with respect to communication surveillance.

Second, the identified laws with respect to communication surveillance in Nigeria, South Africa and Uganda require urgent reforms in order to comply with international human rights law. This reform will also be necessary for all other legal provisions that bear on state surveillance. Such reform will involve a more inclusive and wide consultations by the legislature that would lead to amendments of old laws or enactment of new ones. For example, Nigeria needs a primary legislation enacted specifically for communication surveillance by the legislature and so do South Africa and Uganda need amendments in various parts of their communication surveillance laws highlighted above.

Third, there is a need to equip major government stakeholders with critical and strategic training on the need for human rights protection in communication surveillance. For example, designated judges will require capacity building with respect to emerging challenges posed by communication surveillance to privacy rights especially in the digital age. This will also be necessary for legislators who make the laws to understand the importance of each provision of such laws. There is also a need to carry out more capacity building with respect to wide powers of the executive to carry out surveillance with more accountability and transparency. This training will ensure that each government stakeholder understands its powers and limits under the law.

67 The Model Law on Access to Information for Africa (2013) https://www.achpr.org/legalinstruments/detail?id=32 24 (24 June 202; Guidelines on Freedom of Association and Assembly (2017) https://www.achpr.org/public/Document/file/English/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf (accessed 24 June 2021); Guidelines on Access to information and Elections in Africa (2017) https://www.achpr.org/public/Document/file/English/guidelines_on_access_to_information_and_elections_in_africa_eng.pdf (accessed 24 June 2021) and the revised Declaration.

7 CONCLUSION

The main goal of this article is to assess the adequacy of laws on communication surveillance and examine the possibilities of framing a rights-respecting reform of these laws through the African human rights system in three African countries: Nigeria, South Africa and Uganda. This is done by focusing on the major international human rights instruments that offer more guidance on the impacts of communication surveillance and how effective the major laws are in each of these countries with respect to compliance with human rights. In the analyses of the provisions of each of these laws in each country, the article concludes that the major international human rights principles on communication surveillance, especially the recently revised Declaration, are not complied with. In a number of instances, the laws comply with aspects of these major principles but still falls short of the requirement of international human rights law on making a law with respect to communication surveillance.

Therefore, there is an urgent need to frame communication surveillance laws on human rights principles and less on paranoia, unchecked state control and arbitrariness. Nigeria, South Africa and Uganda should join other African countries in pushing for a regional set of rights-respecting guidelines or model law on communication surveillance. This process can be championed by the African Commission. In addition to this, each country must embark on thorough reform of its laws not only through amendments and enactments, but also through planned implementation of such reforms. Lastly, each country must commit to training proximate government stakeholders involved in the implementation of communication surveillance laws.

Reclaiming the delinquent child: a proposed framework for a customary law-based child justice system in Africa using Zambia as a case study

*Kelly Kapianga**
https://orcid.org/0000-0001-9793-4376

ABSTRACT: One consequence of Africa's colonial history appears to be the subjugation of African customs and rites in favour of western values in the legal systems of several African countries. An example of this subjugation is the 'repugnancy clauses' that still populate the statute books of several African nations. The effect of the 'repugnancy clauses' has been multiplied by their suppression of African customs relating to the rearing of children alleged or adjudged to have committed a crime. The article draws upon limited research conducted in 2020 and 2021 in five districts of Zambia on children in conflict with the law as part of a limited study conducted by the author in the preparation of Zambia's juvenile justice strategy (2021-25). The study collected quantitative data on the rates of children prosecuted in Zambia's courts for the years 2012-17 and 2019-2020 and determined the rates at which these cases were diverted to customary institutions. It also collected qualitative data in the form of interviews with seven adjudicators, five law enforcement officials and one Chief to make sense of the quantitative data. The research found that although dealing with alleged child delinquents under customary law is a requirement under Zambia's Juveniles Act, neither law enforcement officials nor magistrates referred cases to customary institutions. This article seeks to propose a framework for a balanced incorporation of customary law and its institutions in Zambia's juvenile justice system. Such framework, the article argues, comports not only with the spirit of the Charter for African Cultural Renaissance, but also the African Charter on the Rights and Welfare of the Child, the United Nations Convention on the Rights of the Child, and the Committee on the Rights of the Child's General Comment 24.

TITRE ET RÉSUMÉ EN FRANCAIS:

Réinsertion de l'enfant délinquant: proposition d'un cadre légal efficace pour un système de justice juvénile basé sur le droit coutumier en Afrique avec la Zambie comme étude de cas

RÉSUMÉ: L'une des conséquences de l'histoire coloniale de l'Afrique semble être l'assujettissement des coutumes et des rites africains en faveur des valeurs occidentales dans les systèmes juridiques de plusieurs pays africains. plusieurs nations africaines. L'effet des clauses de répugnance a été multiplié par sa suppression des coutumes africaines relatives à l'éducation des enfants présumés ou reconnus coupables d'un crime. Le document s'appuie sur des recherches limitées menées en 2020-2021 dans cinq districts de Zambie sur les enfants en conflit avec la loi dans le cadre d'une étude limitée menée par l'auteur dans le cadre de la préparation de la stratégie de justice pour mineurs de la Zambie (2021-25). L'étude a collecté des données quantitatives sur les taux d'enfants poursuivis devant les tribunaux zambiens

* MA (Harvard), MSC (Oxford); kkapianga@llm20.law.harvard.edu or kellskaps @yahoo.com

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pour les années 2012-17 et 2019-2020 et a déterminé les taux auxquels ces affaires ont été détournées vers les institutions coutumières. Il a également collecté des données qualitatives sous la forme d'entretiens avec sept arbitres, cinq responsables de l'application des lois et un chef pour donner un sens aux données quantitatives. Les données. La recherche a révélé que bien que le traitement des enfants délinquants présumés en vertu du droit coutumier soit une exigence en vertu de la loi zambienne sur les mineurs, des lois de la Zambie, ni les responsables de l'application des lois ni les magistrats n'ont renvoyé les affaires aux institutions coutumières. Ce document cherche à proposer un cadre pour une incorporation équilibrée du droit coutumier et de ses institutions dans le système de justice pour mineurs de la Zambie. Un tel cadre, fera valoir le document, est conforme non seulement à l'esprit de la Charte pour la renaissance culturelle africaine, la Charte africaine des droits et du bien-être de l'enfant, la Convention des Nations Unies relative aux droits de l'enfant et le Comité sur la Observation générale sur les droits de l'enfant no 24, respectivement.

KEY WORDS: juvenile justice system, repugnancy clauses, Zambia, delinquency

CONTENT:

1 INTRODUCTION

The juvenile justice system is the portion of a country's legal system concerned with questions of guiding children from infancy into law abiding adulthood. Every carer of children probably knows the arduousness of child rearing. Within a household, guiding children into law abiding and productive citizenship is complicated by several factors including the diversity of value systems to which modern caregivers and children are exposed. The difficulty only multiplies when these concerns are at a national level. At this level, states are obligated to set child policies. In doing so, they must also accommodate the rights of primary caregivers to raise their children by whatever value system they deem fit whilst simultaneously ensuring adherence to minimum safeguards set out in national and international child rights instruments designed to protect children. Africa faces an even more daunting challenge. As a result of its colonial history, African customary value systems have been diluted by western value system and significantly eroded. This concern has motivated efforts at the continental level for nations to collectively audit their legal systems to reify the role that African culture and values play in their respective

legal systems. Instruments such as the Charter for African Cultural Renaissance (Renaissance Charter) represent such an effort.

1.1 Recent attempts to balance English and customary value systems in Zambia

Zambia has in recent years taken steps to reinstate the prominence of customary institutions enjoyed in Zambian life before Zambian society came into contact with western value systems. From around 2008, the process of amending the Constitution of the Republic of Zambia[1] began and this culminated in the enactment of the Constitution (Amendment) Act, 2 of 2016. Among the many amendments introduced this statute made to the Constitution, there was a marked attempt to formally recognise customary law as a source of law in Zambia,[2] and to restore the powers and prestige that customary institutions[3] enjoyed in Zambia's pre-colonial legal system. In the amended Constitution, article 165(1) guarantees the existence of the chieftaincy and traditional institutions 'in accordance with the culture, customs and traditions of the people to whom they apply'. Article 165(2)(b) goes on to caution parliament not to 'enact legislation which (b) derogates from the honour and dignity of the institution of Chieftaincy'. These provisions appear to be a direct response to legislative efforts which started at the onset of British domination of present-day Zambia and continued after independence to limit the adjudicative powers of chiefs and customary institutions. The amendments also address the need to reify the role of dispute resolution mechanisms under customary law. For this, the Constitution requires the formal courts to promote the use of 'traditional dispute resolution mechanisms'.[4] Despite these developments, little has been done to realign subordinate legislation and the practice on the ground with the new constitutional framework. This is most evident in Zambia's juvenile justice system.

Between July 2017 and September 2018, the Office of the Auditor General of the Republic of Zambia conducted an audit of the performance of Zambia's juvenile justice institutions in the statutory sub-system.[5] These institutions include the Zambia Police Service, the Department of Social Welfare, the courts (the Magistrate and High Court), Zambia Department of Corrections, the approved Schools and

1 Ch 1 of the Laws of Zambia.

2 This is achieved by art 7(d) of the of the Constitution of the Republic of Zambia, 2016.

3 The customary law institutions include family elders, headmen, chiefs and the chief's police force called Kapasus.

4 The Constitution of the Republic of Zambia, 2016, art 118(2)(d).

5 Office of the Auditor General of the Republic of Zambia (2018) 'Performance Audit on the Juvenile Justice System in Zambia for the Period 2014 to 2017' (unpublished).

Reformatory and are concerned with the proper upbringing of juveniles.[6] The audit examined the performance of these institutions between the years 2014 and 2017. The findings were published in December 2018. The report highlights significant violations of juvenile's rights including overuse of arrests by law enforcement, an overuse of pre-trial detention, prolonged detention at every stage, lack of separation of detained children from adults, inadequate provision of the necessities to children in detention and overall, no evidence that the system rehabilitates children.[7] One of the causes of this state of affairs was the fact that the number of juveniles brought into the system far outstripped the available institutional capacity to provide them with the care required by national and international human rights standards.[8] This was partly because, according to the report, 'in the Zambian juvenile justice system, there is no legal provision that allows for pre-trial diversion of cases'.[9] The notion that Zambian law does not provide for pre-trial diversion is not true. A more accurate position is that the erosion of Zambian cultural values results in the disuse of restorative diversion options under customary law with preference being given to the retribution-oriented western-style juvenile justice. The use of customary law in the juvenile justice system is not only permitted but is actually required. Section 1(2) of the Juveniles Act Chapter 53 of the Laws of Zambia, which is the primary statute dealing with juvenile justice, reads as follows:

> In the application of this Act to juveniles, the provisions of African customary law *shall be observed* unless the observance of such customary law would not be in the interests of such juveniles.

Customary law is used to deal with juvenile delinquency mostly in rural areas. The issue the Auditor General detected was not the lack of diversion under Zambian. It is in fact a resistance by the actors in the formal juvenile justice system to refer cases to the customary law institutions despite the mandatory obligation imposed by the Juveniles Act. The result of this resistance is that there exists in Zambia two distinct and standalone sub-systems for dealing with juvenile delinquency, one customary and predominant in rural areas and the other statutory and predominant in urban areas. This situation results in the treatment of juveniles who commit similar offences receiving different treatments depending on the system they are treated under. This arrangement goes against the recommendations by the United Nations Committee on the Convention on the Rights of the Child (CRC Committee) which discourages 'children committing similar crimes … being dealt with differently in parallel systems or forums'.[10]

Against this background, this article has three goals. First, it seeks to investigate the legal basis of these diverging subsystems and the

6 Constitution of Zambia (n 4).

7 Auditor General (n 6) viii to ix.

8 Auditor General (n 6) 67.

9 Auditor General (n 6) 41.

10 United Nations Committee on the Convention on the Rights of the Child, General Comment 24 (2019) on children's rights in the child justice system, para 103, 17. https://undocs.org/CRC/C/GC/24 (accessed 27 May 2021).

source of the difficulties in merging the two. Second, it shows that Zambia's obligations under international public law require that it establishes a framework for the co-existence of both sub-systems. Third, the article considers the approach taken by Sierra Leone in incorporating customary institutions into its juvenile justice system to propose a framework for establishing synergy between Zambia's juvenile justice subsystems.

1.2 Structure of the remainder of the article

The remainder of the article is divided into four parts from parts two to five. Part two provides a brief description of Zambia's juvenile justice system and brief overviews of its constituent sub-systems. Part three discusses the position of international and regional child rights instruments on the role of customary institutions in the juvenile justice system and addresses some concerns regarding the use of customary institutions in juvenile cases. Part four discusses how Sierra Leone's laws have attempted to incorporate customary institutions into its juvenile justice system. Finally, part five proposes a framework, inspired by Sierra Leone's example, for incorporating customary laws and institutions into juvenile justice systems on the African continent using Zambia as an example.

Sierra Leone is not the only African country to have taken steps to harmonise its customary law system with the inherited western-style justice system in dealing with juvenile delinquents. Also, this choice does not suggest that Sierra Leone's juvenile justice system functions flawlessly or that the merger of these two systems is perfect. Sierra Leone has been chosen for two reasons. First, Sierra Leone's demographic and legal diversity, and its colonial history resembles that of Zambia. Second, the way it has legislated the co-existence of customary and statutory sub-systems is one of the best examples in the region for borrowing the best features of the customary and western-style juvenile justice systems and merging them into a homogenised juvenile justice system. These justifications are explored in detail below.

2 DEFINING ZAMBIA'S JUVENILE JUSTICE SYSTEM

2.1 An overview

Zambia's juvenile justice system comprises the laws, institutions, processes, and procedures for dealing with juveniles[11] falling into three categories. The first category covers juveniles who need care as a result of several factors including familial neglect, abuse or the lack of primary

11 Sec 2 of the Juveniles Act defines a juvenile as 'any person who a person who has not attained the age of nineteen years'.

caregivers. The second category relates to juveniles who are beyond their caregiver's capacity to control them and are in legal, moral or physical danger. The final category is that of juvenile delinquents, that is, those alleged or adjudged to have committed an offence under Zambian law.

The Constitution of Zambia spells out the various sources of law to include laws enacted by Parliament[12] and Zambian customary law.[13] This duality of the sources of law in turn establishes two distinct subsystems within Zambia's legal system, that is, the statutory and customary subsystem. The juvenile justice system inherits this duality and contains subsystems along the same lines.

2.2 The statutory subsystem

The statutory subsystem is based on written laws. It is a creation of Zambia's colonial legacy and was established by the Juveniles Act, 1956[14] which was modelled after the English Children and Young Persons Act, 1933.[15] This system applies to all juveniles in Zambia. Philosophically, this system constructs juvenile delinquency as a crime to be dealt with through the criminal justice system.[16] As such, the same substantive criminal laws that apply to adults, primarily the Penal Code Act (PCA), is also used to establish criminal culpability in juvenile cases. Similarly, the institutions which enforce penal laws in juvenile cases are the same as those which deal with adults. These include law enforcement agencies (the Zambia Police Service, Drug Enforcement Commission, Zambia Department of Immigration, and the National Prosecution Authority), adjudicative bodies (the Subordinate and High Court) and institutions which implement penalties issued by the courts (such as the Department of Social Welfare and Zambia Correctional Service). Also, the same procedures applied to adult cases as prescribed under the Criminal Procedure Code Act are also applied to juvenile proceedings with minor modifications in the Juveniles Act relating to matters such as the nature of the orders that can be issued in juvenile proceedings, the attendance of parents or guardians in courts proceedings and court's power to assist juveniles in examining witnesses.[17]

As regards adjudicating juvenile cases, the court with primary jurisdiction is the Magistrate Courts.[18] Proceedings before these courts are adversarial. Hence, criminal proceedings are undergirded by the

12 Constitution of Zambia (n 4) art 7(b).
13 Constitution of Zambia (n 4) art 7(d).
14 Now Chapter 53 of the Laws of Zambia.
15 E Simuluwani 'Zambian approaches to disposition of juvenile offenders', unpublished master's degree thesis, Simon Fraser University (1985) 53.
16 Simuluwani (n 15) 65.
17 Juveniles Act, Chapter 53 of the Laws of Zambia, sec 64.
18 Juveniles Act (n 17) sec 63.

juvenile's presumption of innocence,[19] which obligates the state to prove the juvenile's guilt beyond a reasonable doubt, through examination of witnesses. In these proceedings, the juvenile is provided an opportunity to cross-examine state witnesses and call their own evidence in rebuttal.[20] Once the court finds the juvenile guilty of the alleged offence, it is empowered to issue any orders available to it under the law including those applicable to adults[21] except the death penalty.[22] Courts can also issue orders:

(a) for juveniles above the age of 16 years, detention in a reformatory or imprisonment in a prison;[23]
(b) for all juveniles –
    (i) detention in an Approved School;
    (ii) For the juvenile or their primary caregiver to pay a fine, damages or costs;
    (iii) Placing the juvenile on probation;[24]
    (iv) For the juvenile to undergo counselling;[25] and
    (v) For the juvenile to perform community service.

2.3 The customary subsystem

In contrast to the statutory subsystem, the customary law subsystem is established by unwritten customary laws. This was the sole system that applied to the geographical territory that is present-day Zambia before 1899, when European settlers first settled in the territory. Zambia has approximately 73 ethnic groups each, having its own customary system. Despite the plurality of customary systems, there are features common to all customary systems.

Across nearly all customary systems, pre-pubescent juveniles are treated differently from juveniles who have attained puberty. As regards pre-pubescent juveniles, customary law constructs them as incapable of understanding society's requirements of them and therefore neither subjected to trials nor sanctions. However, there appears to be no uniform age for the onset of puberty among the customary law systems. Research suggests that it can range from 10[26] to 15.[27] Pre-pubescent juveniles are, therefore, not subjects of the law

19 Constitution of Zambia (n 4) art 18(2)(a).
20 Constitution of Zambia (n 4) art 18(2)(e).
21 Juveniles Act (n 17) secs 73(1)(j) & (3).
22 Penal Code Act, Chapter 87 of the Laws of Zambia, sec 25(2).
23 Juveniles Act (n 17) secs 73(1)(d) & (i).
24 Juveniles Act (n 17) secs 73(1)(b), (c), (f) & (g).
25 Penal Code Act, sec 138(4).
26 Zambia Law Development Commission 'Report to the Minister of Justice on the restatement ofcustomary law project' 2004 252; http://www.zambialaw development.org/research-reports/# (accessed 1 May 2021).
27 Y Calliou & YH Burchill 'Customary law and juvenile justice' (2016) 9, https://www.tdh.ch/sites/default/files/le_droit_coutumier_khopeburchill_ycolliou_en.pdf (accessed 20 May 2021); Save the Children, 'An exploratory study on the interplay between African customary law and practices and children's protection rights: a focus on South Africa and Zambia' (2011) 14, https://resourcecentre.savethechildren.net/node/5845/pdf/5845.pdf (accessed 20 May 2021).

but objects of the community's care. From this perspective, juvenile delinquency is viewed as a lapse in children's upbringing to be dealt with within the juvenile's family or clan.[28] If a party external to the family unit is harmed by the juvenile's behaviour, the focus of communal interventions, if any, is on ensuring that the juvenile's caregivers repair whatever harm ensued from the juvenile's behaviour.[29]

Post-pubescent juveniles are considered to be adults and treated as such.[30] As regards criminal conduct by this population, customary law treats it just like any other non-criminal infraction. It is important to note that unlike Western-style justice system, Zambian customary law constructs justiciable disputes as one single phenomenon and does not construct 'crimes' in a manner distinguishable from a civil wrong.[31] Under customary law, any conduct which threatens social harmony is a justiciable wrong.[32] This broad categorisation covers behaviours which are purely personal, such as assaults, and those which have a more public outlook such as murder or witchcraft. Within this framework, the goal of dispute resolution is restorative,[33] that is, to restore social harmony in the community by ensuring that the offender understands the impact of their conduct, reconciling the parties involved and repairing the harm caused by the anti-social behaviour.[34]

The proceedings for determining whether the juvenile, whether pre or post pubescent engaged in the alleged delinquent conduct, or caused the harm are often informal, taking the form of negotiation, mediation and familial arbitration.[35] Where arbitration is used, the proceedings are inquisitorial in nature[36] and there is no evidential threshold to be met for any findings of fact.

2.4 Harmonising Zambia's juvenile justice system: a story of oil and water

The preceding discussion highlights fundamental differences in the statutory and customary subsystems. These differences are largely based on how the juvenile is constructed and the goal of each

28 Simuluwani (n 15) 43.

29 Simuluwani (n 15) 63.

30 Simuluwani (n 15) 40.

31 Zambia Law Development Commission (n 26) 252.

32 Simuluwani (n 15) 37.

33 Calliou & Burchill (n 27) 6.

34 Simuluwani (n 15) 38; United Nations Human Rights Office of the High Commissioner'Human rights and traditional justice systems in Africa' (2016) 69, https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf (accessed 1 May 2021).

35 Danish Institute for Human Rights, 'Access to justice in the Republic of Zambia: a situationAnalysis' (2015) 29, https://www.academia.edu/20028811/Access_to_Justice_in_the_Republic_of_Zambia_A_Situation_analysis (accessed 3 May 2021).

36 Danish Institute for Human Rights (n 35) 276.

subsystem. Since the arrival of European settlers in present day Zambia, several attempts to harmonise the existence of the English law and customary law were made. The various constitutional documents which regulated the English settler's governance of present-day Zambia made provision for the continued application of customary laws subject to the so-called repugnancy clauses. A repugnancy clause is generally a clause used to qualify the application of native customary laws in most African countries colonised by the British. These clauses were intended to prevent the application of so-called 'barbaric practices' under African customary laws.[37] In terms of these clauses, customary laws would only be recognised and legally enforced only to the extent that they were 'not repugnant to natural justice or morality, or to any order made by Her Majesty in council, or to any regulation made' by the colonial administration.[38] Simply put, to be recognised as a source of law, customary law had to be consistent with the English sense of justice.[39]

Within the juvenile justice system, however, a different standard was introduced with the enactment of the Juveniles Act. This statute was enacted at a time when Zambia was a British protectorate and made up of two distinct demographics that is, the European settlers and native Zambians bound by customary laws. To harmonise the subsystems, the Act, first, limited the application of statutory subsystem to specified areas which were those largely inhabited by European Settlers and, second, left customary laws to apply to the natives.[40] This was consistent with the British's concept of indirect rule.[41] To achieve this, section 1 of the Juveniles Act it would apply only to geographical areas the Minister of Justice would designate and that customary law would be applied unless its application was not in the juvenile's best interests. Therefore, as long as Zambia's population remained segregated, the subsystems applied to two different demographics connected only by the condition that a native juvenile could be subjected to the English-style system if applying the customary subsystem would not be in their best interests. There is little literature and jurisprudence on how this applied in practice.

Upon attaining independence, the entire Juveniles Act was made applicable to the whole of Zambia.[42] This created an overlap in the application subsystems over the same population. This development was also accompanied by several other changes whose ultimate design was to remove all adjudicative functions from customary institutions and vest them into the statutory system. Simuluwani[43] and Hoover, Piper and Spalding[44] provide a comprehensive discussion of the history

37 *Laoye v Oyetunde* [1944] AC 170 cited from E A Taiwo 'Repugnancy clause and its impact on customary law: comparing the South African and Nigerian positions – Some lessons for Nigeria' (2009) 34(1) *Journal for Juridical Science* 92.

38 North Eastern Rhodesia Order in Council, 1900, art 35.

39 Taiwo (n 37) 90; M Ndulo 'African customary law, customs, and women's rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 96.

40 Simuluwani (n 15) 54.

41 Simuluwani (n 15) 44.

42 By Gazette Notice 276 of 1964.

43 Simuluwani (n 15) 52.

of attempts to harmonise the statutory and customary sub systems and will not be repeated here. For purposes of this discussion, three developments are most significant.

First, Zambia retained the repugnancy clauses introduced by the English and discussed above. Repugnancy clauses were modified to reflect the fact that statutes are now enacted within Zambia. Since independence for customary law to be valid, it must be consistent with the Constitution,[45] written law, natural justice, morality, equity, and good conscience.[46] The latent effect of this is that the customary subsystem was viewed as being inconsistent with the notion of justice adopted from the colonial masters and began to erode.

Second, the Independence Constitution made a requirement that people could only be convicted for an offence if such offence were set out in a written law and such law set a penalty.[47] On its face, this provision eradicated criminal offences under customary law which are unwritten. However, there are some provisions of the Constitution which marginally suggest that customary law can still be a source of criminal liability. For instance, section 20(12)(b), in setting out an exception to the right to appear in criminal proceedings through a legal representative provided that

> nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of — … (b) subsection (2)(d) of this section to the extent that the law in question prohibits legal representation before a subordinate court in proceedings for *an offence under African customary law* (being proceedings against any person who, under that law, is subject to that law …

In addition, the Local Courts Act, also recognises criminal offences under customary law.[48] These provisions seem to recognise that customary law, though unwritten can create criminal offences.

Third, the law was amended to limit trials for customary offences to the statutory system. The Local Courts Act was enacted to establish Local Courts and vest in them sole jurisdiction of trying criminal cases under customary law.[49] This statute makes it a criminal offence for any person not duly authorised by a written law to perform any adjudicative functions vested in these courts except in the case of customary arbitrations and the reaching of settlements under African customary law.[50] This provision was directly intended to strip customary authorities of all compulsory adjudicative functions and is still in Zambia's statute books.

There is some debate regarding the impact of these developments on the customary system broadly and the juvenile justice system in particular. Some scholars argue that these developments eradicated or

44 EL Hoover, JC Piper & FO Spalding 'The evolution of the Zambian courts' (1970) 2 *Zambia Law Journal* 55.
45 Constitution of Zambia, art 7(d).
46 Constitution of Zambia, art 118(3).
47 Independence Constitution of Zambia, sec 20(8).
48 Local Courts Act chapter 29 of the laws of Zambia, sec 12(2).
49 Hoover, Piper & Spalding (n 44) 56.
50 Local Courts Act Chapter 29 of the Laws of Zambia, sec 50.

at least limited the customary system's jurisdiction over criminal offences[51] while others feel that it remained intact. However, a third view can be taken. It could be argued that these developments, although, clearly intended to impact customary law, actually had no effect on it. For instance, the constitutional requirement that people could not be convicted of 'criminal offences' unless the offences were in a written law could not apply to customary law because customary law does not create 'criminal offences' as already pointed out. In fact, the definition of an offence under the statutory subsystem refers to offences under written statutes. An offence is defined as 'any crime, felony, misdemeanour, contravention or other breach of, or failure to comply with, *any written law*, for which a penalty is provided.'[52] In any event, as regards the juvenile justice system, these developments could not have impacted it for several reasons. First, the customary subsystem of the juvenile justice system was unaffected by the repugnancy clause because its application was explicitly preserved in section 1(2) the Juveniles Act. Second, since juvenile delinquency proceedings under the customary subsystem are not strictly criminal, they are unaffected by the constitutional requirement for the underlying offences to be in writing. Finally, the fact that delinquency proceedings under customary law are resolved through settlements and arbitration meant that they are unaffected by the provisions of the Local Courts Act prohibiting 'criminal trials' of cases outside the Local Courts.

Whatever view one takes about the legal implications of the post-independence legislative changes on the juvenile justice system, there is no denying that they were motivated by an intention by the government to create a single juvenile system based on the western style statutory subsystem.[53] However, in reality, it created a *de facto* bifurcated juvenile justice system with two independent subsystems having no connection between them. The risk this created is that a juvenile is not protected from punishment under both subsystems. This is because the so called 'double jeopardy' defence, the legal device traditionally used to protect people from being criminally punished twice of the same offending conduct, only operates where the first punishment was under a written law (the statutory sub-system). The PCA provides as follows:[54]

> ... if a person does an act which is punishable under this Code and is also punishable under another Act or Statute of any of the kinds mentioned in this section, he shall not be punished for that act both under that Act or Statute and also under this Code.

The 2016 Constitutional amendments are intended to reverse the course charted from the Independence Constitution. The recognition of customary law as a source of law subject only to the Constitution[55] shows an intention to establish customary law as a source of law on par with subordinate written legislation. The recognition of the existence of the chiefs and customary institutions with the powers and privileges

51 Simuluwani (n 15) 63.
52 Interpretation and General Provisions Act Ch 2 of the Laws of Zambia, sec 3.
53 Simuluwani (n 15) 65.
54 Penal Code Act Ch 87 of the Laws of Zambia sec 2.
55 Constitution of Zambia (n 4) art 7(d).

conferred on them by their respective customary laws[56] coupled with a bar on parliament enacting legislation eroding these powers and privileges[57] is intended to ensure that the legislative efforts taken by the Kaunda government to limit the relevance of customary institutions in Zambia never recurs. Finally, the obligation placed on the formal courts to promote the use of traditional dispute resolution mechanisms is intended to recognise and reinvigorate the use of these institutions in Zambia. However, as far as the juvenile justice system is concerned, it is clear that these changes on their own have not gone far enough to harmonise the statutory and customary subsystems.

3 THE ROLE OF CUSTOMARY LAW INSTITUTIONS UNDER INTERNATIONAL AND REGIONAL INSTRUMENTS

3.1 An overview of provisions in international and regional instruments

In thinking about establishing a synergised juvenile justice system in Zambia, it is important to recognise the provisions of international and regional child rights which bear on the incorporation of customary institutions within the juvenile justice system. At the global level, the United Nations Convention on the Rights of the Child, 1989 (CRC) starts from the position that child policies must not unduly interfere with the roles that communal institutions of socialisation, including those under customary law, play in child rearing. It obligates state parties to

> respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.[58]

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985[59] (Beijing Rules) echo this position and recommend as follows:[60]

> Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose ... of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

56 Constitution of Zambia (n 4) art 165(1).

57 Constitution of Zambia (n 4) art 165(2).

58 CRC art 5.

59 This is the pre-eminent UN instrument setting out non-binding standards for juvenile justice systems.

60 United Nations standard minimum rules for the administration of juvenile justice, 1985 rule 1.3.

Building on these instruments, the Committee on the CRC recognises the advantages that come with the use of customary systems in the juvenile justice system. It expresses itself as follows:[61]

> Many children come into contact with plural justice systems that operate parallel to or on the margins of the formal justice system. These may include customary, tribal, indigenous or other justice systems. They may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing responses tailored to cultural specificities. Such systems can serve as an alternative to official proceedings against children and are likely to contribute favourably to the change of cultural attitudes concerning children and justice.

Instruments on the African continent also emphasise the need for children to be raised in a way that preserves African culture and moral values. Article 11(2)(c) of the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter) provides that African children's education and socialisation should be directed towards 'the preservation and strengthening of positive African morals, traditional values and cultures'. The Charter also repeats the need for child rearing practices in Africa to reify African values when it provides, in the Preamble as follows:

> it is imperative to edify educational systems which embody the African and universal values so as to ensure the rooting of youths in African culture, their exposure to values of other civilisations, and mobilize forces in the context of sustainable, endogenous participatory development.

The Charter goes on to emphasise the need to recognise and utilise customary institutions in resolving conflicts. Article 14 reads as follows:

> Elders and traditional leaders are cultural stakeholders in their own right. Their role and importance deserve official recognition in order for them to be integrated in modern mechanisms of conflict resolution and inter-cultural dialogue system.

From this, it appears that customary institutions are relevant at two levels of a juvenile justice system. First, the African Children's Charter and African Charter emphasise the relevance of these institutions in inculcating African moral values which can serve as part of a strategy to prevent children engaging in delinquency. Second, the UNCRC, the Beijing Rules Committee on Experts on the Rights of the Child and the Children's Charter recognise the positive role these institutions can play as part of the legal infrastructure to for dealing with juvenile delinquency without resort to the criminal justice institutions.

3.2 Addressing some concerns regarding customary dispute resolution mechanisms

There are several concerns often raised regarding the use of customary institutions when dealing with children. These must specifically be addressed as part of the strategy for incorporating customary institutions into the juvenile justice system. To this end, the Committee on the CRC observes as follows:

> Considering the potential tension between State and non-State justice, in addition to concerns about procedural rights and risks of discrimination or marginalization, reforms should proceed in stages, with a methodology that involves a full

61 General Comment 24 (n 10) para 102.

> understanding of the comparative systems concerned and that is acceptable to all stakeholders. Customary justice processes and outcomes should be aligned with constitutional law and with legal and procedural guarantees.[62]

Some scholars are concerned that customary law systems extol social harmony at the cost of procedural safeguards for the children they deal with.[63] The safeguards allegedly sacrificed in the pursuit of social harmony include the lack of the rights to remain silent, presumption of innocence, lack of evidential thresholds to guide the determination of findings of fact, the lack of records of the proceedings and weak oversight mechanisms which allow for decisions which seem arbitrary.[64] Other concerns are directed at the composition of these institutions. Commentors observe that customary adjudicators are rarely appointed based on any training but usually based on heritage. This raises questions about the competence of these adjudicators to address the peculiar challenges of juvenile delinquency. Third, it is often observed that the views of juveniles are rarely sought and considered in customary law proceedings which leads to a charge that these institutions discriminate against children.[65] Finally, some observers take the view that the application of customary law may not be tenable in today's societies due to the disassociation of people from the rural settings to which customary laws are often limited and also the influx of non-native migrant communities who are not the subject of these customary laws.[66]

To begin with, the concerns about the lack of procedural safeguards, the untrained adjudicators and the unstructured decision-making processes are often raised by people alien to these mechanisms. These features of the customary institutions do not appear to bother the users. Research shows that customary institutions in Zambia are vastly more popular and result in outcomes that disputants find more satisfying than the statutory subsystem.[67] To the Zambian users of these institutions, the apparent informality appears is what makes these institutions affordable, familiar and flexible enough to tailor outcomes to meet the needs of society.[68] Also, although the adjudicators may be untrained in the conventional sense, they are often well vested in the society's norms and values and have years of experience resolving disputes. It is also worth noting that similar western style dispute resolution mechanisms such as negotiation, mediation and arbitration rarely face similar criticisms even when they can have informally trained adjudicators themselves.

62 General Comment 24 (n 10) para 103.

63 Caliou & Burchill (n 27) 6.

64 Caliou & Burchill (n 27) 9.

65 Caliou & Burchill (n 27) 9; United Nations Human Rights Office of the High Commissioner (n 34) 63.

66 Hoover, Piper & Spalding (n 44) 50.

67 Danish Institute for Human Rights (n 35) 252.

68 African Human Security Initiative, 'The criminal justice system in Zambia: Enhancing thedelivery of security in Africa' (2009) 113, https://www.africaportal.org/publications/the-criminal-justice-system-in-zambia-enhancing-the-delivery-of-security-in-africa/ (accessed 13 May 2021).

Furthermore, although little is being done in several African countries to reinforce the role of customary law in criminal policy, global trends in criminal policy are moving towards adopting approaches which are similar to those at the core of African customary law. As discussed, African customary law's goal when dealing with anti-social behaviour is restorative. In line with this, there is growing recognition at the global level of the benefits of restorative justice as a penal goal not only for the juvenile justice system but also the broader criminal justice system. This recognition is evident from the adoption of the basic principles on the use of restorative justice programmes in criminal matters by the United Nations in 2002. However, the argument for maintaining records of proceedings before these bodies and the need to establish more robust review mechanism is worth taking on board.

There is little debate that customary law institutions tend to inadequately consider the views of children in their processes. This can be attributed to the fact that most ethnic groups in Zambia, children depend on adult men for subsistence.[69] As a result, children are constructed as objects of care and protection and not holders of rights equivalent to adult men.[70] This no doubt violates international customary law which requires that every person be recognised and be treated equally before the law and international best standards regarding juvenile justice which require adequate both that the views of children be obtained wherever possible and that there be adequate representation among the institutions in the juvenile justice system.[71] However, this critique is not unique to customary systems. One could argue that the statutory sub-system suffers the same problem in that although children ostensibly have a right to express themselves during the proceedings, the esoteric nature of adversarial proceedings and the intimidating environment created in these proceedings makes the exercise of this right impracticable in most cases. On this issue, the office of the Auditor General of Zambia concluded, regarding the statutory sub-system: 'It was observed that the courts lacked the necessary facilities to provide the required child friendly environment for juvenile offenders as stipulated in the Juvenile Act and the CRC.'[72]

Finally, in respect of the charge that customary law may be out of step with the demographic realities of modern-day Zambia, this in itself, is not a basis for abandoning the use of this system. One feature of customary law that compares favourably to the statutory subsystem is the former's near unlimited capacity to adapt to suit the society's lived experiences whether economic, social or political which contrasts

69 K Kariseb 'Signs of triumph, trial and tribulation: reflections on the domestication andimplementation of article 9 of the Women's Rights Protocol in Namibia' (2018) 2 *African Human Rights Yearbook* 150-151, http://doi.org/10.29053/2523-1367/2018/v2n1a6 (accessed 1 July 2021).

70 Ndulo (n 39) 89.

71 Rule 22.2 of the Beijing Rules.

72 Office of the Auditor General of the Republic of Zambia (2018) 'Performance Audit on the Juvenile Justice System in Zambia for the Period 2014 to 2017' (unpublished) 41.

the latter's rigidity and cumbersome procedural requirements for change.[73] Therefore, customary law is fully capable of adapting to the demographic and social changes identified in the critique. In fact, as shown below, some countries have adapted their customary law institutions to accommodate the changes in the populations to whom customary law is intended to apply.

A point that also ought to be made is that some of the features of the customary subsystem make it particularly apt for dealing with juvenile delinquency. For instance, its flexibility and capacity to keep abreast with social changes makes it a far superior system for addressing acts of delinquency which tend to be equally versatile. Customary's broad definition of delinquency which covers all conduct which threatens social harmony will naturally cover even emergent threats to harmony. Conversely, the statutory subsystem will only cover offences listed in the statute books. This distinction in speed of adapting was brought into contrast as regards dealing with cyberbullying. Customary institutions had little trouble dealing with this phenomenon which is covered by the broad prohibition for insulting and intimidating language while the statutory subsystem only captured this behaviour at the beginning of 2021 with the enactment of the Cyber Security and Cyber Crimes Act, 1 of 2021.

Second, the speed with which disputes are dealt with under the customary subsystem is not only required by child rights instruments[74] but also entail minimum disruption to the live and developmental progression of the juvenile. This is in addition to the fact that no detention is ever used either to secure the juvenile's attendance or as a punishment before these institutions.

Third, the informality of the proceedings in the customary subsystem, the use of local languages and the fact that adjudicators are often known by, and know the juvenile, all serve to create a more child-friendly environment than prevails in the statutory subsystem. In this environment, the juvenile is better able to participate in the proceedings. Also, the fact that the adjudicators will often know the juvenile and their home situation makes it more likely that these institutions will only intervene where intervention is necessary and issue dispositions to address the underlying causes of the juvenile's delinquency. However, it is worth bearing in mind that this knowledge of the juvenile can also impede the conduct of a fair trial especially as regards juveniles who have a reputation of delinquency or from families with such reputation.

Finally, the fact that pre-pubescent juveniles are not the direct subjects of delinquency proceedings shields these children from the

73 Danish Institute of Human Rights (n 35) 35; United Nations Human Rights Office of theHigh Commissioner (n 34) 1; A Varvaloucas et al 'Improving the justice sector: law and institution-building in Sierra Leone' in OEG Johnson (ed) *Economic challenge and policy issues in early-twenty-first century Sierra Leone* (2012) 511 https://www.theigc.org/wp-content/uploads/2012/03/Johnson-Ed.-2012-.pdf (accessed 2 February 2022).

74 See for instance the CRC, art 40(2)(b)(iii) and the Beijing Rules, Rule 20.

labelling effect that can come with bringing children into contact with the criminal justice institutions.

4 A NEW WAY OF THINKING ABOUT CUSTOMARY LAW AND JUVENILE DELINQUENCY: THE EXAMPLE OF SIERRA LEONE

Even when it is acknowledged that customary institutions have a role to play in the juvenile justice system, situating them within legal systems that are heavily shape by colonial forces is not any easy task. Despite this, there is at least one African nation, the Republic of Sierra Leone, whose approach offers a promising example, on paper, of how this can be done while simultaneously addressing some of the concerns raised regarding the use of customary institutions.

Sierra Leone enacted its Children's Act in 2007.[75] One of the most notable features of this statute is the innovative way it deals with the incorporation of customary institutions into Sierra Leone's juvenile justice system. Sierra Leone is a particularly good comparison to Zambia because of the similarities between the two countries', histories, demographic composition and legal structures. Demographically, Sierra Leone, like Zambia has several ethnic groups, about 149 chiefdoms headed by Paramount Chiefs with village chiefs overseeing individual towns and villages.[76] Also, like Zambia, it was formerly administered by the British leaving it with a dual legal system which is split between a formal, British-style legal system and its indigenous customary system.[77]

Sierra Leone has legislated the co-existence of customary and statutory systems by creating parallel subsystems, one for dealing with minor acts of delinquency and the other for dealing with serious offences. Minor acts of delinquency are the preserve of Child Panels which are to be established at the district level.[78] These panels are a blend of customary, religious, and statutory institutions. They comprise seven members as follows:

(i) a chairperson nominated by the district council from among the members of the council;

(ii) a member of a women's organisation;

(iii) a representative of the Chiefdom Councils in the district;

(iv) the district social welfare officer, who shall be the secretary;

(v) a district council member, representing the council;

(vi) two other citizens from the community of high moral character and proven integrity one of whom shall be an educationalist.

75 By the Supplement to the Sierra Leone Gazette Extraordinary Vol CXXXVIII, No 43 dated 3 September 2007.

76 Varvaloucas et al (n 73) 497.

77 Varvaloucas et al (n 73) 497.

78 Children's Act 2007 sec 71.

In dealing with juvenile delinquency, the Panels are empowered to deal with minor acts of delinquency through mediation[79] in which the child may be asked to apologise, offer restitution or a form of service to victim of their conduct.[80] Child Panels can also facilitate reconciliation between the child alleged to have committed an offence and any person offended by the action of the child.[81] They can also impose an order, called a 'community guidance order' placing the juvenile under the guidance and supervision of a person of good standing in the local community for a period not exceeding six months for purposes of his reform.[82] A Child Panel may in mediation propose an apology, restitution to the offended person or service by the child to the offended person.

Serious offences such as murder, treason and felonies related to the serious damage to property, injury to the person, and other serious crimes that may from time to time be specified in the Gazette by the Minister responsible for justice[83] are dealt with through juvenile justice institutions in the statutory subsystem, and these comprise law enforcement agencies, Magistrate Courts, and the High Court.[84]

There are several features of this set-up that are worthy of some praise. First, the establishment of the panels at the district level harnesses the benefits of accessibility associated with customary institutions. Importantly, the composition of these bodies directly addresses the concerns about the lack of child perspectives in the customary system as well as the need for trained personnel in customary institutions dealing with delinquent juveniles. Also, the lack of procedural safeguards is addressed by downgrading the proceedings to be more conciliatory and mediatory, which ensures that outcomes are consensual.

Second, the inclusion of customary, state, and religious institutions is a noteworthy innovation. African societies are religious. Recognition of this religiosity is not only a reflection of the evolution of African cultures, but it is also in keeping with the requirement to ensure that the actors in the juvenile justice system reflect the diversity within the society. Rule 22(2) of the Beijing Rules provides that '[j]uvenile justice personnel shall reflect the diversity of [j]uveniles who come into contact with the juvenile justice system.'

Third, by treating minor offences as acts of delinquency within institutions which perform the broader function of child welfare, Sierra

79 Children's Act (n 78) sec 71(2).

80 Children's Act (n 78) sec 75(5).

81 Children's Act (n 78) sec 75.

82 Children's Act (n 78) sec 74(4).

83 Children's Act (n 78) sec 52(1).

84 I Leao 'An analysis of specific laws concerning youth crime and associated procedures forjuvenile delinquency: the Sierra Leone case under the framework of international law' (2011) 11, https://www.academia.edu/3586339/An_ Analysis _of_Specific_Laws_Concerning_Youth_Crime_and_Associated_Procedures_fo r_Juvenile_Delinquency_The_Sierra_Leone_Case_Under_the_Framework_of _International_Law, 11 (accessed 30 June 2021).

Leone's Children's Act casts delinquency in its proper light as an issue of child welfare and not criminal policy.

Despite the commendable job Sierra Leone's statute does in incorporating customary institutions, it has some limitations. First, it does not appear that Child Panels have exclusive jurisdiction to deal with minor allegations of delinquency. From the face of the statute, there is nothing to suggest that the state is proscribed from prosecuting minor acts of delinquency. The lack of an express prohibition is likely to water down the apparent separation between the systems for dealing with minor acts of delinquency separate from serious offences. Second, the differentiation based on the offence the juvenile is alleged to have committed may be difficult to police. This is because unless there are simultaneous measures to limit prosecutorial discretion, the prosecuting authority can choose to skip the jurisdiction of Child Panels by simply charging juveniles with serious offences even where the evidence does not support such a charge. Third, this differentiation is also unprincipled. There is no justification based on principle why two juveniles who commit offences must be treated under different systems by reason only that one has committed a felony and the other a misdemeanour. The requirement to uphold the best interests of juveniles requires that in all interactions with state institutions, the juveniles must be treated first and foremost as juveniles and without differentiation based on the charges they are facing. The juvenile charged with a felony who also enjoys the presumption of innocence should not forfeit her childhood by reason only of the fact that they are charged with a felony.

5 A CUSTOMARY-BASED FRAMEWORK FOR DEALING WITH JUVENILES IN ZAMBIA: A COALITION OF SUB-SYSTEMS

Sierra Leone's Children's Act, 2007 can provide an inspiration for how Zambia can rebalance its juvenile justice system as required by the 2016 constitutional amendments. A balanced co-existence of the systems can only be achieved if they are placed on an equal plane and clear linkages between the two are established. What is clear from the discussion is that section 1(2) of Zambia's Juveniles Act has not managed to create a functional linkage between the two subsystems with the consequence that the two operate independently. In addition, it has established a juvenile justice system whereby the outcomes of juvenile cases depend on where the juvenile is located. In what follows, I propose a framework for maintaining the statutory sub-system largely intact but modifying the customary subsystem to exist alongside and not beneath the statutory subsystem as is currently the case.

A proper framework for a cohesive juvenile justice system in Zambia would entail maintaining the statutory subsystem but developing the customary subsystem to be on par with this system in a synergised fashion. For this, I propose a three step-process.

At step one, the Constitution needs to set up customary law alongside and not beneath the written law. The current constitutional provision on the sources of law partly does this. However, this is then watered down by the repugnancy clauses contained in the Constitution and subordinate legislation which still establish consistency with a written law, natural justice and good conscience as preconditions for customary law's validity. These should all be deleted. Consistency with the Constitution should be the only requirement that customary law must meet.

Step two, customary institutions with jurisdiction to settle cases of juvenile delinquency should be reorganised along the lines of Sierra Leone's Child Panels. The advantages of this transformation have already been discussed. Additional impetus for this transformation can be situated in Zambia's Constitution. First, as regards gender parity, customary institutions are public bodies,[85] which are bound to the constitutional requirement to ensure 'adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups'.[86] As regards the inclusion of religious officials, the Constitution reflects Zambia's 'multi-religious ... character'. This religiosity is even more important when it comes to child rearing and must be reflected in all institutions for the rearing of children as the Beijing Rules recommend. This may not be difficult to do. In the last couple of years, Zambia has been creating institutions at the district level called 'Child Protection Committees' which comprise personnel from the Department of Social Welfare and customary institutions for the purpose of promoting the welfare of children.[87] All that needs to be done is to establish these bodies by law, clearly provide for their composition to include the same number of juveniles and women as men and expand their jurisdiction to include resolution of juvenile delinquency.

The final step involves establishing jurisdictional rules for the two subsystems to prevent overlaps, building clear linkages between the two sub-systems and oversight mechanisms to police the linked system. Any reforms in this area can be linked to a few developments which are current in Zambia. Three are particularly relevant. The first, the Village Protection Committees, have already been discussed. Second, Zambia is in the process of enacting a new statute intended to revamp its juvenile justice system. One of the fundamental provisions intended to be introduced is to raise the minimum age of criminal responsibility (MACR) to 14 which will align it to the internationally recommended age.[88] Although this is a positive move, there is a risk that anti-social behaviours by children below this age which often points to the need for social welfare interventions will remain unaddressed. Third, in 2018, Zambia promulgated a National Diversion Framework (NDF) which is an administrative framework for dealing with juveniles outside the

85 Constitution of Zambia (n 4) art 171(2).

86 Constitution of Zambia (n 4) art 173(1)(j).

87 https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZMB/CRC_C_ZMB_Q_2-4_Add-1_22814_E.pdf (accessed 2 February 2022).

88 General Comment 24 (n 10) para 22.

statutory subsystem using restorative approaches. The NDF is currently being piloted. What this development shows is that there is some political will within Zambia to use restorative approaches to dealing with juvenile delinquency. What is disappointing, however, is that instead of building on the customary subsystem, which is already restorative, the NDF establishes diversion as a disposal within the statutory subsystem and largely relies on institutions within the statutory subsystem.

Once a synergised juvenile justice system is established following the three step process just suggested, this synergy can be emphasised by establishing clear jurisdictional rules to regulate this system. The following could be done. First, a clear rule must be established that children under the MACR, proposed to be at 14, cannot be subjected to any form of court proceedings for acts of delinquency. Instead, such children must be referred to the appropriate social welfare institutions. Second, as regards children above the MACR, the customary law subsystem must be given primacy and resorted to unless the juvenile or their primary caregiver raises an objection. This set-up is because section 1(2) of the Juveniles Act makes the application of the customary subsystem mandatory in all juvenile cases the only exception being in cases where the application of this subsystem would not serve the juvenile's best interests. Under international child rights instruments, the best way to assess the child's best interests would be to respect the views of the juvenile or those of their primary caregivers on how the case must be determined. Therefore, the starting point would be that every juvenile case would by customary institutions unless the juvenile opts out and chooses to have their case determined in the statutory sub-system. Once the customary subsystem assumes jurisdiction over a case, the outcome of the proceedings must be reduced in writing and submitted to the Magistrate Court for review and reduction into a court order. This would provide accountability, ensure that the decisions of these institutions are in the juvenile's best interests as required by section 1(2) of the Juveniles Act and also align with the Constitution. Finally, the statutory subsystem would apply to any juvenile who opts out of the customary sub-system. The entry point into the subsystem would be the NDF. All cases eligible for diversion under the NDF could be diverted. Those ineligible for diversion can proceed to the court system. The customary institutions can report the case to the Police and the case would thereafter proceed under the statutory sub-system.

6 CONCLUSION

International public law recognises the difficulty of creating state policies for the proper upbringing of children. It also recognises the importance of utilising all a society's resources in socialising children and, the role of customary law institutions in this endeavour is gaining prominence. The rise of customary law institutions aligns with the goals of the Children's Charter which include reifying the role that these institutions play in conflict resolution. This article built on these points to make a case for greater integration of customary law institutions in the juvenile justice system using Zambia as an example. The article

showed the chaotic state of Zambia's laws relating to the role of customary institutions in the juvenile justice system and pinpointed the progressive replacement of the customary value system with the adopted Anglo-American value system as the cause of this chaos. The article argued for a reification of the customary law system. If sought inspiration from the Sierra Leonean Child Panels to develop a framework upon which Zambia can reorganise its customary institutions and incorporate them into the juvenile justice system while at the same time updating these institutions to align them with the demands of international child rights instruments and modernity. The life of nation need not necessarily entail the death of the tribe.

The role of NGOs in the domestic implementation of the African Union Transitional Justice Policy Framework: perspectives from Uganda

*Tonny Raymond Kirabira**
https://orcid.org/0000-0003-3100-6133

ABSTRACT: This article explores the role of non-governmental organisations (NGOs) in the domestic implementation of the African Union Transitional Justice Policy (AUTJP). It uses Uganda as a prism through which to examine the implementation of two key constitutive elements of the AUTJP: criminal prosecutions and traditional justice. Besides reflections based on the author's experience in Uganda, the analysis rests on an extensive study and review of literature and qualitative interviews. The article argues that NGOs have the potential to sequence the constitutive TJ elements of the AUTJP, where there are competing narratives of peace versus justice. While local NGOs are pivotal in fostering local ownership of TJ, the findings reveal the critical role of NGO networks in the domestic implementation of TJ. The article concludes that there is a compelling case to be made for the continued involvement of NGOs in the domestic implementation of TJ.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le rôles des organisations non-gouvernementales dans la mise en œuvre nationale de la politique de justice transitionnelle de l'Union Africaine: perspectives de l'Ouganda

RÉSUMÉ: Cet article explore le rôle des organisations non-gouvernementales (ONG) dans la mise en œuvre nationale de la politique de justice transitionnelle de l'Union Africaine (PJTUA). Il utilise l'Ouganda comme prisme pour examiner la mise en œuvre de deux éléments constitutifs clés de la PJTUA: les poursuites pénales et la justice traditionnelle. Outre les réflexions fondées sur l'expérience de l'auteur en Ouganda, l'analyse s'appuie sur une étude et un examen approfondi de la littérature et d'entretiens qualitatifs. L'article soutient que les ONG ont le potentiel de séquencer les éléments constitutifs de la justice transitionnelle de la PJTUA, où il existe des récits concurrents de la paix contre la justice. Alors que les ONG locales sont essentielles pour favoriser l'appropriation locale de la justice transitionnelle, les résultats de cette étude révèlent le rôle crucial des réseaux d'ONG dans la mise en œuvre nationale de la justice transitionnelle. L'article conclut qu'il existe des arguments convaincants en faveur de l'implication continue des ONG dans la mise en œuvre nationale de la justice transitionnelle.

* LLB (Uganda), LLM (Notre Dame, USA), PhD Law Researcher at University of Portsmouth (UK); Visiting Fellow at the Firoz Lalji Institute for Africa, London School of Economics (LSE); tonny.kirabira@myport.ac.uk. The author would like to thank the organisers and participants at the African Youth for Transitional Justice Training (AY4TJ) programme in May and June 2021, where he gained valuable insights for this article.

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KEY WORDS: transitional justice, African Union Transitional Justice Policy, International Criminal Court, Uganda, non-governmental organisations, legitimacy

CONTENT:

1 INTRODUCTION

A growing body of scholarship gives attention to the implementation of transitional justice (TJ) across local, national, regional and global levels.[1] TJ is defined as redress for gross violations of human rights following periods of authoritarian rule or armed conflict.[2] These include criminal accountability, truth commissions, reforms and reconciliation. As argued by Brankovic and Van der Merwe, the practice of TJ will shape future understanding of its boundaries, goals, strategies and definition.[3]

There are scholarly questions regarding North-South gaps in the understandings and beliefs about what TJ is and what it can achieve. Whereas Parmentier explicitly agrees that this gap exists,[4] a North-based understanding of TJ is illustrated in what Dolan terms 'North-based transitional justice operators', that often obscure local contexts in favour of criminal accountability.[5] Inevitably, Dolan raises an interesting argument for 'South-based transitional justice', creating new spaces for non-state actors, as opposed to state-controlled truth telling and prosecutions. [6] There are calls for the rethinking of TJ, in order to provide closer attention to its context.[7] Similarly, Palmer adds to the inclusivity critique, arguing for legal pluralism and bottom-up

1 A Macdonald 'Somehow this whole process became so artificial: exploring the transitional justice implementation gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225-248; F Teksen 'Implementation of transitional justice initiatives in Bosnia and Herzegovina: the need for an inclusive approach' (2019) 39 *Journal of Muslim Minority Affairs* 199-215.

2 R Duthie & P Seils (eds) *Justice mosaics: how context shapes transitional justice in fractured societies* (2017).

3 J Brankovic & H van der Merwe (eds) *Advocating transitional justice in Africa: the role of civil society* (2018) ix.

4 L Fletcher & H Weinstein 'North-South dialogue: bridging the gap in transitional justice – workshop transcript' (2018) 36 *Berkeley Journal of International Law* 227.

5 Fletcher & Weinstein (n 4) 228-229.

6 As above.

7 M Mutua 'What Is the future of transitional justice?' (2015) 9 *International Journal of Transitional Justice* 1-9.

approaches to TJ.[8] To this end, this article underlines the need to implement TJ in ways that resonate with country specific realities.

In February 2019, the African Union (AU) adopted a regional framework, in form of a Transitional Justice Policy (AUTJP).[9] The backbone of the framework rests on four broad areas. First, it contains the principles and values that show an overall objective to offer 'guidelines, possible benchmarks and practical strategic proposals for the design, implementation, monitoring and evaluation of African TJ processes'.[10] Second, it consists of a normative framework and indicative elements of TJ. Third, it highlights crucial cross cutting issues related to gender and broader inclusivity of vulnerable groups. Finally, it presents an outline on implementation mechanisms. This comprehensive policy framework affirms the arguments that Africa is actively engaged in the development of human rights law.[11] But how should this policy be implemented across specific country contexts in Africa?

This article explores the role of NGOs in the domestic implementation of the AUTJP. Lühe's work shows the contribution of NGO expertise in the development of the AUTJP.[12] Wachira's theoretical analysis of the AUTJP highlights how the policy would fit within the general structure of governance in Africa.[13] He notes the expansive conception of the notion of justice that includes restorative, redistributive and transformative justice, as unique developments.[14] Beyond the development of regional standards in TJ, he argues that the AUTJP presents a unique opportunity to address impunity in Africa.[15] This article goes beyond the theoretical analysis of the TJP, to explore ways in which it would be implemented.

The article uses the case study of Uganda as a prism through which to explore the domestic implementation of the policy. Due to the political and normative disagreements around TJ, the AUTJP is viewed

8 N Palmer *Courts in conflict: interpreting the layers of justice in post-genocide Rwanda* (2015) 181.

9 African Union, Transitional Justice Policy, 12 February 2019 (AUTJP).

10 AUTJP (n 9) para 9.

11 M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) *Research handbook on international human rights law* (2010) at 413

12 U Lühe 'Developing the African Union transitional justice policy: an assemblage perspective' in B Jones & U Lühe (eds) *Knowledge for peace: transitional justice and the politics of knowledge in theory and practice* (2021).

13 GM Wachira 'The African Union transitional justice policy framework and how it fits into the African Governance Architecture (AGA)' in C Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: development and challenges* (2019).

14 Wachira (n 13) 164.

15 Wachira (n 13) 163.

as an important development for both institutionalisation and diversification of TJ processes in Africa.[16] Using the Robben Island Guidelines as an example, Long and Murray show the potential of thematic instruments of the African Commission to positive reforms in domestic contexts.[17] This suggests a need to consider how the AUTJP would be implemented at national levels.

The AUTJP envisions a network of actors at local, national and regional levels, including non-state actors.[18] The African Commission on Human and Peoples' Rights (African Commission) is the body responsible for monitoring implementation of AU human rights framework, including the AUTJP. However, as argued by Killander, there are considerable challenges in the implementation regime, that requires innovations.[19] More generally, Long and Murray are concerned about the implementation gap of African Commission soft-law instruments at the national and regional levels.[20]

Murray's comparative research recommends multifaceted approaches towards national implementation of regional human rights standards, encompassing a broad range of stakeholders including victims and NGOs.[21] This article lends support to Murray's argument that empathises the centrality of NGOs in both development and functioning of the African human rights system.[22] It will thus explore how NGOs can contribute to the national implementation of the AUTJP.

There are calls for more rigorous conceptualisation of the roles of NGOs in TJ.[23] It is thus useful to examine how the AUTJP applies in domestic contexts. It is even more important to understand how it can be implemented. Van der Merwe and Brankovic locate the work of NGOs in five dimensions: implementers, opponents, reframers, alternatives and mediators.[24] Surprisingly, while there is considerable scholarly attention on NGO roles in TJ and human rights in general, the question of how this links with the regional framework has not

16 V Arnould 'Regionalisation of transitional justice frameworks in Africa and Europe' *Leuven Transitional Justice Blog* https://blog.associatie.kuleuven.be/ltjb/regionalisation-of-transitional-justice-frameworks-in-africa-and-europe/ (accessed 30 April 2021).

17 D Long & R Murray 'The role and use of soft law instruments in the African human rights system' in S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) at 96.

18 AUTJP (n 9) para 127.

19 Killander (n 11).

20 Long & Murray (n 17).

21 R Murray 'Addressing the implementation crisis: securing reparation and righting wrongs' (2020) 12 *Journal of Human Rights Practice* 1 at 11.

22 R Murray 'The role of NGOs and civil society in advancing human security in Africa' in A Abass (ed) *The role of NGOs and civil society in advancing human security in Africa* (2010).

23 P Gready & S Robins 'Rethinking civil society and transitional justice: lessons from social movements and 'new' civil society' (2017) 21 *The International Journal of Human Rights* 956-975.

24 H van der Merwe & J Brankovic 'The role of African civil society in shaping national transitional justice agendas and policies' (2016) 1 *Acta Juridica* 230.

garnered similar scrutiny. Yet, the potential for implementation of the ATJ framework through NGOs appears substantial.

Thus, the article offers an analysis of NGO work in TJ, using the concept of implementation as a theoretical framework. The key question relates to the role of NGOs in the domestic implementation of TJ. This dimension is useful when designing strategies to ensure that both elements of criminal accountability and traditional justice are implemented, without undermining the broad goals of the AUTJP.

As a methodological choice, this article is based on a combination of research methods. First, it lies on the case study method of TJ in Uganda. This is a good case study since Uganda adopted a National Transitional Justice Policy, three months after the adoption of the AUTJP.[25] This case study also allows the article to draw on reflections based on the author's experience as a legal practitioner in Uganda.

Second, due to the methodological deficits in the orthodox doctrinal legal research method, the article uses a socio-legal approach. As argued by Hellum, there is need for research approaches that view human rights as socially constructed, in order to transcend normative debates within law and anthropology.[26] This socio-legal research is applied in order to address the key question regarding the role of NGOs in the domestic implementation of the AUTJP framework in Uganda. It also allows for empirical assessment through the use of a variety of data sources like semi-structured interviews and participant observations.

Finally, the analysis rests primarily on an extensive study and review of secondary sources regarding the TJ process and the formulation of the Uganda national TJ Policy of 2019. As a secondary source, it relies on qualitative semi-structured interviews with a range of NGO representatives, victim representatives, prosecutors, judges, academics and defence lawyers. The participants were selected on the basis of their work in Uganda's TJ process. For the NGO representatives, the primary goal was to understand how their policies and interventions feed into the two key constitutive elements of the AUTJ Policy. It also aimed to identify the common themes that pervade their work.

Due to the COVID-19 disruptions, the interviews were conducted through a mixture of telephone and online using video technology. Salmon's qualitative e-research framework was used as a tool for organising and designing the interviews.[27] The University of Portsmouth ethical guidelines and usual ethical principles guiding socio-legal research applied during the entire process. This was vital in order to have verifiable research participants, and provide informed consent before participating in the online interviews.[28] The findings

25 Uganda national transitional justice policy, 2019 (Uganda TJP).

26 A Hellum 'How to study human rights in plural legal contexts: an exploration of plural water laws in Zimbabwe' in BA Andreassen, H Sano & S McInerney-Lankford (eds) *Research methods in human rights: a handbook* (2017) at 437.

27 J Salmons *Doing qualitative research online* (2016).

28 J Salmons 'Designing and conducting research with online interviews' in J Salmons (ed) *Cases in online interview research* (2012) 8.

were analysed systematically, to identify the discursive elements that relate to elements of criminal prosecutions and traditional justice.

The article is organised in four main sections. Following this Introduction, section two sets the scene analysing the key indicative elements of the AUTJP justice and accountability, and the use of traditional mechanisms. The section closes with a discussion on the role of NGOs in the implementation of TJ. Next, section three turns to the case study of Uganda, giving empirical perspectives of NGO work in TJ. Finally, in section four, the article concludes that there is still a compelling case to be made for the involvement of NGOs in the domestic implementation of TJ.

2 CONTESTED JUSTICE IN AFRICA

This section examines two key indicative elements of the TJP-Justice and accountability, and the use of traditional mechanisms. The aim of the section is to explore the interconnectedness, but also contestations around the two dimensions. These discussions will be relevant for the implementation of the AUTJP in the domestic contexts.

2.1 Justice and accountability

The dimension of justice and accountability is a key element of the AUTJP, providing for the prosecution of crimes at the national levels, extraordinary chambers or hybrid courts and international tribunals with competent jurisdiction.[29] Arnould makes a critical comparison between the AUTJP and the European Union TJ policy regarding the aspect of criminal justice.[30] She reveals that unlike the latter that places international criminal justice at the centre of its approaches, the AUTJP prioritises national trials and regional courts.[31] It is thus important to explore how criminal accountability is understood within the African context, in order to determine effective implementation mechanisms.

Previous years have seen an increasing engagement of the AU in international criminal justice as a form of TJ. This evolving role is exemplified through the creation of regional and sub regional bodies, for example, the extraordinary African chambers for the trial of former Chadian president Hissène Habré. However, there are scholarly concerns in relation to how such mechanisms relate to the broader goals of TJ, suggesting for a cautious implementation approach.[32]

The African Union backlash against the ICC in the previous years presents a ground to analyse the normative developments under the

29 AUTJP (n 9), paras 77-79.

30 Arnould (n 16).

31 Arnould (n 16).

32 See GM Musila 'The role of the African Union in international criminal justice: force for good or bad?' in EA Ankumah (ed) *The International Criminal Court and Africa* (2016).

TJP.[33] In particular, a key question could arise on how states will implement global international criminal justice as a form of TJ. The African Union (AU) is determined to establish a criminal chamber within the African Court of Justice and Human Rights (the criminal chamber). Critics of the ICC intervention in Africa are optimistic about the potential role of the African Court of Justice and Human Rights (ACJHR) in TJ.[34] In what he calls a 'differentiated accountability system', Murithi stresses the regional accountability mechanism as a core body under the AU's TJ framework.[35]

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) (Malabo Protocol) is a key development within the TJ framework.[36] However, the controversial provision for immunity for incumbent Heads of State and other senior officials elicits concerns about the relevance of the Malabo Protocol within the context of TJ.[37] Besides limiting the mandate of the African Court, the immunity provision has the potential to negatively impact on the TJ capacities of *ad hoc* courts.[38] Consequently, there are arguments for African states to respect their obligations arising from the principle of universal jurisdiction and Rome Statute.[39] For example, the ICC is seen as a relevant mechanism in contexts where national courts fail to prosecute top commanders.[40]

Besides its potential merits, Kemp highlights significant problems like lack of adequate finances and human resources, that might impede the functioning of the proposed international criminal law section of the African Human Rights Court.[41] He argues for the continued role of

33 J Oloka-Onyango 'Unpacking the African backlash to the International Criminal Court (ICC): the case of Uganda and Kenya' (2020) 4 *Strathmore Law Journal* 41-68; P Brett & LE Gissel *Africa and the backlash against international courts* (2020).

34 T Murithi 'The advent of a differentiated accountability system: the African Court of Justice and Human Rights and the AU transitional justice architecture' in C Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: development and challenges* (2019).

35 Murithi (n 34) 166-179.

36 Malabo Protocol.

37 D Nsereko & MJ Ventura 'Perspectives on the international criminal jurisdiction of the African Court of Justice and Human Rights pursuant to the Malabo protocol (2014) in C Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: development and challenges* (2019); see also Malabo protocol (n 36) art 46A

38 NC Ani 'Implications of the African Union's stance on immunity for leaders on conflict resolution in Africa: the case of South Sudan and lessons from the Habre case' (2018) 18 *African Human Rights Law Journal* 438 at 462.

39 CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1087.

40 EC Lubaale 'The dominant role of commanders in the Sudanese military justice system and accountability for international crimes' (2018) 26 *African Journal of International and Comparative Law* 391-406.

41 G Kemp 'South Africa's (possible) withdrawal from the ICC and the future of the criminalization and prosecution of crimes against humanity, war crimes and genocide under domestic law: a submission informed by historical, normative and policy considerations' (2017) 16 *Washington University Global Studies Law Review* 435.

the ICC in Africa, under the broad notion of ending impunity.[42] However, it is also vital to consider the nexus between the ICC and the context specific realities.

The challenges surrounding the involvement of the ICC in contexts like Libya and Sudan illustrate the need to examine how accountability mechanisms are implemented.[43] Within the context of TJ, Okafor and Ngwaba relate the ICC role to that of a football referee, making observations with a potential for alternative justice.[44] In light of the calls for regional accountability mechanisms, it is important to consider the challenges of implementing TJ, most notably, in the absence of regime changes at the domestic levels.[45]

2.2 Traditional justice under the AUTJP

Besides formal justice and accountability, the AUTJP stresses the importance of traditional and complementary justice mechanisms:[46]

> Alongside its focus on holding perpetrators accountable, and hence on retribution, in the African transitional setting the justice and accountability element should involve conciliation and restitution. Procedures should involve granting compensation to victims and facilitating full participation of victims and community members in proceedings and reconciliation and healing.

These traditional mechanisms resonate with empirical research findings on possible alternatives conceptions of justice: (i) restoration of relationships through compensation and rituals; (ii) ending ongoing violations through peace talks; (iii) redistribution of wealth and compensation; (iv) justice as accountability and punishment where the perpetrators confess and live with the affected people; and (v) justice as equality through the prosecution of all perpetrators including state agents.[47] Concerns about the application of cosmopolitan notions of justice have triggered calls for alternative forms of justice rooted in the African context, as a way of peacebuilding.[48] In a nutshell, the dominant use of criminal accountability as a tool for global justice is criticised for failure to take account of diverse conceptions of justice.[49] Consequently, there are strong arguments for legal pluralism within

42 Kemp (n 41) 435.

43 See Lubaale (n 40); M Kersten 'Justice after the war: the International Criminal Court and post-Gaddafi Libya' in KJ Fisher & R Stewart (eds) *Transitional justice and the Arab spring* (2014); and M Kersten *Justice in conflict: the effects of the International Criminal Court's interventions on ending wars and building peace* (2016).

44 OC Okafor & U Ngwaba 'The International Criminal Court as a 'transitional justice' mechanism in Africa: some critical reflections' (2015) 9 *International Journal of Transitional Justice* 107.

45 Murithi (n 34).

46 AUTJP (n 9).

47 SMH Nouwen & WG Werner 'Monopolizing global justice' (2015) 13 *Journal of International Criminal Justice* 165.

48 C Zambakari 'Two paradigms of justice: Criminal vs survivor justice in Africa' (2019) 22 *Contemporary Justice Review* 122-138; C Zambakari 'To punish or to reform? Survivor justice in Africa' (2016) *Conflict Trends* 3-11.

49 Nouwen & Werner (n 47).

international criminal justice.[50] The use of traditional justice mechanisms is particularly suited in post-war contexts, where it fosters reintegration of former combatants.[51]

Notable traditional justice mechanisms include *Gacaca* in Rwanda, *Magamba* spirit mediums in Mozambique, *Fambul Tok* or 'family talk' in Sierra Leone, *Bashingantahe* or counsel of wise elders in Burundi and the *Mato Oput* system in Northern Uganda.[52] More generally, the AU peace and security architecture recognises the pivotal role of the panel of the wise (elders) in the conflict prevention and resolution.[53]

Consequently, one could think of ways in which the TJP would influence the policies of both state and non-state actors, on traditional justice mechanisms. However, the practical implementation of traditional justice remains a critical challenge.[54] It is important to note that legal pluralism triggers tensions within the communities, due to the divergent normative orders between formal and traditional justice.[55]

In light of this dilemma, a key question arises: What strategies can the AU invoke to ensure that both criminal accountability and traditional justice are implemented, without undermining the broad goals of the TJP? Crucially, the role of non-state actors like NGOs becomes vital. The next section explores the role of NGOs within TJ, specifically their work and policies regarding the two key indicative elements of the TJP-Justice and accountability, and the use of traditional mechanisms.

2.3 Implementation of TJ through NGOs

The past years have seen growing NGO engagements within the African human rights mechanisms through advisory opinions and strategic litigation, within the broader context of human rights.[56] Another notable role that we could think of relates to the monitoring of state compliance with TJ processes, since NGOs are part of broader compliance constituencies that also include the judiciary and media.

50 EC Lubaale 'Legal pluralism as a lens through which to appreciate the role and place of traditional justice in International Criminal Justice' (2020) 52 *Journal of Legal Pluralism and Unofficial Law* 180-202.

51 C Rose & FM Ssekandi 'The pursuit of transitional justice and African traditional values: a clash of civilizations' (2007) 4 *SUR International Journal on Human Rights* 101-107.

52 African Commission on Human and Peoples' Rights 'Study on transitional justice and human and peoples' rights in Africa, 2019 https://www.achpr.org/news/viewdetail?id=185 (accessed 22 June 2021).

53 A Jegede 'The African Union peace and security architecture: can the panel of the wise make a difference?' (2009) 9 *African Human Rights Law Journal* 409-433.

54 E Brems, G Corradi & M Schotsmans *International actors and traditional justice in sub-Saharan Africa: policies and interventions in transitional justice and justice sector aid* (2015); Lubaale (n 50).

55 Brems, Corradi & Schotsmans (n 54).

56 M Killander & MG Nyarko 'Human rights developments in the African Union' (2018) 18 *African Human Rights Law Journal* 732-757.

However, human rights scholars argue that such constituencies can either advance or obstruct the domestic implementation of regional human rights standards.[57] It is thus therefore important to identify the various ways in which NGOs influence the adoption and implementation of TJ mechanisms at the national and local levels.

According to Long and Murray, ownership of the African Commission soft law instruments can be demonstrated by NGOs, in addition to national human rights institutions and states.[58] As a tool to encourage implementation of human rights decisions made by regional bodies, NGOs play critical roles in increasing visibility and publicity around human rights while pressuring states to comply.[59]

NGOs organise workshops where stakeholders hold discussions outlining what TJ should look like. For example, discussions within NGO workshops in the Democratic Republic of the Congo (DRC) proposed a decentralised approach to TJ through the use of local committees, due to the context sensitive dynamics.[60] Another important suggestion relates to what Arnould regards as a 'grounded decentralisation' requiring the implementation of TJ based on victims' own conceptions of justice, instead of normative positions.[61] In the opinion of the author, such decentralised approaches would be a good basis for implementation of the TJP element of traditional justice.

NGO coalitions play a pivotal role in legitimising truth and justice mechanisms through their engagement with the public, media, donors, governments and these TJ mechanisms.[62] As a solution to what she terms as 'renewed authoritarianism' in Egypt, Aboueldahab advances a TJ approach that prioritises social justice, judicial activism and the strengthening of civil society.[63] She uses the Egyptian case to empathise the importance of NGOs in shaping TJ, particularly in authoritarian contexts.[64]

From a normative perspective, NGOs fill the gaps where the states lack capacity, by drafting TJ legislation and working directly with the victims.[65] It can be argued that by articulating TJ norms from an

57 A Donald & A Speck 'The dynamics of domestic human rights implementation: lessons from qualitative research in Europe' (2020) 12 *Journal of Human Rights Practice* 59.

58 Long & Murray (n 17) 107.

59 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* 86-87.

60 V Arnould 'Reflections on a decentralized approach to transitional justice in the DR Congo' (2021) 33 *Africa Policy Brief* 1-10.

61 Arnould (n 60) 7.

62 LK Bosire & G Lynch 'Kenya's search for truth and justice: the role of civil society' (2014) 8 *International Journal of Transitional Justice* 256-276; C Sperfeldt 'The trial against Hissène Habré: networked justice and reparations at the extraordinary African chambers' (2017) 21 *International Journal of Human Rights* 1243-1260.

63 N Aboueldahab 'Transitional justice policy in authoritarian contexts: the case of Egypt' (2017) *Brookings Doha Center* 3-5.

64 Aboueldahab (n 63) 3-5.

65 Brankovic & Van der Merwe (n 3).

African perspective, NGOs have the potential to legitimise the constituent elements of the TJP in contexts where TJ is contested. We cannot underestimate the role of local NGOs in the implementation of traditional justice mechanisms. Community based NGOs have the potential to question top-down approaches that may not be culture-congruent'.[66] Ultimately, the local ownership of the TJP is critical in order to guarantee its successful implementation.

NGOs are pivotal in the work of specialised criminal tribunals. The Special Court for Sierra Leone (SCSL) had a cordial relationship with NGOs and needed their support, particularly the Office of the Prosecutor.[67] NGOs were influential in the interpretation of the Special Court Agreement (Ratification) Act 2002, in regards to the contested legal relationship between the Tribunal and the Truth and Reconciliation (TRC).[68] As the two TJ mechanisms operated in parallel, there were legal concerns regarding the use of evidence and overlap in their mandates. Therefore, the interpretative role of NGOs can be regarded as a form of legitimisation of the tribunals, since it sets a new normative foundation for TJ.

Despite the aforementioned merits of NGOs, it is important to consider the structural dynamics surrounding NGO work. International NGOs are considered as 'gatekeepers' in the TJ field, since they not only do advocacy, but also operationalise particular TJ elements.[69] In an arena of multiple social and political dimensions, NGOs may not always reflect the views of the local constituencies of TJ -victims, but accentuate donor goals.[70] These donor dynamics have a negative implication on TJ in the local context, as top-down approaches are not always appropriate for the underlying societal needs. In relation to implementation, local NGOs can either adapt or resist TJ concepts and institutions.[71]

Against the background of the critical role of NGOs in TJ, a crucial question arises in respect to how the TJP could be implemented in domestic contexts. The next section will make a qualitative analysis of the case study of Uganda, to identify the constructive role that NGOs play in implementation of TJ.

66 LE Fletcher & HM Weinstein 'Writing transitional justice: an empirical evaluation of transitional justice scholarship in academic journals' (2015) 7 *Journal of Human Rights Practice* 191.

67 Interview with DM Crane, Founding Chief Prosecutor, 1 March 2021.

68 WA Schabas 'Internationalized courts and their relationship with alternative accountability mechanisms: the case of Sierra Leone' in CPR Romano, A Nollkaemper & JK Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004) 166.

69 S Dezalay 'The role of international NGOs in the emergence of the field of transitional justice: a case-study of the International Center for Transitional Justice' in C Lawther, L Moffett & D Jacobs (eds) *Research handbook on transitional justice* (2017).

70 A Jeffrey, L Staeheli & DJ Marshall 'Rethinking the spaces of civil society' (2018) 67 *Political Geography* 112.

71 Van der Merwe & Brankovic (n 24).

3 IMPLEMENTATION OF TRANSITIONAL JUSTICE IN UGANDA: PIVOTAL ROLE OF NGOS

The Uganda case study aims to show the critical role of NGOs in the implementation of TJ. The section starts by giving a historical account of TJ in Uganda. Against this background, it then links the NGO work to the constitutive elements of the ATJP. The analysis rests on two dimensions: First, the work of transnational networks and coalitions and second, the role of NGOs in fostering local ownership of TJ. Local ownership will be analyses through the victim-oriented discourses on TJ within the post-conflict effected communities.

3.1 Brief historical overview of conflict and TJ in Northern Uganda

Northern Uganda erupted into in a civil conflict in 1987, one year after President Yoweri Museveni took charge of the country. The Lord's Resistance Army (LRA), a new rebel movement, was formed by Joseph Kony. The LRA were implicated in acts of sexual violence, murder and recruitment of children as soldiers. There atrocities caused massive internal displacement of more than 440 000 persons in Northern Uganda.[72]

In 1994, there was a temporary ceasefire and a peace agreement was close to being reached between the Government of Uganda and the LRA.[73] However, the LRA returned to the bush and the violence escalated in the coming subsequent years. In July 2006, the Ugandan government and the LRA commenced peace talks, convened in Juba, South Sudan. These talks collapsed in December 2008.[74] Either side viewed the other with suspicion and the Ugandan government opted for a military operation to end the insurgency.[75]

72 Office of the special representative of the Secretary-General for children and armed conflict 'The lord's resistance army and children' (2012) https://children andarmedconflict.un.org/2012/06/the-lords-resistance-army-and-children/ (accessed 19 June 2021).

73 Agreement between the Uganda government and the Lord's Resistance Army (LRA) (Gulu ceasefire) (1994) file:///C:/Users/Admin/Downloads/UG_940202_ The%20Gulu%20Ceasefire.pdf, (accessed 10 March 2021).

74 D Hendrickson & K Tumutegyereize *Dealing with complexity in peace negotiations: Reflections on the Lord's Resistance Army and the Juba Talks* (2012) 5.

75 'Army doubts Kony peace offer' *New Vision* 25 May 2006.

Due to the demand for peace, the Ugandan government enacted an Amnesty Act in 2000, which offered immunity and resettlement packages to LRA fighters who surrendered. Consequently, over 26 000 people in the whole country responded positively and returned home.[76] In 2002, the Ugandan government began an intensive military drive named 'Operation Iron Fist', exerting further pressure on the LRA.[77] Despite its initial success, the number of internally displaced persons (IDPs) grew to over 800 000 at the end of 2003.[78] One year after the ICC started its work in 2002, the Ugandan government referred the situation to the ICC for investigation.

On 6 May 2005 the Office of the Prosecutor (OTP) filed an application to Pre-Trial Chamber II for warrants of arrest for five of the most senior commanders in the LRA, and they were subsequently issued on 8 July 2005.[79] Subsequently, arrest warrants relating to crimes against humanity and war crimes, were issued for the LRA's top 5 commanders in 2005. Dominic Ongwen, one of LRA's top commanders surrendered in 2015, and his trial before the ICC commenced in 2016.[80] In 2008, the ICC trust fund for victims started its assistance mandate operations in Uganda, as a way or repairing the post-war affected communities.[81]

It is important to note that the Juba peace talks and the domestic implementation of the Rome Statute led to the creation of a hybrid court in Uganda, the International Crimes Division (ICD).[82] Thomas Kwoyelo, a commander of the LRA, was arrested and prosecuted at the ICD for atrocities he committed in Northern Uganda. At the time of writing this article, Kwoyelo's trial was underway.

On 4 February 2021, the Trial Chamber IX of the ICC convicted Ongwen of 61 out of 70 counts of war crimes and crimes against humanity, and on 6 May 2021, sentenced him to 25 years

76 Conciliation resources 'Undermining the LRA: Role of Uganda's Amnesty Act' https://www.c-r.org/news-and-views/comment/undermining-lra-role-ugandas-amnesty-act (accessed 22 June 2010).

77 A Macdonald 'In the interests of justice? The International Criminal Court, peace talks and the failed quest for war crimes accountability in Northern Uganda' (2017) 11 *Journal of Eastern African Studies* 631.

78 KC Dunn 'Uganda: The Lord's Resistance Army' (2004) 31 *Review of African Political Economy* 141.

79 See International Criminal Court 'Statement by the Chief Prosecutor on the Uganda arrest warrants', 14 October 2005, at 3, https://www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf (accessed 1 September 2020).

80 See International Criminal Court 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of top LRA Commander Dominic Ongwen' 21 January 2015 https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-21-01-2015 (accessed 20 June 2021).

81 KJ Fisher 'Messages from the expressive nature of ICC reparations: complex-victims in complex contexts and the trust fund for victims' (2020) 20 *International Criminal Law Review* 318-345.

82 High Court (International Crimes Division) practice direction, legal notice No 10 of 2011, section 6(1). The ICD was set up in 2008 to prosecute international crimes under the ICC Act of 2010, the Geneva Conventions Act 1964 and Ugandan criminal law.

imprisonment.[83] Ongwen's prosecution elicited mixed views on the role of international criminal justice within the broader TJ context, considering the fact that Ongwen was both a victim of the brutality of the LRA as well as a perpetrator of gross crimes.[84] Besides the criminal accountability, other forms of TJ include amnesty and reconciliation.

In June 2019, Uganda adopted a National Transitional Justice Policy,[85] three months after the adoption of the AUTJP. The policy was founded upon the peace negotiations in Juba and the Agreement on Accountability and Reconciliation (AAR), that acknowledged the 'need for an overarching justice framework that will provide for the exercise of formal criminal jurisdiction, and for the adoption and recognition of complementary alternative justice mechanisms'.[86] Uganda's TJ Policy mirrors the key constitutive elements of the AUTJP-formal accountability and traditional justice mechanisms.

3.2 Implementing accountability mechanisms through networks

The TJ element of formal accountability is reflected through the application of international criminal justice in Uganda. One notable mechanism relates to the intervention of the ICC in Uganda. The initial relationship between the Ugandan government and the ICC, had been perceived as a 'marriage made in heaven'.[87] However, all was not smooth, as the Court navigated its way through the affected communities and other stakeholders, including NGOs.

At the domestic level, the Northern Ugandan Transitional Justice Working Group (NUTJWG), a collation of over sixty NGOs was formed in 2008 to engage with TJ mechanisms.[88] Workshops convened under the auspices of NUTJWG aimed at 'building consensus among civil society in northern Uganda to promote collective and collaborative engagement on issues of transitional justice'.[89]

So, what do we make of these NGO coalitions within the context of implementing TJ? In Northern Uganda, the coalitions hosted

83 *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, trial chamber IX, sentence, 6 May 2021; TR Kirabira, 'Ongwen at the International Criminal Court' (2021) 25 *ASIL Insights*.

84 A Branch 'Dominic Ongwen on Trial: The ICC's African dilemmas' (2017) 11 *International Journal of Transitional Justice* 39; EK Baines 'Complex political perpetrators: reflections on Dominic Ongwen' (2009) 47 *Journal of Modern African Studies* 163-191.

85 Uganda TJP (n 25).

86 'Annex to the agreement on accountability and reconciliation between the government of the Republic of Uganda and the Lord's Resistance Army/ Movement (Annex to June 29 Agreement), Juba, Sudan, June 29, 2007, February 19, 2008' para 5.2.

87 Oloka-Onyango (n 33) 47.

88 Justice and reconciliation project annual report (2009) 7 http://justice andreconciliation.com/wp-content/uploads/2009/01/JRP_AnnualReport_2009 -SM.pdf (accessed 11 April 2021).

89 Justice and reconciliation report (n 88).

consultative dialogues within the affected communities to reflect on indicted Ongwen's 'Justice Dilemma,' emphasising the importance of both the ICC and domestic justice mechanisms.[90] NUTJWG's work diminished significantly as the ICC case progressed'.[91] One possible reason for the redundancy of the coalition can be attributed to shifting donor and international NGO priorities in the preceding years, as revealed earlier from Macdonald's empirical work in Northern Uganda.[92] Crucially, it can be argued that donor priorities have some influence on how TJ is implemented.

NGO networks were pivotal in the victims' participation process at the ICC. As one local leader and NGO noted:

> Many of the international partners wanted the victim's voices to be heard and some of them even facilitated the victims to the Hague so that they can be part of the process. They also wanted the court to put in consideration of the victim's feelings. Some victims were also facilitated in the court seat so that they can watch the trial and be a part of it.[93]

NGO representatives from Uganda Victims Foundation (UVF) participated in meetings of the Assembly of States Parties (ASP) to the ICC.[94] The UVF network facilitates dialogues and 'Victim Empowerment Training'.[95] It is important to note that due to the sensitivity about ICC intervention, UVF operated under a broad coalition of NGOs named Uganda Victims' Rights Working Group (U-VRWG). A founding member of UVF noted: 'There were fears from retaliation when talking about the ICC in the North'.[96] On a global level, the victims work was part of a wider Victims' Rights Working Group (VRWG) hosted by REDRESS in London.[97] Crucially, the issue of victims' rights and justice remained central within the discourses and work of NGO networks.

Another notable network was the Ugandan Coalition for the International Criminal Court (UCICC), formed in 2004 and hosted by the Human Rights Network Uganda (HURINET–U). It was envisioned as a broad network 'to bring together key players in civil society, government and the international community to map out, as well as endorse a strategy to be employed in the campaign for the ICC in

90 'Ongwen's Justice Dilemma' I*FAIR*, 18 March 2015 https://ifair.eu/2015/03/18/ongwens-justice-dilemma/ (accessed 12 April 2021).

91 Interview with NGO representative, 2 March 2021.

92 Macdonald (n 1) 233.

93 Interview with local leader and NGO representative, 6 March 2021.

94 Interview with a legal representative for victims in the *Dominic Ongwen* case, 12 April 2021

95 TrustAfrica 'Strengthening victim participation in accountability processes: Learning from the experiences of the victim support initiative (VSI)' *TrustAfrica,* 5 August 2019 https://www.trustafrica.org/en/resource/news/item/3435-strengthening-victim-participation-in-accountability-processes-learning-from-the-experiences-of-the-victim-support-initiative-vsi (accessed 12 April 2021).

96 Interview with founding member of UVF, 12 March 2021.

97 VRWG http://www.vrwg.org/about-vrwg/who-we-are (accessed 13 April 2021).

Uganda'.[98] There were contestations among local NGOs regarding who should host the UCICC.[99]

UCICC was not just an advocacy network, but was also involved in the implementation of TJ programmes as the ICC case against Ongwen progressed. According to one of its former coordinators, 'the coalition was just implementing activities, yet it was supposed to be synergising NGO efforts'.[100] This observation illustrates the critical role of NGO networks in legitimising international criminal justice. It also opens up space for closer analysis of how networks might impact on the way in which the AUTJP is implemented in domestic contexts.

During the review conference of the Rome Statute that took place in 2010 in Uganda, the UCICC directly engaged with both ICC staff and delegations. Among other goals, they aimed 'to bring ICC closer to the people affected'.[101] In addition, local events debunked the perception of the ICC as biased against African countries.[102] In the opinion of the author, the legitimacy of formal accountability mechanisms is intricately connected to the discourses among the affected communities.

From a normative perspective, the UCICC was instrumental in the ratification and domestic implementation of the Rome Statute in Uganda.[103] At the time of writing this article, the UCICC was technically not in operation. Two reasons are provided for this situation: First, its operations were largely done by one NGO, HURINET–U, which created conflicts among member NGOs.[104] The other critical aspect relates to the funding. As explained by a former Coordinator, 'The priorities of donors changed along the way, there were some serious challenges.'[105] This is akin to Kendall's observation regarding the Special Court for Sierra Leone, in what she terms 'donors' justice'.[106] Crucially, it can be argued that NGO work in the field of TJ is to some extent dependant on priorities of other actors like donors and the state. Within the context of Uganda, these donor dynamics also have a negative impact, since certain TJ mechanism like amnesty and reconciliation are obscured.

98 Information about UCICC published on the Victims' Rights Working Group (VRWG) http://www.vrwg.org/about-vrwg/ucicc (accessed 12 April 2021).

99 Interview with a former coordinator of the UCICC, 2 March 2021.

100 Interview with a former coordinator of the UCICC, 2 March 2021.

101 Coalition for the International Criminal Court https://www.coalitionforth eicc.org/country/uganda (accessed 12 April 2021).

102 Coalition for the International Criminal Court (CICC) 'ICC challenges: Perspectives from Uganda's student community' Coalition for the International Criminal Court 27 September 2017 https://www.coalitionfortheicc.org/news/20170927/icc-challenges-perspectives-ugandas-student-community (accessed 12 April 2021).

103 Interview with a former coordinator of the UCICC,12 March 2021. The country adopted the International Criminal Court Act (ICC Act 2010) in June 2010.

104 Interview with a former coordinator of the UCICC, 2 March 2021.

105 Interview with a former coordinator of the UCICC, 12 March 2021.

106 S Kendall 'Donors justice: recasting international criminal accountability' (2011) 24 *Leiden Journal of International Law* 585-606.

International NGOs do both advocacy and implementation of TJ. The International Centre for Transitional Justice (ICTJ) has operated in the country since 2005, mainly offering technical support and capacity building.[107] Similarly, *Avocats Sans Frontier* (ASF) works in the thematic areas of victims and reparations under the TJ process.[108] From the author's observations, some transnational NGO networks are akin to donor beneficiary relationships. Ultimately, it can be argued that these relationships have a bearing on the way in which TJ is implemented. One argument could be that international NGOs mirror particular objectives of the AUTJP, in line with their goals.

As the *Dominic Ongwen* case progressed, international NGOs further engaged in support for international criminal justice-oriented elements of TJ. For REDRESS, important aspects relate to the issue of reparations for victims. REDRESS works with local intermediaries to build capacity in the domestic accountability for international crimes.[109] This intervention somewhat overlaps with that of ASF and ICTJ. Nonetheless, NGOs were pivotal in the *Ongwen* case, as revealed by Benjamin Gumpert, the lead prosecutor in the trial:

> The experience was mixed. Some NGOs were supportive and prepared to provide information and assistance, since they believed this would be for the benefit of their clients. Others were defensive and uncooperative. They did not always give reasons. My feeling was that it depended very much upon the pre-formed attitudes of influential NGO staff to the ICC and its work in Uganda.[110]

In light of the aforementioned observation, the impact of transnational NGO networks in TJ cannot be underestimated. In a broader perspective, the observations resonate with Lohne's research findings on the role of NGO networks in global justice.[111] As asserted by Howard Morrison, a judge in the Appeals Chamber of the ICC, 'NGOs may be the principal force in pushing for universal jurisdiction'.[112] However, considering the need for legal pluralism in TJ, it is also vital to explore how NGO work impacts on the implementation of alternative forms of justice besides criminal accountability.

Regarding the element of traditional justice, the work of the Coalition for Reconciliation in Uganda (CORU) empathised reconciliation and healing. CORU was established by NGOs, academics,

107 ICTJ-Uganda https://www.ictj.org/our-work/regions-and-countries/uganda (accessed 10 April 2021).

108 ASF https://www.asf.be/blog/category/country/ouganda/ (accessed 10 April 2021).

109 For a detailed analysis, see REDRESS 'Not with us: strengthening victim participation in transitional justice processes in Uganda' (2020) https://redress.org/wp-content/uploads/2020/07/Not-Without-Us-Report-for-Web.pdf (accessed 27 May 2021).

110 Interview, 6 May 2021.

111 K Lohne *Advocates of humanity: human rights NGOs in international criminal justice* (2019).

112 Interview, 5 March 2021.

religious leaders and other actors in 2006, as a forum to build reconciliation in Northern Uganda.[113] The NGOs proposed a National Reconciliation Bill, while maintaining strong discourses against the ICC intervention. Oola highlights that, '[I]t was clear to many CSOs at this stage that formal trials would not address the full extent of impunity in Uganda'.[114] However, just like the NUTJG, CORU became redundant following the shifting of many donors towards the domestic prosecution. As one local leader revealed:[115]

> The availability of resources makes certain modes of justice be preferred like for example the traditional leaders don't even have facilities to conduct their local reconciliation processes and yet the court process have very many parties willing to support [them] making it [international criminal justice] more preferred than the traditional ones.

The failure of such NGOs is one way to illustrate why it is important to build a strong NGO network as a way of implementing TJ. The element of traditional justice was subdued by dominant international NGO discourses on accountability through international criminal justice. The implementation of TJ is also linked with broader institutional practices at both domestic and global levels. Ultimately, NGO networks have the potential to sequence the constitutive TJ elements of the AUTJP, where there are competing narratives of Peace versus Justice.

To a large extent, the work of international NGOs mirrors the objectives of the AUTJP framework, in terms of promoting criminal accountability. However, less attention is given to the restorative, redistributive and transformative justice elements of the AUTJP. This policy gap can be closed by supporting more grass roots NGOs to access donor and state support. Like has been illustrated in the discussions, transnational NGO networks have a strong influence on the design and implementation of TJ.

3.3 Fostering local ownership of TJ

The AUTJP underlines the need for national and local ownership of TJ initiatives by centralising victims and members of the affected communities in design and implementation of TJ.[116] It is important to note that the dominance of legal approaches in TJ can trigger resistance from the affected communities.[117] Therefore, we can think of ways in which NGO work aligns TJ to local needs and aspirations of the victims.

Of particular importance to the implementation of TJ, is the issue of local outreach. A group of local NGOs, most notably, Justice and

113 S Oola 'The coalition for reconciliation in Uganda (CORU): important lessons for proactive civil society engagement in catalyzing transitional justice discourse', *Advocating justice: Civil society and transitional justice in Africa* (2010) 5 https://peaceinsight.s3.amazonaws.com/media/images/wp-content/uploads/2010/09/Stephen-Oola_TJ-Advocacy-in-Uganda.pdf (accessed 13 May 20210.

114 Oola (n 113) 7.

115 Interview with local leader, 4 April 2021.

116 AUTJP (n 9).

117 See generally B Jones & T Brudholm 'Introduction: rethinking resistance to transitional justice' (2016) 2 *Conflict and Society* 68-73.

Reconciliation Project (JRP) and the Refugee Law Project (RLP) carried out outreach programmes in Northern Uganda. JRP was particularly involved in the understanding of traditional justice processes, but also engaged extensively in the documentation of atrocities and re-integrating former LRA combatants within the societies in northern Uganda.[118] Local NGOs also assisted victims to fill out application forms to participate in the ICC case, before the appointment of victims' lawyers.[119]

It is important to note that the Peace vs Justice debates had an effect on the way TJ was implemented in Northern Uganda. As the ICC intervention emanated from a self-referral by the Ugandan government, the Prosecutor and the government had close working relationships. However, it also had an impact on the sociological legitimacy of the Court before the affected communities. As recalled by one NGO staff: 'when the ICC centred their work around the president, this undermined their legitimacy in Northern Uganda'.[120] The local NGOs were therefore the voice of the affected people. Therefore, the Court had to work more with the affected communities, with lesser engagement with the government. It was noted that 'NGO criticisms strengthened the way the ICC approached it'.[121]

Some of the local NGOs involved in the ICC work, including community leaders and victims representatives could be categorised as Intermediaries of the ICC.[122] However, this categorisation is problematic when used within the context of TJ, as many of the NGOs, do not solely depend on the ICC for their existence and mandates.

Local ownership of TJ can be achieved through involving victims in the domestic accountability mechanisms. Within the Ugandan context, NGOs support victims to achieve justice in the *Thomas Kwoyelo* case. The trial has had numerous delays due to majorly legal procedural and technical capacity challenges.[123] Another cause of the delays is premised on the Uganda government's lack of interest in criminal prosecution as a TJ approach.[124] This created a need for external intervention in order to pursue justice for victims.

Domestic and INGOs thus play a critical role in both the operations of the ICD and the prosecution of Kwoyelo. ASF and ICTJ helped in the drafting of the court's rules of Procedure and technical capacity

118 JRP https://www.justiceandreconciliation.org/ (accessed 11 April 2021).

119 Interview with a legal representative for victims in the *Dominic Ongwen* case, 18 March 2021.

120 Interview with NGO founder, 26 February 2021.

121 Interview with NGO founder, 26 February 2021.

122 L Ullrich 'Beyond the global-local divide: local intermediaries, victims and the justice contestations of the International Criminal Court' (2016) 14 *Journal of International Criminal Justice* 543-568.

123 Interview with former judge of the ICD, 4 March 2021.

124 Interview with criminal lawyer, 3 March 2021.

building by training judges and lawyers. Justice Rapid Response provides direct technical support to the prosecutors,[125] while REDRESS supported the victims' lawyers to collect additional evidence.[126] This work was implemented through its local intermediaries Emerging Solutions Africa (ESA) and the UVF.

An NGO representative pointed out that, 'at times, we help the court to do the outreach'. It is important to note that when Kwoyelo's trial started, there were no rules to govern how victims would participate in the case. Against this background, ASF, together with ICTJ and Victim Support Initiative (VSI), developed a criterion on who would be considered a victim in 2018.[127] Nonetheless, there was contestation and debates about the role of victims in this new hybrid system. According to Kwoyelo's lead lawyer, this debate has never been settled.[128] One notable aspect that we observe, is the relevance of court outreach and engagement with victims. As observed in other contexts like Sierra Leone, outreach enhances the sociological legitimacy of the Court in the affected communities.[129]

The AUTJP goal of local ownership can be implemented through NGO discourses on victims. As one NGO representative noted: 'In all my engagements, I speak about victims and survivors'.[130] Both domestic and international NGO reports detail the need of victims including reparations.[131] The Victim Support Initiative (VSI) facilitates ICC-ICD dialogues and victim empowerment training.[132] These activities are part of a wider and global Victims' Rights Working Group (VRWG) under the auspices of the CICC, hosted by REDRESS.[133] A victim representative noted:

125 Justice Rapid Response 'Uganda: victims are central to prosecuting mass atrocity crimes' Justice Rapid Response (2019) https://www.justicerapidresponse.org/uganda-victims-are-central-to-prosecuting-mass-atrocity-crimes/ (accessed 13 April 2021).

126 Interview with NGO Representative, 26 March 2021.

127 Interview with NGO Representative, 20 March 2021.

128 Interview with C Alaka, Kwoyelo's lead lawyer, 6 March 2021.

129 Interview with DM Crane, Founding Chief Prosecutor, 1 March 2021.

130 Interview with NGO Representative, 16 March 2021.

131 OB Kasozi 'Does the International Criminal Court's verdict offer psychological relief for Dominic Ongwen's victims in Northern Uganda' refugee law project 8 April 2021 https://refugeelawproject.org/index.php?option=com_content&view=category&id=27&Itemid=101 (accessed 13 April 2021). See also Avocats Sans Frontières 'Reflections on victim participation before the International Crimes division in Uganda' (2019) Policy brief; SK Kihika & E Kallweit 'Building blocks for reparations: providing interim relief to victims through targeted development assistance, *International Center for Transitional Justice* (2020) Research report https://www.ictj.org/sites/default/files/ICTJ_Report_Uganda_InterimRelief_Web.pdf (accessed 21 November 2020); Justice Rapid Response (n 125).

132 TrustAfrica (n 95).

133 VRWG information https://asp.icc-cpi.int/iccdocs/asp_docs/20a/VRWG%20Information%20Sheet.pdf (accessed 29 September 2021).

> Other NGOs like the DRC, Refugee Law project and others that I cannot remember now came to us and trained us on our human rights and also the different processes that take place in a court hearing ...[134]

This observation underscores the relevance of increased communication with victims and affected communities where there are multiple sites of justice.[135] More broadly, it can be argued that the victim-oriented work had a direct influence on how victims and affected communities viewed the international criminal justice mechanism.

Domestic NGOs continue to engage in issues of victims' rights, as implementing partners of the Trust Fund for Victims (TFV) in Northern Uganda.[136] The TFV has an office in Uganda where they implement their assistance mandate. Since the start of its Uganda operations in 2008, the TFV has more than 25 NGO domestic NGO implementing partners, whose work has benefited more than 56 000 people across Northern Uganda.[137] Crucially, it can be argued that victim-oriented work mirrors the AUTJP goal of local ownership of TJ.

Local ownership is also implemented through NGO work and discourses on two elements of TJ in Northern Uganda: Amnesty and traditional justice. Boniface Ojok, a co-founder of JRP emphasises the relevance of traditional justice as a complement to criminal accountability, noting: 'Ongwen may escape the heavy sentence on the basis that there is a traditional mechanism that would help to re-integrate him in society'.[138]

Finally, both domestic and international NGOs were pivotal in the discussions and drafting of Uganda's TJ Policy, as evidenced from the legislative history and activities.[139] However, the effective implementation of the Policy requires the adoption of formal legislation as a normative guideline for critical aspects like reparations. Consequently, NGOs are continuing to advocate for this legal framework.[140] In a nutshell, NGOs have the potential to determine the reach and outcomes of the AUTJP, through the various strategies that they use for the implementation of TJ.

134 Interview with local victim Representative, 14 April 2021.

135 Palmer (n 8).

136 TFV https://www.trustfundforvictims.org/en/locations/northern-uganda#:~:text=The%20TFV%20has%20been%20implementing,6%2C006%20direct%20beneficiaries%20in%202018 (accessed 13 April 2021).

137 Interview with TFV Programme Manager for Uganda, 23 March 2021; see also, TFV https://www.trustfundforvictims.org/en/locations/northern-uganda#:~:text=The%20TFV%20has%20been%20implementing,6%2C006%20direct%20beneficiaries%20in%202018 (accessed 13 April 2021).

138 Interview with NGO representative, 26 February 2021.

139 Of particular importance, Avocats Sans Frontières and International Centre for Transitional Justice provided technical expertise and support to the government during the drafting process.

140 Interview with NGO representative, 26 February 2021.

4 CONCLUSION

The aim of the article is to explore how NGOs could contribute to the national implementation of the AUTJP. The theoretical analysis on the AUTJP has explored the interconnectedness, but also contestations around the two dimensions of criminal accountability and traditional justice. In light of this dilemma, the article has explored a key question: What strategies can the AU invoke to ensure that both criminal accountability and traditional justice are implemented, without undermining the broad goals of the AUTJP? The article has thus made a compelling case for the continued involvement of NGOs in the TJ framework.

The Ugandan case study has shown that NGOs have the potential to sequence the constitutive TJ elements of the AUTJP, where there are competing narratives of Peace in relation to Justice. Furthermore, NGOs play a pivotal role in not only advocacy, but also implementation of TJ. The empirical findings reveal the critical role of NGO networks in the domestic implementation of TJ. In the opinion of the author, while it is important to establish umbrella structures for the coordination of TJ, we need to be cognisant of the actor-oriented and bottom-up approaches that centralise the affected communities.

In light of the aforementioned recommendation, the Ugandan case has demonstrated how local ownership of the AUTJP can be achieved through NGO work and discourses on victims and affected communities. The article shows fundamental similarities between Uganda's TJ Policy[141] and the AUTJP, to allay any concerns that might portray the AUTJP as a top-down initiative. Crucially, the article has emphasised scholarly calls for creative and multifaceted responses to TJ in Africa, with a central focus on participatory processes at the domestic and local levels.[142]

While Northern Uganda has been used as an example, it is not the only post-war context or state in transition. The root of the research question was more on the desirability of the case study's type of outcome, as a way of implementing the AUTJP. The question relating to the implementation of the AUTJP invites a broader range of arguments, depending on the actors involved. As the evidence has suggested, one could argue that NGO work makes the AUTJP elements more legitimate, but this is not the only argument one could make. Another possible angle could relate to how NGOs might delegitimise particular elements of the AUTJP. In sum, the article makes a compelling case for increasing involvement of NGOs in TJ.

141 Uganda TJP (n 25).

142 See, V Ladisch & C Yakinthou 'Cultivated collaboration in transitional justice practice and research: reflections on Tunisia's voices of memory project' (2020) 14 *International Journal of Transitional Justice* 80-101; D Mazambani & NT Tapfumaneyi 'A vehicle for peacebuilding or cloak of impunity? the Zimbabwe national peace and reconciliation commission' (2020) 4 *African Human Rights Yearbook* 278-297; MB Lykes & H van der Merwe 'Critical reflexivity and transitional justice praxis: solidarity, accompaniment and intermediarity' (2019) 13 *International Journal of Transitional Justice* 411-416.

حقوق الأشخاص ذوي الإعاقة في إطار المنظومتين الدولية والأفريقية لحقوق الإنسان

د. فاطمة الزهراء صفصاف*
https://orcid.org/0000-0003-2813-6391

ملخص:

ما زال الأشخاص ذوي الإعاقة يواجهون تحديات متعددة ومعقدة، وفيما قطعت المنظومتان الدولية والأفريقية أشواطاً عديدة في إقرار ضمانات لحقوقهم، وعلى الرغم من أن الصكوك الأخيرة التي اعتمدت في إطارهما رسخت الأخذ بنهج اجتماعي/قائم على حقوق الإنسان ينظر للإعاقة باعتبارها بالأساس نتاج لتفاعل الفرد مع بيئة لا تأخذ في الحسبان وجود اختلافات بين قدرات الأفراد. إلا أن النظرة السائدة ما زالت في العديد من الدول سواء على الصعيد الحكومي و/أو المجتمعي، تأخذ بنهج الإحسان أو النهج الطبي حيث يتم التركيز على ما لدى الشخص من "قصور" خلقي أو غير خلقي، كما أن الجهود ذات الصلة ما زالت تركز على العلاج الطبي أو إعادة التأهيل، أو السعي إلى تيسير الاعتناء بالشخص ذي الإعاقة.

وفيما هناك قدر كبير من التماثل بين اتفاقية الأمم المتحدة لحقوق الأشخاص ذوي الإعاقة وبروتوكول حقوق الأشخاص في أفريقيا، فقد تميز البروتوكول بما أولاه من أهمية لبعض الخصوصيات المتعلقة بقضايا الإعاقة في أفريقيا كحالات الطوارئ والنزاع المسلح والنزوح الجبري والطوارئ الإنسانية والكوارث الطبيعية. والعادات والمفاهيم الضارة ودور أشكال القضاء التقليدية. وكذلك اهتم البروتوكول بترسيخ القيم الأفريقية الإيجابية وأكد في عدد من مواده على التزام الدول بتوفير الموارد اللازمة لتعزيز حقوق الأشخاص ذوي الإعاقة.

هذا ويجب العمل على تطوير ضمانات حقوق الأشخاص ذوي الإعاقة والتعامل مع قضايا الإعاقة بشكل عام وذلك بالاستفادة من التطور الكبير والثروة المعرفية التي تراكمت بهذا الخصوص بما في ذلك على صعيد قانون وفقه حقوق الإنسان. كما يجب بشكل خاص بذل المزيد من الجهود لدعم توفر إرادة سياسية لدخول البروتوكول حيز النفاذ وتصديق أكبر عدد من الدول عليه. لقد حان الوقت للانتقال فيما يخص حقوق الأشخاص ذوي الإعاقة من مرحلة الأقوال إلى الأفعال، وذلك بالطبع عملية طويلة ومعقدة تحتاج إلى تضافر جهود كافة الأطراف المعنية، وأن يتم العمل على مختلف الصعد ومنها التوعية والمناصرة والضغط، ويجب أن يتم إشراك الأشخاص ذوي الإعاقة في كل ما يتعلق بهم بحيث ألا يكون هناك شيء يخصهم بدونهم.

* حاصلة على دكتوراه في القانون الدولي والعلاقات الدولية من كلية الحقوق جامعة الجزائر 1، باحثة ومدربة في القانون لحقوق الإنسان، قانونية بالمحكمة الأفريقية لحقوق الإنسان والشعوب، sefsaf.fati@yahoo.fr

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TITLE AND ABSTRACT IN ENGLISH:

The rights of persons with disabilities in the African Human Rights System

ABSTRACT: Persons with disabilities still face multiple and complex challenges. International and regional human rights treaties were adopted to protect their rights from a social and human rights-based approach to disability which considers disability as resulting from an individual's interaction with their environment. This approach, however, does not consider the fact that there are differences in the abilities of individuals. The prevailing view in many states continues to take the charitable or medical approach to disability, where the focus is on congenital or non-congenital 'impairments' of the person. The result is that efforts for dealing with disabilities are still based on medical treatment or rehabilitation, or seeking to facilitate the care of a person with a disability. Although there are many similarities between the United Nations Convention on the Rights of Persons with Disabilities and the Protocol on the Rights of Persons with Disabilities in Africa, the Protocol stands out for the importance it attaches to certain specificities related to disability issues in Africa. These include issues such as emergencies, armed conflicts, forced displacement, humanitarian emergencies and natural disasters, harmful customs and concepts and the role of traditional forms of justice. The Protocol also emphasises the consolidation of positive African values by emphasising the obligation of states to provide the necessary resources to promote the rights of persons with disabilities. Notwithstanding the normative developments, work must still be done to realise the guarantees for the rights of persons with disabilities and to address disability issues in general, taking advantage of the great development and wealth of knowledge that has accumulated in this regard. In particular, more efforts must be made to sustain the political will to achieve the entry into force of the Protocol and its ratification by the greatest number of States. With regard to the rights of persons with disabilities, it is also time to move from words to deeds – although this is a long and complex process which requires the concerted efforts of all parties concerned working at different levels – some of the steps to be taken include awareness raising, advocacy and lobbying, and involving people with disabilities in everything that affects them.

TITRE ET RÉSUMÉ EN FRANCAIS:

Les droits des personnes handicapées dans le système africain des droits de l'homme

RÉSUMÉ: Les personnes handicapées sont toujours confrontées à des défis multiples et complexes. Des traités internationaux et régionaux relatifs aux droits de l'homme ont été adoptés pour protéger leurs droits à partir d'une approche du handicap fondée sur les droits sociaux et les droits de l'homme, qui considère que le handicap résulte de l'interaction d'un individu avec son environnement. Cette approche ne tient toutefois pas compte du fait qu'il existe des différences dans les capacités des individus. Dans de nombreux pays, l'approche dominante du handicap reste l'approche caritative ou médicale, qui met l'accent sur les 'déficiences' congénitales ou non de la personne. Il en résulte que les efforts déployés pour faire face aux handicaps sont toujours fondés sur le traitement médical ou la réadaptation, ou encore sur la recherche de moyens de faciliter la prise en charge d'une personne handicapée. Bien qu'il existe de nombreuses similitudes entre la Convention des Nations Unies relative aux droits des personnes handicapées et le Protocole relatif aux droits des personnes handicapées en Afrique, le Protocole se distingue par l'importance qu'il accorde à certaines spécificités liées aux questions de handicap en Afrique. Il s'agit notamment de questions telles que les situations d'urgence, les conflits armés, les déplacements forcés, les urgences humanitaires et les catastrophes naturelles, les coutumes et concepts néfastes et le rôle des formes traditionnelles de justice. Le protocole met également l'accent sur la consolidation des valeurs africaines positives en soulignant l'obligation des États de fournir les ressources nécessaires à la promotion des droits des personnes handicapées. Malgré les développements normatifs, il reste encore

du travail à faire pour réaliser les garanties des droits des personnes handicapées et pour aborder les questions de handicap en général, en profitant du grand développement et de la richesse des connaissances qui se sont accumulées à cet égard. En particulier, il faut redoubler d'efforts pour soutenir la volonté politique de parvenir à l'entrée en vigueur du Protocole et à sa ratification par le plus grand nombre d'États. En ce qui concerne les droits des personnes handicapées, il est également temps de passer des paroles aux actes - bien qu'il s'agisse d'un processus long et complexe qui nécessite les efforts concertés de toutes les parties concernées travaillant à différents niveaux - certaines des mesures à prendre comprennent la sensibilisation, le plaidoyer et le lobbying, et la participation des personnes handicapées à tout ce qui les concerne.

الكلمات المفتاحية/Key words

حقوق ذوي الإعاقة، اتفاقية حقوق الأشخاص ذوي الإعاقة، بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا، المنظومة الدولية لحقوق الإنسان، المنظومة الأفريقية لحقوق الإنسان.

جدول المحتويات/Table of contents

مقدمة

يوجد في العالم أكثر من مليار شخص من ذوي الإعاقة، يمثلون زهاء 15 في المائة من السكان، 80 في المائة منهم يتواجدون في البلدان النامية،[1] وتشير التقديرات إلى أن هناك ما يقارب 80 مليون شخص ذوي إعاقة في أفريقيا.[2] ويواجه الأشخاص ذوي الإعاقة الذين يشكلون فئة هامة من المجتمع تحديات معقدة بشأن تمتعهم بحقوقهم مقارنة بغيرهم، من بينها حواجز متعددة مادية واقتصادية وقانونية تحول دون وصولهم إلى المرافق والخدمات المتاحة لعامة الجمهور، كما لا يتوفر لهم ما يلزمهم من تسهيلات، ويواجهون أيضاً عقبات ناشئة من المواقف التي يتخذها الناس تجاههم، بما فيها الوصم والخوف والتحامل والتقليل من شأن قدراتهم والنزوع إلى الوصاية عليهم وعدم معرفة كيفية التواصل معهم. كل هذه التحديات وغيرها تعيق من إسهام الأشخاص ذوي الإعاقة في تنمية ذواتهم ومجتمعاتهم، كما أنهم محرمون في أحيان كثيرة من إسماع صوتهم وإظهار قوتهم في العملية السياسية. على سبيل المثال، يواجه الأشخاص ذوي الإعاقة والذين في سن العمل عراقيل بدنية واجتماعية واقتصادية وثقافية تعوق حصولهم على التعليم وتنمية المهارات والتوظيف والخدمات الصحية، وتعوق، بصورة أعمّ، مشاركتهم في المجتمع على قدم المساواة مع الآخرين. وتبيّن الأدلة أن الأشخاص ذوي الإعاقة أكثر عرضة لخطر الوقوع في الفقر في البلدان المتقدمة والنامية.[3]

هذا وينبغي الانتباه إلى أن التعميمات المتعلقة بـ "الإعاقة" أو "الأشخاص ذوي الإعاقة" قد تكون مضللة، فالإعاقة مسألة معقدة وديناميكية ومتعددة الأبعاد. إذ تختلف تجربة الإعاقة الناتجة عن تفاعل الظروف الصحية، والعوامل الشخصية والعوامل البيئية اختلافاً كبيراً من حالة لأخرى.[4] فلدى الأشخاص ذوي الإعاقة عوامل شخصية متنوعة، مادية كالجنس أو العمر أو الأثنية أو العاهة (بدنية، بصرية، سمعية، عقلية، ذهنية) أو الحجم والوزن، واجتماعية واقتصادية كالوضع الاقتصادي والطبقة الاجتماعية والمستوى التعليمي وغير ذلك. كذلك، فلمحيط الشخص ذي الإعاقة تأثيره، إذ أن إمكانية الوصول والترتيبات القانونية والسياسية والعوامل الاقتصادية والاجتماعية والخدمات لها تأثير كبير حيث يمكنها أن تضاعف من الأثر الناتج عن الإعاقة أو أن تخفف منه، وهو ما يعني أنه ينبغي مراعاة الجوانب المختلفة عند النظر إلى الإعاقة.

[1] Persons with disabilities: Facts & Figures, available at: https://www.un.org/en/observances/day-of-persons-with-disabilities/background, accessed on 15 June 2021.

[2] Disability in Africa, African Study Centre Leiden, university of Leiden, available at: https://www.ascleiden.nl/content/webdossiers/disability-africa, accessed on 15 June 2021.

[3] تقرير الأمين العام المعنون "الوفاء بالوعد: تحقيق الأهداف الإنمائية للألفية للأشخاص ذوي الإعاقة حتى عام 2015 وما بعده"، وثيقة الأمم المتحدة A/65/173؛ وانظر أيضا: Rebecca Yeo, Chronic Poverty and Disability, Chronic Poverty Research Centre Working Paper No. 4 (Somerset, United Kingdom, Action on Disability and Development, 2001).

[4] World Health Organization, & World Bank. (2011). World report on disability. Geneva, Switzerland: World Health Organization, P. 7.

وهناك نهجٌ متعددة للتعامل مع الإعاقة، بعضها حديث نسبياً كالنهج الاجتماعي والنهج القائم على حقوق الإنسان بينما النهج القائم على الإحسان هو أقدم هذه النهج يليه النهج الطبي. ومازالت هذه النهج الأربعة قائمة جميعاً في التعامل مع الإعاقة بدرجات متفاوتة على صعيد المناطق والثقافات المختلفة. وينطلق النهج القائم على الإحسان في التعامل مع الأشخاص ذوي الإعاقة من اعتبارهم أشخاصاً غير قادرين على التكفل بأنفسهم بسبب إعاقتهم، وأن على المجتمع التكفل بهم، وفي إطار هذا النهج ينظر إلى الإعاقة باعتبارها مشكلة فردية ولا ينظر إلى الظروف المحيطة ويتم تجاهل تمكين الأشخاص ذوي الإعاقة حيث لا يتحكمون في حياتهم وتقل مشاركتهم أو لا يشاركون بتاتاً، ويعتبرون عبئاً على المجتمع ويعتمدون على الإحسان والمساعدات، مما يؤثر على جودة الرعاية المقدمة حيث لا تكون بالضرورة متسقة أو حتى أحياناً ذات بال.

وفقًا للنهج الطبي فإن الأشخاص ذوي الإعاقة هم مرضى يجب أن يعالجوا ليصبحوا أشخاصاً عاديين، وينصب تركيز هذا النهج على عاهة الشخص التي تصور باعتبارها مصدراً لعدم المساواة، حيث ينظر للأشخاص ذوي الإعاقة على أنهم مرضى يتعين "معالجتهم" من إعاقتهم أو على الأقل تحفيفها إلى أدنى حد ممكن بهدف إدماجهم في المجتمع وإذا تعذر ذلك فيجب إيداعهم بمؤسسات خاصة بهم. وينظر النهج الطبي أيضاً إلى الإعاقة باعتبارها مشكلة فردية كما أنه لا يعطى أيضاً اهتمام لدور الظروف المحيطة. وغالباً ما يمتزج النهج الطبي في الممارسة بالنهج القائم على الإحسان.

هذا فيما يختلف النهج الاجتماعي جذرياً عن النهجين السابقين، حيث لا ينظر للإعاقة باعتبارها مشكلة فردية بل يعتبرها نتيجة لتفاعل الشخص ذي الإعاقة مع البيئة التي لا تستوعب اختلافاته وإعاقته، ولعدم قدرة المجتمع على إزالة الحواجز التي تعترضه وهو ما ينعكس في التمييز وضعف أو انعدام مشاركته. ولا يلغي الانتقال من النهج الطبي إلى النهج الاجتماعي بأية حال أهمية الرعاية والنصح والمساعدة التي يقدمها الخبراء الطبيون والمؤسسات الطبية. ويكمن جانب من الاختلاف بين النهجين الطبي والاجتماعي في أسلوب التعامل مع العلاج بوجه عام، إذ يستجيب النهج الاجتماعي لتطلعات المريض، وليس لتطلعات المؤسسة. كما يختلف النهج الاجتماعي عن النهج القائم على الإحسان والنهج الطبي في أنه يقتضي مشاركة الأشخاص ذوي الإعاقة في صياغة جميع السياسات والقوانين.

يتضمن النهج القائم على حقوق الإنسان اتفاقاً والتزاماً بتنفيذ بعض الجوانب الأولية للنهج الاجتماعي، ويستفيد منه ويقر بحقوق الأشخاص ذوي الإعاقة وبمسؤولية الدولة وغيرها من الأطراف عن احترام هذه الحقوق، ويتعامل مع الحواجز في المجتمع باعتبارها تمييزية، كما يقر بحقهم في تقديم الشكاوى بشأن تلك الحواجز. ويسعى النهج القائم على حقوق الإنسان إلى إيجاد سبل لاحترام التنوع البشري ودعمه وإعلاء شأنه بتهيئة الظروف التي تمكن الأشخاص ذوي الإعاقة من المشاركة الفعلية.[5]

[5] للمزيد حول النهج الأربعة للتعامل مع الإعاقة، الوحدة 1 من اتفاقية حقوق الأشخاص ذوي الإعاقة: دليل عملي، مفوضية الأمم المتحدة لحقوق الإنسان، سلسلة التدريب المهني رقم 19، 2014، الصفحات من 5 إلى 15.

وقد شهدت العقود الأخيرة قدراً من التقدم بشأن التعامل مع الإعاقة بفضل الأخذ بالنهج الاجتماعي والنهج القائم على حقوق الإنسان حيث نظر النهجان للإعاقة باعتبارها بالأساس نتاج لتفاعل الفرد مع بيئة لا تأخذ في الحسبان وجود اختلافات بين قدرات الأفراد، فعلى سبيل المثال تتجاهل أنه فيما غالبية الأفراد يستطيعون التنقل على أرجلهم إلا أن هناك أفراد يحتاجون لاستخدام الكراسي المتحركة وما يرتبط بها من تسهيلات كوجود ممرات مناسبة حتى يستطيعون التنقل، ويترتب على تجاهل وجود مثل هذه الاختلافات بين الأفراد الحد من تمتع الأشخاص ذوي الإعاقة بحقوقهم. إلا أنه على الرغم من هذا التقدم إلا أن من الملاحظ أن النظرة السائدة للأشخاص ذوي الإعاقة في العديد من الدول سواء على الصعيد الحكومي و/أو المجتمعي، ما زالت تُركز في الغالب على ما لدى الأشخاص ذوي الإعاقة من "قصور" خلقي أو غير خلقي، وما زالت الجهود ذات الصلة تُركز على التغلب على ما لدى الشخص ذي الإعاقة من "قصور" سواء عن طريق العلاج الطبي أو إعادة التأهيل، أو السعي إلى تيسير الاعتناء بالشخص ذي الإعاقة. وهو ما يعكس أن النظرة إلى قضايا الإعاقة ما زال أسيرة الإخفاق في الاعتراف بأوجه الاختلاف بين الأفراد واستيعابها، وتتجاهل العقبات التي يضعها المجتمع أمام مشاركة الأشخاص ذوي الإعاقة وتمتعهم بحقوقهم. وهذه النظرة تمثل انتهاك للكرامة الإنسانية للأشخاص ذوي الإعاقة وحقهم في حياة لائقة طبيعية وكاملة قدر الإمكان، وذلك أياً كانت خصائص إعاقتهم أو مصدرها أو درجتها.

سوف يوضح هذا المقال أي النهج الأربعة السابقة تم تبنيه من قبل كل من اتفاقية الأمم المتحدة بشأن حقوق الأشخاص ذوي الإعاقة وبروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا، كما سيلقي الضوء على بعض جوانب التمايز بين الاتفاقية والبروتوكول. وكذلك سيسعى المقال على الوقوف على الشوط الذي قطعته المنظومتان الدولية والأفريقية لحقوق الإنسان في الإقرار بحقوق الأشخاص ذوي الإعاقة. آملاً أن يساهم بذلك في إيلاء المزيد من الاهتمام بتلك الحقوق على صعيد الدول الأفريقية، وأن يدفع لبذل مزيد من الجهود لدعم دخول بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا حيز النفاذ وتصديق أكبر عدد من الدول الأفريقية عليه. وفيما يلي سأقوم في البداية بإلقاء الضوء على تناول منظومة الأمم المتحدة لقضايا الإعاقة وأدوار آلياتها وهيئاتها المختلفة، ومساهمة الدول الأفريقية في اعتماد اتفاقية الأمم المتحدة لحقوق الأشخاص ذوي الإعاقة، ثم أنتقل لتناول حقوق الأشخاص ذوي الإعاقة في إطار المنظومة الأفريقية مع التركيز بشكل خاص على بروتوكول حقوق الأشخاص ذوي الإعاقة في إفريقيا، مستعرضاً عدد من نقاط التمايز بين الاتفاقية والبروتوكول، ثم أقدم في الخاتمة عدد من الاستنتاجات والتوصيات.

أولاً: تناول منظومة الأمم المتحدة لقضايا الإعاقة وأدوار آلياتها وهيئاتها المختلفة

إذ لا يتسع المجال هنا لاستعراض خمس وسبعين عام من عمل الأمم المتحدة ووكالاتها المتخصصة على صعيد المسائل المتعلقة بالإعاقة فسوف أقتصر أدناه على استعراض موجز لأهم المحطات الرئيسية لعمل الأمانة العامة للأمم المتحدة بهذا الشأن.[6] ولما يمثله اعتماد اتفاقية حقوق الأشخاص ذوي الإعاقة من نقلة جذرية على صعيد الاهتمام بقضايا الإعاقة من جانب الأمم المتحدة فسوف اتخذ اعتماد الاتفاقية فاصلاً بين مرحلتين، ما قبل اعتمادها وما بعد ذلك، وقبل أن أنتقل من المرحلة الأولى إلى المرحلة الثانية سوف أعرج على تسليط الضوء على مساهمة لعبته الدول الأفريقية في اعتماد الاتفاقية.

(أ) من التأسيس إلى اعتماد اتفاقية حقوق الأشخاص ذوي الإعاقة

لم تغب قضايا الإعاقة قط عن جدول أعمال الأمم المتحدة ولقد نص ميثاقها التأسيسي لعام 1945 على مبدأ المساواة بين البشر وأوضح أن أحد أهدافها يتمثل في تعزيز احترام حقوق الإنسان والحريات الأساسية للناس جميعاً (المادة 1(3))،[7] كما نص الإعلان العالمي لحقوق الإنسان لعام 1948 على أن "لكل شخص ... الحق في ما يأمن به الغوائل في حالات البطالة أو المرض أو العجز أو الترمل أو الشيخوخة أو غير ذلك من الظروف الخارجة عن إرادته والتي تفقده أسباب عيشه." (المادة 25((1)).[8]

وفي عام 1950 نظرت اللجنة الاجتماعية التابعة للمجلس الاقتصادي والاجتماعي في تقريرين بشأن "التأهيل الاجتماعي للمعاقين جسدياً" و"التأهيل الاجتماعي للمكفوفين"، وافق المجلس على وضع برامج لإعادة تأهيل المعاقين جسدياً والوقاية من العمى وعلاجه، وفي نفس العام نظم مؤتمر في جنيف حضرته كالات الأمم المتحدة المتخصصة نوقشت فيه قضايا الإعاقة والتأهيل،[9] واعتمدت منظمة الأمم المتحدة للتربية والعلم والثقافة اتفاق استيراد المواد التعليمية والعلمية والثقافية والذي نص على الالتزام باستيراد المواد الخاصة بالمكفوفين وإعفائها من الرسوم (المادة 2)،[10] كما هو واضح فلقد كان التركيز خلال العقد الأول من تأسيس الأمم المتحدة على تعزيز الوقاية من الإعاقة وإعادة التأهيل بالنسبة للأشخاص ذوي الإعاقة الجسدية.

[6] See The United Nations and Disabled Persons -The First Fifty Years, at https://www.un.org/esa/socdev/enable/dis50y00.htm; and United Nations and Disability: 70 years of the work towards a more inclusive world, at https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/01/History_Disability-in-the-UN_jan23.18-Clean.pdf, accessed on 1 July 2021.

[7] ميثاق الأمم المتحدة والنظام الأساسي لمحكمة العدل الدولية، مطبوعات الأمم المتحدة، 2015، DPI/2587، ص 4.

[8] حقوق الإنسان: مجموعة صكوك دولية، المجلد الأول: الجزء الأول، مطبوعات الأمم المتحدة، 2002، A.02.XIV، ص 7.

[9] History of United Nations and Persons with Disabilities – The early years: 1945 – 1955, United Nations Department of Economic and Social Affairs, available at https://www.un.org/development/desa/disabilities/history-of-united-nations-and-persons-with-disabilities-the-early-years-1945-1955.html, Access on August 3, 20121.

[10] United Nations, Treaty Series, vol. 131, p. 25.

وخلال الستينات جرى إعادة تقييم السياسة المتبعة في المنظمة تجاه قضايا الإعاقة مما أسفر عن تبني نموذج اجتماعي جديد انعكس صداه في الإعلان بشأن التقدم والإنماء في الميدان الاجتماعي الذي اعتمد عام 1969 والذي تضمنت أهدافه "إنشاء وتحسين نظم الضمان والتأمين الاجتماعي لصالح جميع الأشخاص الذين يكونون، بسبب المرض أو العجز أو الشيخوخة، غير قادرين بصورة مؤقتة أو مستمرة علي الارتزاق وذلك لتأمين مستوي معيشي سليم لهم ولأسرهم ولمعاليهم" (المادة 11(أ))، كما نص الإعلان على "حماية حقوق الأطفال والمسنين والعجزة وتأمين رفاههم، وتوفير حماية لذوي العاهات البدنية أو العقلية" (المادة 11(ج)،[11] و"اعتماد تدابير مناسبة لإعادة تأهيل الأشخاص ذوي العاهات العقلية أو الجسمية، ... وتهيئة ظروف اجتماعية برئيه من أي تمييز ضد ذوي العاهات بسبب عاهاتهم." (المادة 19(د)).[12]

وشهدت السبعينات اعتماد الإعلان الخاص بحقوق المتخلفين عقلياً لعام 1971، وجاء هذا الإعلان متأثراً بالنهج الطبي إذ يعالج حالة العجز على أنها "حالة طبية" وينظر إلى المصابين بها على أنهم أفراد يعانون مشاكل طبية، يعيشون على الضمان الاجتماعي والرعاية الاجتماعية، ويحتاجون إلى خدمات ومؤسسات منفصلة. إلا أنه تضمن أيضاً البوادر الأولى للتعامل مع هذه الفئة من ذوي الإعاقة باعتبارها صاحبة حق لا مجرد أشخاص تجب رعايتهم، كما ورد فيه بعض المبادئ الهامة لحماية وتعزيز حقوق الإنسان لفائدة المصابين بقصور ذهني. ومما لا يخلو من مغزى أن هذا الإعلان أشار في بدايته إلى ضرورة أن يتمتع الشخص المتخلف عقلياً بنفس الحقوق التي يتمتع بها سائر البشر (الفقرة 1). ثم وضح أهم تلك الحقوق وبخاصة حقهم في الحصول على الرعاية الطبية والتعليم المناسبين (الفقرات 2 إلى 6).[13] هذا كما اعتمد في عام 1975 الإعلان الخاص بحقوق المعوقين، والذي أكد على العديد من الحقوق إلا أنه تأثر أيضاً بالنهج الطبي كما يتضح مما ورد فيه من أنه "يقصد بكلمة 'المعوق' أي شخص عاجز عن أن يؤمن بنفسه، بصورة كلية أو جزئية، ضرورات حياته الفردية و/أو الاجتماعية العادية بسبب قصور خلقي أو غير خلقي في قدراته الجسمانية أو العقلية." (الفقرة 1).[14]

وفي الثمانينيات جرى اعتماد برنامج العمل العالمي المتعلق بالمعوقين لعام 1982، الذي هدف لتعزيز التدابير الفعالة للوقاية من العجز، وإعادة التأهيل، وتحقيق هدفي "المشاركة الكاملة" للمعوقين في الحياة الاجتماعية والتنمية و"المساواة" (الفقرة 1).[15] هذا كما اعتمدت الأمم المتحدة عقد كامل (1983-1992) لتحقيق أهداف برنامج العمل

[11] حقوق الإنسان: مجموعة صكوك دولية، المجلد الأول: الجزء الأول، مرجع سابق، ص. 613.

[12] المرجع السابق، ص. 618.

[13] المرجع السابق، ص. 315-317.

[14] المرجع السابق، ص. 319.

[15] برنامج العمل العالمي المتعلق بالمعوقين، تقرير اللجنة الاستشارية للسنة الدولية للمعوقين (1981) عن دورتها الرابعة، المعقودة خلال الفترة من 5 إلى 14 تموز/يوليه 1982، وثيقتي الأمم المتحدة A/37/351/Add.1، و A/37/351/Add.1/Corr.1.

العالمي المتعلق بالمعوقين،[16] وقد تضمن البرنامج وضع معايير قياسية تستهدف الدفع بحقوق الأشخاص ذوي الإعاقة قدماً، وتجاوزت هذه المعايير مفاهيم "الرفاه الاجتماعي" التي سادت من قبل واتجهت إلى تأكيد وجود إطار لحقوق الإنسان يسهّل المشاركة التامة للمعوقين في جميع جوانب الحياة وفي عملية التنمية، على أساس المساواة (الفقرات 86 إلى 154).[17]

وفي النصف الأول من هذا العقد برزت إلى الوجود أول مبادرة تدعو إلى وضع اتفاقية دولية لحقوق المعوقين، حيث أوصى الاجتماع العالمي للخبراء لاستعراض تنفيذ برنامج العمل العالمي المتعلق بالمعوقين، والذي عُقد في استكهولم في نيسان/أبريل 1987، بأن تقوم الجمعية العامة للأمم المتحدة بعقد مؤتمر خاص عن حقوق المعوقين وتعهد إليه بولاية توضيح هذه الحقوق وصياغة اتفاقية دولية للقضاء على جميع أشكال التمييز ضد المعوقين بحيث تصدّق عليها الدول قبل نهاية العقد في عام 1992.[18] وقامت إيطاليا بطرح مسألة وضع الاتفاقية على الجمعية العامة للأمم المتحدة في عام 1987.[19] وتلى ذلك قيام السويد في عام 1989 باقتراح آخر قدم من السويد إلى الجمعية العامة لوضع صك دولي يتعلق بحقوق المعوقين،[20] غير أن الدعوة لوضع اتفاقية لم تحظ حينها بما يلزم من تأييد، وبدلاً من ذلك تم التوصل عام 1993 إلى اتفاق بشأن وضع صك غير ملزم، حيث اعتمدت الجمعية العامة بالإجماع القواعد الموحدة المتعلقة بتكافؤ الفرص للمعوقين.[21] كصك دولي للتعاون التقني ولتعزيز وضع وتقييم السياسات المراعية للإعاقة. ويتضح من مراجعة القواعد الموحدة أنها قد خطت هي الأخرى خطوات هامة تجاه ضمان المزيد من احترام وتعزيز حقوق الأشخاص ذوي الإعاقة ومثلت نقلة هامة في نهج التعامل مع قضايا الإعاقة بتخليها عن النهج الطبي.

وخلال عقدي الثمانينيات والتسعينيات جرى اتخاذ خطوات هامة أخرى تمثلت في تعيين آليات خاصة تعنى بحقوق الأشخاص ذوي الإعاقة حيث عين مقرر خاص للجنة الفرعية لمنع التمييز وحماية الأقليات لإعداد دراسة شاملة حول حقوق الإنسان

[16] اعتمد برنامج العمل العالمي المتعلق بالمعوقين بموجب قرار الجمعية العامة للأمم المتحدة رقم 52/37، المؤرخ 3 كانون الأول/ديسمبر 1982. وثيقة الأمم المتحدة A/RES/37/52.

[17] ورد نص برنامج العمل العالمي المتعلق بالمعوقين، في وثيقتي الأمم المتحدة A/37/51/Add.1، و A/37/35/Add.1/Corr.1، المرفق.

[18] O'Reilly, A. (2007). The right to decent work of persons with disabilities. ILO.

[19] محضر موجز للجلسة السادسة عشرة للجنة الثالثة للجمعية العامة للأمم المتحدة في دورتها الثانية والأربعين، وثيقة الأمم المتحدة A/C.3/42/SR.16.

[20] محضر موجز للجلسة السادسة عشرة للجنة الثالثة للجمعية العامة للأمم المتحدة في دورتها الرابعة والأربعين، وثيقة الأمم المتحدة A/C.3/44/SR.16.

[21] قرار الجمعية العامة للأمم المتحدة 96/48، المعنون "القواعد الموحدة بشأن تحقيق تكافؤ الفرص للمعوقين"، المؤرخ في 20 كانون الأول/ديسمبر 1993، وثيقة الأمم المتحدة A/RES/48/96. انظر أيضاً https://digitallibrary.un.org/record/283453?ln=en، تاريخ الاطلاع 5 آب/أغسطس 2021.

والإعاقة (1984-1991)،[22] كما عين مقرر خاص للجنة التنمية الاجتماعية المعني بمسألة الإعاقة (1994-2014).[23] كما أكدت الإعلانات وبرامج العمل التي اعتمدتها المؤتمرات الرئيسية الخمس التي عقدتها الأمم المتحدة خلال عقد التسعينات لمناقشة قضايا البيئة وحقوق الإنسان والسكان والتنمية الاجتماعية والمرأة، على الحاجة لمجتمع يشمل كافة الأفراد، ودعت إلى إتاحة المجال أمام مشاركة الجميع وضمان تكافؤ الفرص، وأكدت أيضاً على أهمية إتاحة فرص الوصول في كل المجالات.

وفي عام 1997، أجرت الأمم المتحدة دراسة مقارنة شاملة عن السياسات والبرامج العالمية بشأن الإعاقة.[24] وأسهمت هذه الدراسة في زيادة إبراز الحاجة إلى وجود إطار أوسع لحقوق الإنسان يخصص لحقوق الأشخاص ذوي الإعاقة.

وفي عام 2000 اعتمدت لجنة حقوق الإنسان قراراً يقضي بإدراج حقوق المعوقين ضمن عمل آليات الرصد ذات الصلة الخاصة بحقوق الإنسان، وتبع ذلك قيام مفوضية الأمم المتحدة السامية لحقوق الإنسان بإعداد دراسة بشأن "حقوق الإنسان والإعاقة: الاستخدامات الحالية والإمكانات المستقبلية لصكوك الأمم المتحدة في سياق الإعاقة".[25] وفي عام 2001 أثارت حكومة المكسيك مجدداً مسألة وضع اتفاقية لحماية وتعزيز حقوق المعوقين،[26] وتلى ذلك تأسيس الجمعية العامة للأمم المتحدة "اللجنة المخصصة المعنية بوضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم"،[27] للنظر في المقترحات المتعلقة بوضع الاتفاقية ودعت جميع أصحاب المصلحة إلى المشاركة في أعمال اللجنة وتقديم الإسهامات لها، بما في ذلك: الحكومات، والمنظمات الدولية، والهيئات الإقليمية والمجتمع المدني، وخاصة منظمات المعوقين، والخبراء.[28] وفي الفترة 29 تموز/يوليه إلى 9 آب/أغسطس 2002 عقدت اللجنة أول اجتماع لها وأجرت في سياقه مناقشات تتعلق بمجموعة

[22] تقرير اللجنة الفرعية لمنع التمييز وحماية الأقليات عن دورتها السابعة والثلاثين المنعقدة خلال الفترة من 6-31 آب/أغسطس 1984، وثيقة الأمم المتحدة E/CN.4/1985/3، والتقرير النهائي الذي أعده المقرر الخاص للجنة الفرعية لمنع التمييز وحماية الأقليات المعني بحقوق الإنسان والعجز، وثيقة الأمم المتحدة E/CN.4/sub.2/1991/31.

[23] https://www.un.org/development/desa/disabilities/about-us/special-rapporteur-on-disability-of-the-commission-for-social-development.html، تاريخ الاطلاع 5 آب/أغسطس 2021.

[24] تقرير الأمين العام للأمم المتحدة بشأن استعراض وتقييم برنامج العمل العالمي المتعلق بالمعوقين، وثيقة الأمم المتحدة A/52/351.

[25] http://www2.ohchr.org/english/issues/disability/docs/Studydisability_en.doc،تاريخ الاطلاع 17 حزيران/يونيه 2021.

[26] في البداية، أثارت حكومة المكسيك مسألة وضع اتفاقية، في المؤتمر العالمي لمناهضة العنصرية والتمييز العنصري وكراهية الأجانب وما يتصل بذلك من تعصب، المعقود في ديربان، بجنوب أفريقيا، في الفترة من 31 آب/أغسطس إلى 7 أيلول/سبتمبر 2001، وتمخضت عن ذلك الفقرة 180 من برنامج العمل الذي اعتمده المؤتمر، وهي الفقرة التي دعت الجمعية العامة إلى النظر في وضع اتفاقية دولية متكاملة وشاملة لحماية وتعزيز حقوق المعوقين وكرامتهم، على أن تشتمل، بصورة خاصة، على أحكام تعالج الممارسات والمعاملة التمييزية التي تؤثر عليهم.

[27] قرار الجمعية العامة للأمم المتحدة 168/65، المعنون "اتفاقية دولية شاملة متكاملة تستهدف تعزيز وحماية حقوق المعوقين وكرامتهم"، المؤرخ في 19 كانون الأول/ديسمبر 2001، الفقرة 1، وثيقة الأمم المتحدة A/RES/56/168.

[28] قرار الجمعية العامة للأمم المتحدة 229/57، المعنون "اللجنة المخصصة المعنية بإعداد اتفاقية دولية شاملة متكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم"، المؤرخ في 18 كانون الأول/ديسمبر 2002، الفقرتين 5 و7، وثيقة الأمم المتحدة A/RES/57/229.

واسعة من القضايا التنظيمية والمواضيعية المتصلة بالاتفاقية، وواصلت بعد ذلك اجتماعاتها حيث قدمت اللجنة تقريرها النهائي للجمعية العامة للأمم المتحدة في كانون الأول/ديسمبر ،2006[29] وفي 13 كانون الأول/ديسمبر 2006 أقرت الجمعية العامة بتوافق الآراء اتفاقية حقوق الأشخاص ذوي الإعاقة والبروتوكول الملحق بها.[30]

مساهمة الدول الأفريقية في اعتماد اتفاقية حقوق الأشخاص ذوي الإعاقة

شاركت الدول الأفريقية مشاركة ملحوظة سواء في إعداد اتفاقية حقوق الأشخاص ذوي الإعاقة أو فيما سبقها من خطوات. فعلى سبيل المثال، في مرحلة استطلاع وجهات النظر بشأن وضع الاتفاقية، دعمت العديد من الدول الأفريقية وضع الاتفاقية، وقدم بعضها مقترحات بخصوص مضمون الاتفاقية حيث أشارت الجزائر إلى أهمية أن تراعي الاتفاقية اختلاف درجات تطبيق الحقوق الاقتصادية والاجتماعية ومستويات التقدم التكنولوجي والاقتصادي لكل بلد، واعتبرت أن من المفيد أن تتضمن الاتفاقية تعريف للإعاقة. واقترحت أوغندا أن تقوم الأمم المتحدة بإعداد وتوزيع نماذج للرصد والتقييم تستوفيها الدول الأطراف ثم تعيدها إليها لأغراض التحليل والتغذية العكسية، ورأت موريتانيا ضرورة إشراك أسر المعوقين في عملية صياغة الاتفاقية. وأكد الاتحاد الأفريقي على ضرورة وجود صك ملزم قانوناً يركز تحديداً على حقوق المعوقين، وأشار إلى الحاجة المحددة للنظر في محنة المعوقين في أفريقيا. وركز على ما تواجهه المرأة من مشقة مضاعفة، وحصولها على مستويات دنيا من التعليم، وكونها من أشد الفئات تهميشاً.[31] ورأى المغرب أن تطبيق الاتفاقية الجديدة سيتطلب إنشاء هيئات تنسيق دولية وإقليمية ووطنية تعنى بالاستراتيجيات وتحديد الأهداف وأدوات تطبيقها، وأنه ينبغي بالإضافة لذلك إنشاء آليات دولية تقوم برصد تطبيق الاتفاقية عن طريق تحليل البيانات الإحصائية وغيرها من البيانات، وإجراء التحقيقات والزيارات القطرية. هذا وقدمت ليبيا مقترحاً لتعريف الإعاقة، وأشارت أنه ينبغي أن تساهم الاتفاقية في إنشاء منظمة دولية معنية بالإعاقة والوقاية منها وأن يتم استخدم تكنولوجيات الاتصال الجديدة من أجل زيادة الوعي على كافة المستويات وتوحيد لغات الإشارة.[32]

وعلاوة على ذلك، أكد الاتحاد الإفريقي على ضرورة النظر في الجانب المتعلق بالحياة الجنسية وخاصة للمعوقات اللائي قد يُحرَّم عليهن الزواج أو إنجاب الأطفال لمجرد

[29] التقرير الختامي للجنة المخصصة لوضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق الأشخاص ذوي الإعاقة وكرامتهم عن أعمال دورتها الثامنة، وثيقة الأمم المتحدة A/61/611.

[30] قرار الجمعية العامة للأمم المتحدة رقم 106/61، المعنون "اتفاقية حقوق الأشخاص ذوي الإعاقة"، المؤرخ في 13 كانون الأول/ديسمبر 2006، وثيقة الأمم المتحدة A/RES/61/106.

[31] مذكرة الأمين العام بشأن وجهات النظر التي قدمتها الحكومات والمنظمات الحكومية الدولية وهيئات الأمم المتحدة بشأن وضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم، وثيقة الأمم المتحدة A/AC.265/2003/4، الفقرات 23، و25، و30، و31.

[32] ملحق مذكرة الأمين العام بشأن وجهات النظر التي قدمتها الحكومات والمنظمات الحكومية الدولية وهيئات الأمم المتحدة بشأن وضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم، وثيقة الأمم المتحدة A/AC.265/2003/4/Add.1، الفقرتين 1 و3.

كونهن معوقات، وضرورة أن تكافح الشعوب الأفريقية من أجل إزالة الحواجز الاجتماعية والاستمساك بمبدأ العمل الإيجابي لصالح المعوقين. وذلك بالاستناد إلى إعلان العقد الأفريقي (1999-2009) وخطة العمل الخاصة به والتي اعتمدت في تموز/يوليه 2002، أكد الاتحاد على الدور الحاسم الذي تضطلع به الهيئات الإقليمية في سياق تعاونها مع الدول الأعضاء والوكالات المتخصصة.[33]

وكان هناك سبع دول أفريقية هي أوغندا وجزر القمر وجنوب أفريقيا وسيراليون والكاميرون ومالي والمغرب ضمن الفريق العامل الذي شكلته اللجنة المخصصة المعنية بوضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم والذي كلف بإعداد وتقديم مشروع نص يشكل أساساً لوضع الاتفاقية، كما شارك في الفريق العامل هيئات مثل المنظمة الدولية للمعوقين (أفريقيا)، ولجنة جنوب أفريقيا لحقوق الإنسان (ممثلة للمؤسسات الوطنية لحقوق الإنسان).[34] وكذلك شاركت في أعمال اللجنة منظمات غير حكومية من تونس وجنوب أفريقيا ورواندا والسودان وغنيا والنيجر ونيجيريا.[35] وقدمت الدول الأفريقية العديد من الوثائق للجنة من بينها موجز أعمال "المشاورات دون الإقليمية بشأن مشروع اتفاقية حماية وتعزيز حقوق المعوقين وكرامتهم" التي عقدت في بوركينا فاسوا في تشرين الأول/أكتوبر 2004.[36] أعمال "المؤتمر الاستشاري الإقليمي الأفريقي للمعوقين" الذي عقد في جنوب أفريقيا في أيار/مايو 2003،[37] والإعلان الختامي لورشة العمل الإقليمية حول "تعزيز حقوق الاشخاص ذوي الاحتياجات الخاصة: نحو اتفاقية جديدة للأمم المتحدة"، التي عقدت في أوغندا في حزيران/يونيه 2003، وقد تضمن هذا الإعلان العديد من المقترحات بشأن الديباجة وأغراض الاتفاقية ونطاقها وواجبات الدول الأطراف فيها وتعريف الإعاقة ومبدأ عدم التمييز، وأكد على الترابط بين كل من الحقوق المدنية والسياسية والاقتصادية والاجتماعية والثقافية منوهاً لعدد من الحقوق التي ينبغي أن تنص عليها الاتفاقية، وأشار إلى أن الاتفاقية ينبغي أن تشجع على إجراء بحوث فعالة تتعلق بحقوق الأشخاص ذوي الإعاقة، وأوصى بأن تدعم الاتفاقية إنشاء آليات رصد وطنية فعالة،

[33] وثيقة الأمم المتحدة A/AC.265/2003/4، مرجع سابق، الفقرتين 44، و45.

[34] تقرير الفريق العامل للجنة المخصصة لوضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم، وثيقة الأمم المتحدة A/AC/265/2004/WG.1، الفقرة 2.

[35] راجع مرفق تقارير للجنة المخصصة المعنية بوضع اتفاقية دولية شاملة ومتكاملة لحماية وتعزيز حقوق المعوقين وكرامتهم الواردة في وثائق الأمم المتحدة: A/AC.265/2004/4، وA/AC.265/2004/5، وA/AC.265/2005/2، وA/AC.265/2006/2، وA/AC.265/2006/2، وA/59/360. متاحة على https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html، تاريخ الاطلاع 5 آب/أغسطس 2021.

[36] مذكرة شفوية مؤرخة 1 شباط/فبراير 2005 موجهة إلى الأمانة العامة من البعثة الدائمة لبوركينا فاسو لدى الأمم المتحدة، المرفق، وثيقة الأمم المتحدة A/AC.265/2005/1.

[37] مذكرة شفوية مؤرخة 12 حزيران/يونيه 2003 موجهة إلى الأمانة العامة من البعثة الدائمة لجنوب أفريقيا لدى الأمم المتحدة، وثيقة الأمم المتحدة A/AC.265/2003/CRP.11.

وأن يكون لها آلية رصد فعالة تتضمن إمكانية إجراء تحقيقات في الانتهاكات المنهجية.[38]

وتضمنت المقترحات التي قدمت في إطار المناقشات بشأن إعداد الاتفاقية العديد من المقترحات المقدمة من الدول الأفريقية،[39] وقد شاركت الدول الأفريقية بفعالية أيضاً في مناقشات اللجنة المخصصة لإعداد الاتفاقية،[40] ودعم العديد منها كارتيريا وغانا والمغرب وملاوي ونيجيريا أعمال اللجنة خلال المناقشات ذات الصلة التي جرت في إطار اللجنة الثالثة للجمعية العامة للأمم المتحدة.[41]

(ب) منذ اعتماد اتفاقية حقوق الأشخاص ذوي الإعاقة إلى الآن

يمثل اعتماد اتفاقية حقوق الأشخاص ذوي الإعاقة والبروتوكول الملحق بها، وما حظيت به الاتفاقية من زخم يشبه الإجماع العالمي النقلة الأهم في مسار النضال من أجل احترام وحماية وتعزيز حقوق الأشخاص ذوي الإعاقة، حيث باتت الاتفاقية بمثابة التشريع الدولي بهذا الخصوص، وتعكس الاتفاقية نقلة جذرية من اعتماد النهج القائم على الإحسان أو النهج الطبي إلى اعتماد نهج اجتماعي/قائم على حقوق الإنسان. ومن آثار ذلك ما شهده الاهتمام بقضايا الإعاقة داخل الأمم المتحدة خلال العقدين الأخيرين من تطور مضطرد. وهو ما سنلقي الضوء عليه فيما يلي قبل أن ننتقل لتناول اهتمام المنظومة الأفريقية بقضايا الإعاقة.

1' اتفاقية حقوق الأشخاص ذوي الإعاقة ولجنتها

لقد وقعت على الاتفاقية 81 دولة في اليوم الأول لفتح باب التوقيع عليها وذلك في سابقة من نوعها، من بينهم 16 عشر دولة أفريقية، وفي 22 حزيران/يونيه 2021 بلغ عدد الدول الأطراف في الاتفاقية 182 دولة من بينها 46 دولة أفريقية،[42] بينما بلغ عدد الدول الأطراف في البروتوكول الملحق بالاتفاقية 99 دولة، منها 29 دولة أفريقية.[43] وتتكون الاتفاقية من ديباجة و50 مادة. وأوضحت الاتفاقية أن "الإعاقة

[38] متاح على https://static.un.org/esa/socdev/enable/rights/contrib-uganda.htm، تاريخ الاطلاع 20 حزيران/يونيه 2021.

[39] ترد هذه المقترحات ضمن التجميع الذي أعدته الأمم المتحدة للمقترحات المقدمة بشأن اتفاقية دولية شاملة ومتكاملة لتعزيز وحماية حقوق وكرامة الأشخاص ذوي الإعاقة، الوارد في وثيقتي الأمم المتحدة A/AC.265/2003/CRP/13، وA/AC.265/2003/CRP/13/Add.1.

[40] للاطلاع على جانب من المناقشات راجع على سبيل المثال مختصر مناقشات الاجتماعات في إطار دورات اللجنة المختصة، متاحة على https://www.un.org/esa/socdev/enable/rights/adhoccom.htm، تاريخ الاطلاع 23 حزيران/يونيه 2021

[41] محضر موجز للجلسة الثالثة للجنة الثالثة للجمعية العامة للأمم المتحدة في دورتها الثامنة والخمسين، وثيقة الأمم المتحدة A/C.3/58/SR.3، الفقرات 9، و16، و50؛ ومحضر موجز للجلسة الثالثة للجنة الثالثة للجمعية العامة للأمم المتحدة في دورتها التاسعة والخمسين، وثيقة الأمم المتحدة A/C.3/59/SR.2، الفقرة 35؛ ومحضر موجز للجلسة الثالثة للجنة الثالثة للجمعية العامة للأمم المتحدة في دورتها الستين، وثيقة الأمم المتحدة A/C.3/60/SR.4، الفقرة 32.

[42] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en، تاريخ الاطلاع 6 حزيران/يونيه 2021.

[43] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en، تاريخ الاطلاع في 6 حزيران/يونيه 2021.

تُشكل مفهوماً لا يزال قيد التطور"(الديباجة)، ونوهت إلى أن "الإعاقة تحدث بسبب التفاعل بين الأشخاص المصابين بعاهة والحواجز في المواقف والبيئات المحيطة التي تحول دون مشاركتهم مشاركة كاملة فعالة في مجتمعهم على قدم المساواة مع الآخرين" (الديباجة)، وتمثل الإشارة الصريحة للحواجز، الخارجة عن إرادة الشخص المعني باعتبارها عوامل تشكل الإعاقة، نقلة هامة تبتعد عن المفاهيم التي تساوي بين الإعاقة والقيود الوظيفية وهي مفاهيم ظلت سائدة حتى منتصف التسعينيات كما في القواعد الموحدة المتعلقة بتكافؤ الفرص للمعوقين السابق الإشارة إليها أعلاه. ولا تتضمن الاتفاقية تعريف مغلق للأشخاص ذوي الإعاقة، بل توضح أنهم يشملون "من يعانون من عاهات طويلة الأجل بدنية أو عقلية أو ذهنية أو حسية، قد تمنعهم لدى التعامل مع مختلف الحواجز من المشاركة بصورة كاملة وفعالة في المجتمع على قدم المساواة مع الآخرين." (المادة 1).

وأوضحت الاتفاقية أن الغرض منها يتمثل في "تعزيز وحماية وكفالة تمتع جميع الأشخاص ذوي الإعاقة تمتعاً كاملاً على قدم المساواة مع الآخرين بجميع حقوق الإنسان والحريات الأساسية، وتعزيز احترام كرامتهم المتأصلة." (المادة 1)، وتقوم الاتفاقية على عدد من المبادئ هي: احترام كرامة الأشخاص ذوي الإعاقة المتأصلة واستقلالهم الذاتي، وعدم التمييز، وكفالة مشاركتهم وإشراكهم بصورة كاملة وفعالة في المجتمع، واحترام الفوارق وقبولهم كجزء من التنوع والطبيعة البشرية، وتكافؤ الفرص، والمساواة بين الرجل والمرأة، واحترام القدرات المتطورة للأطفال ذوي الإعاقة واحترام حقهم في الحفاظ على هويتهم (المادة 3)، وتؤكد الاتفاقية على أهمية ايلاء عناية خاصة للفئات الأكثر ضعفاً من الأشخاص ذوي الإعاقة كالأطفال والنساء (المادتين 6 و7)، وتلزم الاتفاقية الدول بكفالة وتعزيز إعمال كافة حقوق الإنسان والحريات الأساسية إعمالاً تاماً لجميع الأشخاص ذوي الإعاقة دون أي تمييز من أي نوع على أساس الإعاقة، وأن تحظر أي تمييز تجاه الأشخاص ذوي الإعاقة، وأن تكفل لهم الحماية القانونية المتساوية والفعالة من التمييز (المادة 5)، وأن تتخذ جميع التدابير الملائمة لإنفاذ الحقوق المعترف بها في الاتفاقية ولتعديل أو إلغاء القوانين واللوائح والأعراف والممارسات التي تُشكل تمييزاً ضد الأشخاص ذوي الإعاقة، وللقضاء على هذا التمييز من جانب أي شخص أو منظمة أو مؤسسة خاصة، وكفالة تصرف السلطات والمؤسسات العامة بما يتفق مع الاتفاقية (المادة 4(1)).

وتلزم الاتفاقية الدول باتخاذ التدابير اللازمة بأقصى ما تتيحه مواردها، وحيثما يلزم، في إطار التعاون الدولي، لإعمال الحقوق الاقتصادية والاجتماعية والثقافية تدريجياً إعمالاً تاماً، وذلك دون الإخلال بالالتزامات الواجبة التطبيق فوراً بموجب الاتفاقية (المادة 4(2))، كما على الدول أن تتشاور تشاوراً وثيقاً مع الأشخاص ذوي الإعاقة بشأن وضع وتنفيذ التشريعات والسياسات الرامية إلى تنفيذ الاتفاقية، وفي عمليات صنع القرار الأخرى بشأن المسائل التي تتعلق بهم، وأن تشركهم فعلياً في ذلك (المادة 4(3))، وأن تعمل على رفع الوعي ومكافحة القوالب النمطية وأشكال التحيز والممارسات الضارة المتعلقة بالأشخاص ذوي الإعاقة، وأن تعزز الوعي بقدراتهم وإسهاماتهم (المادة 8(1))، وأن تتخذ التدابير المناسبة التي تكفل إمكانية وصولهم،

على قدم المساواة مع غيرهم، إلى البيئة المادية المحيطة ووسائل النقل والمعلومات والاتصالات، بما في ذلك تكنولوجيات ونظم المعلومات والاتصال، والمرافق والخدمات الأخرى المتاحة لعامة الجمهور أو المقدمة إليه، في المناطق الحضرية والريفية على السواء (المادة 9)، كما تقر الاتفاقية بالعديد من الحقوق والضمانات للأشخاص ذوي الإعاقة منها التزام الدول باتخاذ جميع التدابير الضرورية لضمان تمتعهم فعلياً بالحق في الحياة على قدم المساواة مع الآخرين (المادة 10)، وضمان حماية وسلامة من يتواجد منهم في حالات تتسم بالخطورة، بما في ذلك حالات النزاع المسلح والطوارئ الإنسانية والكوارث الطبيعية (المادة 11).

وتقر الاتفاقية أيضاً بحق الأشخاص ذوي الإعاقة في الاعتراف بهم في كل مكان كأشخاص أمام القانون، وأن توفر الدولة ما يلزم من دعم لممارستهم أهليتهم القانونية (المادة 12)، وأن تكفل لهم سبلاً فعالة للجوء إلى القضاء على قدم المساواة مع الآخرين، وتشجع التدريب المناسب للعاملين في مجال إقامة العدل، ومن ضمنهم الشرطة وموظفو السجون (المادة 13)، وأن تكفل تمتعهم على قدم المساواة مع الآخرين بالحق في الحرية الشخصية والأمن الشخصي، وعدم حرمانهم من حريتهم بشكل غير قانوني أو بشكل تعسفي وأن يكون أي حرمان من الحرية متسقاً مع القانون، وألا يكون وجود الإعاقة مبرراً بأي حال من الأحوال لأي حرمان من الحرية (المادة 14)، وأن تتخذ جميع التدابير اللازمة لحمايتهم من جميع أشكال الاستغلال والعنف والاعتداء (المادة 16)، وأن تحميهم من التعرض للتعذيب أو المعاملة أو العقوبة القاسية أو اللاإنسانية أو المهينة (المادة 15)، وأن تحترم سلامتهم الشخصية، وحقهم في التمتع بحرية التنقل، وحرية اختيار مكان إقامتهم، وحصولهم على الجنسية، على قدم المساواة مع الآخرين (المادة 18).

كما تقر الاتفاقية بحق جميع الأشخاص ذوي الإعاقة، في العيش في المجتمع، بخيارات مساوية لخيارات الآخرين. وتلزم الدول باتخاذ تدابير فعالة ومناسبة لتيسير تمتعهم الكامل بحقهم وإدماجهم ومشاركتهم بصورة كاملة في المجتمع (المادة 19)، وأن تكفل لهم حرية التنقل بأكبر قدر ممكن من الاستقلالية (المادة 20)، وممارستهم لحقهم في حرية التعبير والرأي (المادة 21)، واحترام حقهم في الخصوصية (المادة 22)، وأن تتخذ تدابير فعالة ومناسبة للقضاء على التمييز ضدهم في جميع المسائل ذات الصلة بالزواج والأسرة (المادة 23). وتنص الاتفاقية أيضاً على حق الأشخاص ذوي الإعاقة في التمتع على قدم المساواة بالحق في التعليم (المادة 14)، والحق في الصحة (المادة 25)، وفي التأهيل وإعادة التأهيل والعمل والعمالة (المادتين 26 و27)، وفي مستوى المعيشة اللائق والحماية الاجتماعية (المادة 28)، وفي المشاركة في الحياة السياسية والعامة وفي الحياة الثقافية وأنشطة الترفيه والتسلية والرياضة (المادتين 29 و30). هذا كما على الدول أن تجمع المعلومات المناسبة، لتمكينها من وضع وتنفيذ السياسات المتعلقة بكافة حقوقهم (المادة 31)، وأن تعين جهة تنسيق واحدة أو أكثر للعناية بالمسائل المتصلة بتنفيذ الاتفاقية. وينبغي أن تتاح الفرصة للمجتمع المدني وخاصة الأشخاص ذوي الإعاقة والمنظمات الممثلة لهم، للإسهام في عملية الرصد والمشاركة فيها مشاركة كاملة (المادة 33). ونوهت الاتفاقية لأهمية التعاون الدولي، مع التأكيد

على أن المسؤولية الأساسية لإعمال الاتفاقية تقع على عاتق الدولة المعنية (المادة 32).

وتناولت الاتفاقية بالتوضيح عدداً من التدابير التي يجب اتخاذها لإعمال الحقوق التي أقرت بها ومن ذلك على سبيل المثال فيما يخص الحق في التعليم، نصت الاتفاقية على التزام الدول بأن تمكن الأشخاص ذوي الإعاقة من تعلم مهارات حياتية واجتماعية لتيسير مشاركتهم الكاملة في التعليم على قدم المساواة مع الآخرين بوصفهم أعضاء في المجتمع، وأن تشمل التدابير التي تتخذها لتحقيق ذلك: تيسير تعلم طريقة برايل وأنواع الكتابة البديلة، وطرق ووسائل وأشكال الاتصال المعززة والبديلة، ومهارات التوجيه والتنقل، وتيسير الدعم والتوجيه عن طريق الأقران، وتيسير تعلم لغة الإشارة وتشجيع الهوية اللغوية لفئة الصم، وكفالة توفير التعليم للمكفوفين والصم أو الصم المكفوفين، وخاصة الأطفال منهم، بأنسب اللغات وطرق ووسائل الاتصال للأشخاص المعنيين، وفي بيئات تسمح بتحقيق أقصى قدر من النمو الأكاديمي والاجتماعي، وأن توظف ما يلزم من معلمين مدربين ومتخصصين (المادة 24(3)).

وتنشأ بموجب الاتفاقية "اللجنة المعنية بحقوق الأشخاص ذوي الإعاقة" التي تقوم بفحص مدى وفاء الدول الأطراف في الاتفاقية والبروتوكول الملحق بها بالتزاماتها، إذ يجب على الدول الأطراف أن تقدم تقرير شامل عن التدابير التي اتخذتها لتنفيذ التزاماتها بموجب الاتفاقية وعن التقدم المحرز في هذا الصدد، وذلك خلال فترة عامين عقب بدء نفاذ الاتفاقية بالنسبة لها، ثم مرة كل 4 سنوات على الأقل، وكذلك كلما طلبت اللجنة من الدولة القيام بذلك (المواد 34 إلى 39). ويمكن أيضا للجنة بموجب البروتوكول الملحق بالاتفاقية أن تتلقى شكاوى من قبل الأفراد في حالة انتهاك حقوقهم المعترف بها في الاتفاقية من قبل دولة طرف في البرتوكول. كما أن للجنة بموجب البرتوكول أيضاً إذا ما تلقت معلومات موثوق بها تدل على وقوع انتهاكات جسيمة أو منتظمة من جانب دولة طرف فيه للحقوق المنصوص عليها في الاتفاقية، أن تدعو تلك الدولة الطرف إلى التعاون في فحص المعلومات، وقد تقرر اللجنة أن تجري تحقيقاً بهذا الخصوص بما في ذلك أن تطلب من الدولة المعنية السماح لعضو أو أكثر من أعضائها بالقيام بزيارة أراضي الدولة المعنية، وتنشر اللجنة نتائج أعمالها بهذا الخصوص، وكذلك آرائها فيما يقدم إليها من شكاوى بموجب البروتوكول.

وقد نظرت اللجنة حتى تاريخ 10 تموز/يوليه 2021 فيما يقارب مائة تقرير من تقارير الدول الأطراف في الاتفاقية واعتمدت ملاحظاتها الختامية بشأن كل منها، ومن بين ذلك تقارير قدمتها الدول الأفريقية التالية أوغندا وتونس والجابون والجزائر وجنوب أفريقيا ورواندا والسنغال والسودان وسيشيل وكينيا والمغرب وموريشيوس والنيجر.[44] كما فصلت اللجنة في عشرات من الشكاوى ليس من بينها أي شكوى تخص

[44] للاطلاع على كافة الملاحظات الختامية للجنة راجع https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5، تاريخ الاطلاع 28 حزيران/يونيه 2021.

دولة أفريقية، فيما توجد شكوتان ضد تنزانيا مازالا قيد نظر اللجنة وتتعلقان بادعاءات بالتعذيب والمعاملة القاسية لأشخاص مصابين بالمهق.[45] وتتضمن اجتهادات اللجنة ثروة معرفية هامة، وعكست اللجنة جانباً من خبرتها واجتهاداتها في التعليقات العامة السبعة التي اعتمدتها حتى الآن والتي تتعلق بالاعتراف بالأشخاص ذوي الإعاقة على قدم المساواة مع الآخرين أمام القانون، وإمكانية الوصول، والنساء والفتيات ذوات الإعاقة، والحق في التعليم الشامل للجميع، والعيش المستقل والإدماج في المجتمع، والمساواة وعدم التمييز، ومشاركة الأشخاص ذوي الإعاقة، بمن فيهم الأطفال، من خلال المنظمات التي تمثلهم، في تنفيذ الاتفاقية ورصدها.[46] كما اعتمدت اللجنة مبادئ توجيهية بشأن حق الأشخاص ذوي الإعاقة في الحرية والأمن.[47]

وجدير بالإشارة أن الاهتمام بحقوق الأشخاص ذوي الإعاقة لم يقتصر على اللجنة المعنية بحقوق الأشخاص ذوي الإعاقة بل شمل مختلف لجان المعاهدات الدولية الرئيسية لحقوق الإنسان، وحيث اعتمدت اللجان الأخرى حتى الآن ما يقارب ألفين ملاحظة/توصية بشأن حقوق الأشخاص ذوي الإعاقة.[48] هذا كما اعتمد عدد منها أيضاً تعليقات/توصيات عامة بشأن حقوق الأشخاص ذوي الإعاقة.[49]

2' الإجراءات الخاصة وحقوق الأشخاص ذوي الإعاقة

تساهم الإجراءات الخاصة لمجلس حقوق الإنسان مساهمة هامة على صعيد تعزيز حقوق الأشخاص ذوي الإعاقة، ويوجد حالياً ثلاثة إجراءات خاصة معنية حصراً بحقوقهم، وسنركز فيما يلي على جهود هذه الإجراءات الثلاث، ثم نشير بشكل موجز لجهود الإجراءات الأخرى وكذلك اهتمام آلية الاستعراض الدوري الشامل بحقوق الأشخاص ذوي الإعاقة.

أنشأ مجلس حقوق الإنسان ولاية المقرر الخاص المعني بحقوق الأشخاص ذوي الإعاقة بموجب قراره رقم 20/26 المؤرخ 27 حزيران/يونيو 2014، وهي ولاية مستمرة حتى الآن. ومن القضايا الهامة التي تناولها المكلف بهذه الولاية في تقاريره: حق الأشخاص ذوي الإعاقة في المشاركة في صنع القرار، والحماية الاجتماعية،

[45] https://www.ohchr.org/Documents/HRBodies/CRPD/Tablependingcases.pdf، تاريخ الاطلاع 28 حزيران/يونيه 2021.

[46] ترد هذه التعليقات على التوالي في وثائق الأمم المتحدة CRPD/C/GC/1؛ وCRPD/C/GC/1/Corr.1، وCRPD/C/GC/2، وCRPD/C/GC/3، وCRPD/C/GC/4، وCRPD/C/GC/5، وCRPD/C/GC/6، وCRPD/C/GC/7. متاحة على https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx، تاريخ الاطلاع 5 آب/أغسطس 2021.

[47] تقرير اللجنة المعنية بحقوق الأشخاص ذوي الإعاقة عن دوراتها من الثالثة عشرة حتى السادسة عشرة، المرفق، وثيقة الأمم المتحدة A/72/55.

[48] See Universal Human Rights Index, at https://uhri.ohchr.org/en/search-human-rights-recommendations, accessed on 10 July 2021.

[49] التعليق العام لجنة حقوق الطفل بشأن حقوق الأطفال المعوقين، وثيقة الأمم المتحدة CRC/C/GC/9؛ والتعليق العام للجنة المعنية بالحقوق الاقتصادية والاجتماعية والثقافية بشأن الحقوق الاقتصادية والاجتماعية والثقافية للمعوقين، وثيقة الأمم المتحدة E/1995/22؛ والتوصية العامة للجنة المعنية بالقضاء على التمييز ضد المرأة بشأن النساء المعوقات، وثيقة الأمم المتحدة A/46/38.

والحاجة إلى سياسات شاملة لمسائل الإعاقة، وخدمات الدعم، والصحة والحقوق الجنسية والإنجابية للفتيات والشابات ذوات الإعاقة، وحق الأشخاص ذوي الإعاقة في الاعتراف بهم على قدم المساواة مع غيرهم أمام القانون، وحقهم في الصحة، وحرمانهم من الحرية، والتقاطع بين التقدم في السن والإعاقة، وأثر التنقيص بسبب الإعاقة في الممارسة الطبية والعلمية، وأهمية التعاون الدولي لدعم حقوق الأشخاص ذوي الإعاقة.[50] كما قامت المكلفة بهذه الولاية بزيارات لعدد من الدول من بينها زامبيا.[51] ورعت مؤخراً اعتماد المبادئ التوجيهية الدولية بشأن الوصول إلى العدالة للأشخاص ذوي الإعاقة.[52]

كما أنشأ مجلس حقوق الإنسان ولاية الخبير المستقل المعني بالتمتع بحقوق الإنسان بالنسبة للأشخاص المصابين بالمهق بموجب قراره رقم 6/28 المؤرخ 26 آذار/مارس 2015، وشغلتها حتى الآن السيدة/ إكبونووسا إيرو من نيجيريا، ومن القضايا الهامة التي تناولتها في تقاريرها: دواعي القلق والمسائل ذات الأولوية المتعلقة بتمتع الأشخاص المصابين بالمهق بحقوق الإنسان، والأسباب الجذرية وراء حالات الاعتداء والتمييز ضدهم، والسحر وحقوق الإنسان للأشخاص المصابين بالمهق، والمعايير الدولية لحقوق الإنسان المنطبقة لمعالجة القضايا التي يواجهونها وما يرتبط بها من التزامات، وتمتعهم بأعلى مستوى ممكن من الصحة، وأهداف التنمية المستدامة ذات الصلة وما يرتبط بها من تدابير محددة لفائدتهم، وحقهم في الوصول إلى العدالة، والتشريعات والسياسات والفجوات المتعلقة بحالتهم، وحالة النساء والأطفال المتضررين من المهق، كما قدمت إرشادات للدول بشأن التدابير وأفضل الممارسات الكفيلة بحماية حقوقهم، وناقشت الإنجازات والنجاحات والتحديات وآفاق المستقبل.[53] وعرضت أيضاً خطة العمل الإقليمي المتعلقة بالمهق في أفريقيا، وأعمال ورشة العمل المتعلقة بالسحر وحقوق الإنسان، واجتماع المائدة المستديرة بشأن المهق وحقوق

[50] يرد تناول المقررة الخاصة لهذه القضايا على التوالي في الوثائق التالية للأمم المتحدة: A/HRC/31/62، وA/70/297، وA/71/314، وA/HRC/34/58، وA/72/133، وA/HRC/37/56، وA/73/161، وA/HRC/40/54، وA/74/186، وA/HRC/43/41، وA/75/186. متاحة على https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Reports.aspx، تاريخ الاطلاع 5 آب/أغسطس 2021.

[51] للاطلاع على تقرير المقررة الخاصة عن زيارتها إلى زامبيا خلال الفترة من 18 إلى 28 نيسان/أبريل 2016، انظر وثيقة الأمم المتحدة A/HRC/34/58/Add.2.

[52] https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-AR.pdf، تاريخ الاطلاع 25 حزيران/يونيه 2021.

[53] يرد تناول الخبيرة المستقلة لهذه القضايا على التوالي في الوثائق التالية للأمم المتحدة: A/HRC/31/63، وA/71/255، وA/HRC/34/59، وA/72/131، وA/HRC/37/57، وA/73/181، وA/HRC/40/62، وA/74/190، وA/HRC/43/42، وA/75/170، وA/HRC/46/32. متاحة على https://www.ohchr.org/EN/Issues/Albinism/Pages/Documents.aspx، تاريخ الاطلاع 5 آب/أغسطس 2021.

الإنسان.[54] وقامت بزيارات لعدد من الدول من بينها خمس دول أفريقية هي: موزمبيق، وملاوي، وتنزانيا، وكينيا، وجنوب أفريقيا.[55]

كما أسس مجلس حقوق الإنسان ولاية المقرر الخاص المعني بالقضاء على التمييز ضد الأشخاص المصابين بالجذام وأفراد أسرهم وذلك بموجب قراره رقم 9/35 المؤرخ 22 حزيران/يونيو 2017، وكانت الجمعية العامة قد أحيطت علماً في 21 كانون الأول/ديسمبر 2010 بالمبادئ والمبادئ التوجيهية للقضاء على التمييز ضد الأشخاص المصابين بالجذام وأفراد أسرهم.[56] وقد تناولت المقررة الخاصة في تقاريرها عدد من القضايا الهامة منها: المسار الطولي للانتقال من فصل الأشخاص المصابين بالجذام وأفراد أسرهم إلى حقوق الإنسان، وحالة النساء والأطفال المصابين بالجذام وأفراد أسرهم، وإطار سياسة عامة من أجل خطط عمل قائمة على الحقوق تهدف إلى تحقيق المساواة الفعلية لصالح الأشخاص المصابين بالجذام وأفراد أسرهم، والتأثير غير المتناسب لجائحة مرض فيروس كورونا (كوفيد-19) على الأشخاص ذوي الجذام وأفراد أسرهم "الأسباب الجذرية والعواقب وطريقة التعافي".[57]

وفضلاً عن الإجراءات الخاصة الثلاثة السابقة فقد اهتم المكلفون بالإجراءات الخاصة الأخرى بقضايا الإعاقة،[58] كما لاقت حقوق الأشخاص ذوي الإعاقة اهتماماً كبير في إطار آلية الاستعراض الدوري الشامل حيث تجاوزعدد التوصيات المتعلقة بحقوق الأشخاص ذوي الإعاقة التي قدمت في إطاره حتى 10 تموز/يوليه 2021 ثلاثة آلاف وخمسمائة توصية.[59]

[54] انظر على التوالي ملاحق تقارير الخبيرة المستقلة الواردة في الوثائق التالية للأمم المتحدة: A/HRC/37/57/Add.3، وA/HRC/37/57/Add.2، وA/HRC/40/62/Add.2. متاحة على https://www.ohchr.org/EN/Issues/Albinism/Pages/Documents.aspx، تاريخ الاطلاع 5 آب/أغسطس 2021.

[55] انظر على التوالي ملاحق تقارير الخبيرة المستقلة الواردة في الوثائق التالية للأمم المتحدة: A/HRC/34/59/Add.2، وA/HRC/34/59/Add.1، وA/HRC/37/57/Add.1، وA/HRC/40/62/Add.3، وA/HRC/43/42/Add.1. متاحة على https://www.ohchr.org/EN/Issues/Albinism/Pages/Documents.aspx، تاريخ الاطلاع 5 آب/أغسطس 2021.

[56] قرار الجمعية العامة للأمم المتحدة رقم 215/65، المعنون القضاء على التمييز ضد الأشخاص المصابين بالجذام وأفراد أسرهم، المؤرخ في 12 كانون الأول/ديسمبر 2010، وثيقة الأمم المتحدة A/RES/65/215.

[57] يرد تناول المقررة الخاصة لهذه القضايا على التوالي في الوثائق التالية للأمم المتحدة: A/HRC/38/42، وA/HRC/41/47، وA/HRC/44/46، وA/HRC/47/29. متاحة على https://ohchr.org/EN/Issues/Leprosy/Pages/Reports.aspx، تاريخ الاطلاع 5 آب/أغسطس 2021.

[58] انظر على سبيل المثال دراسة المقرر الخاص المعني بالحق في التعليم بشأن حق الأشخاص ذوي الإعاقة في التعليم الجامع، وثيقة الأمم المتحدة A/HRC/4/29؛ ودراسة المقرر الخاص المعني بالتعذيب وغيره من ضروب المعاملة أو العقوبة القاسية أو اللاإنسانية أو المهينة بشأن حماية الأشخاص ذوي الإعاقة من التعذيب، وثيقة الأمم المتحدة A/63/175؛ ودراسة المقرر الخاص المعني بحق كل إنسان في التمتع بأعلى مستوى مُمكن من الصحة البدنية والعقلية بشأن الإعاقة الذهنية والحق في الصحة، وثيقة الأمم المتحدة E/CN.4/2005/51؛ وكذلك دراسة المقررة الخاصة المعنية بالسكن اللائق بشأن حق الأشخاص ذوي الإعاقة في السكن، وثيقة الأمم المتحدة A/72/128؛ وأيضاً دراسة المقررة الخاصة المعنية بالعنف ضد المرأة وأسبابه وعواقبه بشأن العنف ضد النساء ذوات الإعاقة، وثيقة الأمم المتحدة A/67/227؛ ودراسة المقررة الخاصة المعنية بحقوق الإنسان للمشردين داخلياً بشأن الأشخاص ذوي الإعاقة في سياق التشريد الداخلي، وثيقة الأمم المتحدة A/67/227.

[59] See Universal Human Rights Index, at https://uhri.ohchr.org/en/search-human-rights-recommendations, accessed on 10 July 2021.

3' مفوضية الأمم المتحدة السامية لحقوق الإنسان والصناديق وفرق الخبراء

أولت مفوضية الأمم المتحدة السامية لحقوق الإنسان اهتماماً مضطرداً بحقوق الأشخاص ذوي الإعاقة، ومن ذلك قيامها منفردة أو بالتعاون مع جهات أخرى بإعداد عدد من الأدلة بخصوص اتفاقية حقوق الأشخاص ذوي الإعاقة والبروتوكول الملحق بها، من بينها: إعمال حقوق الأشخاص ذوي الإعاقة: من الاستثناء إلى المساواة - دليل للبرلمانيين بشأن اتفاقية حقوق الأشخاص ذوي الإعاقة والبروتوكول المحلق بها،[60] اتفاقية حقوق الأشخاص ذوي الإعاقة: دليل عملي - توجيهات خاصة بجهات رصد حقوق الإنسان،[61] اتفاقية حقوق الأشخاص ذوي الإعاقة: أداة للمناصرة.[62] كما قامت، بناء على طلب لجنة حقوق الإنسان ومن بعدها مجلس حقوق الإنسان، بإعداد العديد من الدراسات والتقارير الهامة والتي غطت فيها طائفة واسعة من القضايا والموضوعات المتعلقة بحقوق الأشخاص ذوي الإعاقة وفقاً لنهج حقوق الإنسان، ومن بينها: العلاقة بين إعمال الحق في العمل للأشخاص ذوي الإعاقة وتمتعهم بجميع حقوق الإنسان، والالتزام بموجب بتمكينهم من المشاركة في أنشطة الترفيه والتسلية والرياضة على قدم المساواة مع الآخرين، وحقهم في التعليم، وإذكاء الوعي بموجب المادة 8 من الاتفاقية، والتأهيل وإعادة التأهيل، وتمكين الأطفال ذوي الإعاقة من التمتع بحقوق الإنسان المكفولة لهم، وحماية الأسرة والإعاقة، والحق في المساواة وعدم التمييز، وحقوق الأشخاص ذوي الإعاقة المُتعلقة بحالات الخطر والطوارئ الإنسانية، والتعاون التقني وبناء القدرات لتعزيز وحماية حقوق جميع المهاجرين، بمن فيهم النساء والأطفال والمسنون والأشخاص ذوي الإعاقة، وحق الأشخاص ذوي الإعاقة في العيش المستقل والإدماج في المجتمع، وحقهم في اللجوء إلى القضاء، والتشريعات والسياسات والبرامج الوطنية، وحقوقهم في التعليم والعمل والعمالة، والعنف ضد النساء والفتيات والإعاقة، ومشاركة الأشخاص ذوي الإعاقة في الحياة السياسية والعامة، وتعزيز وحماية حقوقهم في سياق تغيير المناخ، ودور التعاون الدولي في دعم الجهود الوطنية الرامية إلى إعمال حقوقهم، والآليات الوطنية المعنية بتنفيذ الاتفاقية ورصد تنفيذها، والتوعية بالاتفاقية وفهمها.[63]

وفضلا عن ذلك أسست الأمم المتحدة في إطار اهتمامها بحقوق الأشخاص ذوي الإعاقة عدداً من الصناديق وفرق الخبراء والدعم كالصندوق الاستئماني متعدد

[60] صدر التعاون بين مفوضية الأمم المتحدة السامية لحقوق الإنسان مع الاتحاد البرلماني الدولي، منشورات الأمم المتحدة HR/PUB/07/6، جنيف، 2007.

[61] مفوضية الأمم المتحدة السامية لحقوق الإنسان، منشورات الأمم المتحدة، سلسلة التدريب المهني رقم 17، HR/P/PT/17، نيويورك وجنيف، 2009.

[62] مفوضية الأمم المتحدة السامية لحقوق الإنسان، منشورات الأمم المتحدة، سلسلة التدريب المهني رقم 19، HR/P/PT/19، نيويورك وجنيف، 2014.

[63] ترد هذه الدراسات على التوالي في وثائق الأمم المتحدة المقدمة في إطار دورات مجلس حقوق الإنسان: A/HRC/46/47، وA/HRC/46/49، وA/HRC/43/27، وA/HRC/40/32، وA/HRC/40/27، وA/HRC/35/12، وA/HRC/34/26، وA/HRC/31/30، وA/HRC/31/80، وA/HRC/28/37، وA/HRC/27/25، وA/HRC/26/24، وA/HRC/25/29، وA/HRC/22/25، وA/HRC/20/5، وA/HRC/19/36، وA/HRC/44/30، وA/HRC/16/38، وA/HRC/13/29، وA/HRC/10/48.

المانحين لشراكة الأمم المتحدة لتعزيز حقوق الأشخاص ذوي الإعاقة،[64] وصندوق الأمم المتحدة للتبرعات لصالح الإعاقة،[65] وفريق الدعم المشترك بين الوكالات المعني باتفاقية حقوق الأشخاص ذوي الإعاقة.[66]

هذا وفيما يخص الإحصاءات والبيانات المُتعلقة أعدت هيئات ووكالات الأمم المتحدة عدد من الأدلة الهامة ذات الصلة، منها على سبيل المثال: المبادئ التوجيهية والمبادئ الأساسية لوضع إحصاءات الإعاقة،[67] والتصنيف الدولي حول تأدية الوظائف والعجز (الإعاقة) والصحة،[68] كما تم تأسيس فريق واشنطن المعني بإحصاءات الإعاقة.[69] وفي حزيران/يونيو 2017 عينت السيدة/ ماريا سوليداد (شيلي) كأول مبعوث خاص للأمين العام للأمم المتّحدة معني بالإعاقة وإمكانية الوصول. كما حددت الأمم المتحدة عدداً من الأيام الدولية للتوعية بحقوق الأشخاص ذوي الإعاقة وتسليط الضوء عليها.[70]

ثانياً: تناول حقوق الأشخاص ذوي الإعاقة في إطار المنظومة الأفريقية

تتفاوت الصكوك والنظم الإقليمية في درجة تطورها على صعيد حقوق الإنسان، بما في ذلك ما يتعلق بحقوق الأشخاص ذوي الإعاقة. وقبل أن نتناول المنظومة الأفريقية نود الإشارة إلى أن المنظومة الأوروبية لحقوق الإنسان وإن كان لا يتضمن معاهدة خاصة بحقوق الأشخاص ذوي الإعاقة إلا أنه أكثر تلك النظم تطوراً نظراً لفاعلية آليات الفحص والمراقبة وإلزام الدول باحترام وإعمال ما يقره من معايير فضلاً عن أنه يتضمن العديد من الصكوك والخطط التفصيلية ذات الصلة، بالإضافة إلى ذلك فإن الاتحاد الأوروبي طرف في اتفاقية حقوق الأشخاص ذوي الإعاقة باعتباره منظمة تكامل إقليمي وقد قدم تقريره الأولي للجنة المعنية بحقوق الأشخاص ذوي الإعاقة وقامت بفحصه واعتماد ملاحظاتها الختامية بشأنه.[71]

هذا وتأتي منظومة الدول الأمريكية لحقوق الإنسان في المرتبة التالية للمنظومة الأوروبية من حيث ما توفره من ضمانات وآليات لحماية وتعزيز حقوق الإنسان بما

[64] http://mptf.undp.org/factsheet/fund/RPD00، تاريخ الاطلاع 13 حزيران/يونيه 2021.

[65] https://www.un.org/development/desa/disabilities/about-us/united-nations-voluntary-fund-on-disability.html، تاريخ الاطلاع 13 حزيران/يونيه 2021.

[66] https://www.unsystem.org/content/ceb، تاريخ الاطلاع 14 حزيران/يونيه 2021.

[67] إدارة الشؤون الاقتصادية والاجتماعية، شعبة الإحصاءات، 2001، نيويورك، وثيقة الأمم المتحدة ST/ESA/STAT/SER.Y/10.

[68] http://www.who.int/classifications/icf/whodasii/en، تاريخ الاطلاع 17 حزيران/يونيه 2021.

[69] http://www.cdc.gov/nchs/washington_group.htm، تاريخ الاطلاع 25 حزيران/يونيه 2021.

[70] https://www.un.org/ar/observances/list-days-weeks، تاريخ الاطلاع 6 آب/أغسطس 2021.

[71] يرد التقرير الأولي للاتحاد الأوروبي للجنة المعنية لحقوق الأشخاص ذوي الإعاقة والملاحظات الختامية للجنة بشأنه في وثيقتي الأمم المتحدة CRPD/C/EU/1، و CRPD/C/EU/CO/1.

في ذلك بالطبع حقوق الأشخاص ذوي الإعاقة، ففضلاً عن الضمانات العامة التي تقر بها الصكوك المختلفة لحقوق الإنسان في منظومة الدول الأمريكية توجد اتفاقية خاصة وهي الاتفاقية الأمريكية بشأن القضاء على كافة أشكال التمييز ضد الأشخاص ذوي الإعاقة"[72] والتي اعتمدت عام 1999، ودخلت حيز النفاذ في 14 أيلول/سبتمبر 2001. أما على صعيد الدول العربية فقد أقر الميثاق العربي لحقوق الإنسان في نسخته المحدثة عدداً من الضمانات والحقوق للأشخاص ذوي الإعاقة،[73] كما عالجت عدد من اتفاقيات وتوصيات منظمة العمل العربية بعض القضايا ذات الصلة بحقوق العمل وظروف العمل المناسبة فيما يخص الأشخاص ذوي الإعاقة،[74] واعتمد البرلمان العربي قانوناً استرشادياً لحقوق الأشخاص ذوي الإعاقة في عام ،2015[75] وكذلك كان هناك العقد العربي لذوي الاحتياجات الخاصة (2004-2013).[76]

ويجدر الإشارة إلى أن آليات الفحص والمراقبة وإلزام الدول ضعيفة على صعيد الصكوك العربية قياساً على ما هو متوفر في إطار المنظومات الثلاث الأخرى الأوروبية والأمريكية والأفريقية، وفضلاً عن ذلك فإن تحليل مضمون الوثائق المعنية بحقوق الأشخاص ذوي الإعاقة التي اعتمدت على الصعيد العربي حتى الحديثة منها يكشف عن ضعف بل وأحياناً غياب نهج ومنظور حقوق الإنسان في التعامل مع قضايا الإعاقة.

أما فيما يتعلق بالمنطقة الأسيوية فلا توجد منظومة إقليمية لحقوق الإنسان وليس هناك سوى صك وحيد يتعلق بحقوق الإنسان هو إعلان آسيا لحقوق الإنسان وهو صك عام اعتمدته رابطة أمم جنوب شرق آسيا في عام 2012، وقد نص على حظر التمييز على أساس الإعاقة.[77]

[72] https://www.oas.org/juridico/english/treaties/a-65.html، و https://oas.org/juridico/english/sigs/a-65.html، تاريخ الاطلاع 25 حزيران/يونيه 2021.

[73] اعتمد من قبل القمة العربية السادسة عشرة التي استضافتها تونس 23 أيار/مايو 2004. http://www.lasportal.org/ar/humanrights/Committee/Pages/CommitteeCharter.aspx، تاريخ الاطلاع 18 حزيران/يونيه 2021.

[74] https://alolabor.org، تاريخ الاطلاع 22 حزيران/يونيه 2021.

[75] أقر من قبل مجلس وزراء الشؤون الاجتماعية العرب بموجب قراره رقم 741 المؤرخ 10 كانون الأول/ديسمبر 2013، وأقره البرلمان العربي بموجب قراره رقم 113 المؤرخ 14 حزيران/يونيه 2015.

[76] إن مجلس الجامعة على مستوى القمة؛ بعد اطلاعه: على تقرير الأمين العام الذي تناول مختلف مجالات العمل العربي المشترك؛ وعلى مشروع العقد العربي لذوي الاحتياجات الخاصة 2004-2013؛ يقرر: 1- الموافقة على العقد العربي لذوي الاحتياجات الخاصة 2004-2013 بالصيغة المرفقة وتسترشد به الدول الأعضاء في وضع استراتيجيتها الوطنية. 2- تكليف الأمانة العامة بمتابعة تنفيذ محاور هذا العقد وتقديم تقارير دورية بشأن ذلك إلى المجلس الاقتصادي والاجتماعي. (ق. ق: 283 د. ع (16) - 2004/5/23). انظر: http://gulfdisability.org/pdf/Disabled_Role_A3.pdf، تاريخ الاطلاع 18 حزيران/يونيه 2021.

[77] اعتمد من قبل رابطة أمم جنوب شرق آسيا في 18 تشرين الثاني/نوفمبر 2012 في اجتماعهم في كمبوديا، (تضم الرابطة عشر دول هي: اندونيسيا وبروني دار السلام وتايلاند والفلبين وفيتنام وكمبوديا ولاوس وماليزيا وميانمار) متاح بالإنجليزية على https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf، تاريخ الاطلاع 6 حزيران/يونيه 2021.

أما على صعيد المنظومة الأفريقية لحقوق الإنسان والتي تعد الأحدث قياساً على المنظومتين الأوربية والأمريكية، فيجدر الإشارة إلى أن منظمة الوحدة الأفريقية قد ركزت بشكل عام في بدايتها على قضايا التحرر من الاستعمار، والوحدة وإلغاء الفصل العنصري وتوطيد الدول في أفريقيا، وهو ما نجم عنه أن قضايا حقوق الأشخاص ذوي الإعاقة - ضمن قضايا أخرى عديدة تتعلق بحقوق الإنسان - لم تلقى اهتماماً من جانب المنظمة. وقد مثل عام 1981 بداية اهتمام منظمة الوحدة الأفريقية بقضايا الإعاقة وذلك تزامناً مع اعتماد الأمم المتحدة السنة الدولية للمعوقين في 1981،[78] حيث اعتمدت عدد من القرارات بهذا الشأن، وأشار مجلس وزراء المنظمة في قراره بهذا الشأن إلى أن الحروب الاستعمارية العنصرية والقمع هي من الأسباب الرئيسية وراء زيادة عدد المعوقين في أفريقيا، ودعى لعقد اجتماع أو ندوة إقليمية في المستوى الأفريقي لبحث مشكلة المعوقين وطرق ووسائل وضع أهداف السنة الدولية للمعوقين حيز التنفيذ.[79] وأعطي اعتماد الأمم المتحدة لبرنامج العمل العالمي المتعلق بالمعوقين والعقد الخاص بتنفيذ البرنامج، المشار إليهما أعلاه، دفعه هامة لهذا الاهتمام.

وفي عام 1981 اعتمد الميثاق الأفريقي لحقوق الإنسان والشعوب والذي بنيت على أساسه لاحقاً المنظومة الأفريقية لحقوق الإنسان، والذي تناول الإعاقة على نحو مقتضب حيث نص على أن "للمسنين أو المعوقين الحق أيضا في تدابير حماية خاصة تلائم حالتهم البدينة أو المعنوية." (المادة 18)، وشأن الاتفاقيات الدولية لحقوق الإنسان حتى ذلك الوقت لم ينص الميثاق على الإعاقة ضمن الأسس المحظورة للتمييز (المادة 2). ولاحقاً أقرت اللجنة الأفريقية لحقوق الإنسان والشعوب التي أسست بموجب الميثاق أن انتهاك الحق في المساواة وعدم التمييز الذي نص عليه الميثاق في مادتيه الثانية والثالثة على أساس الإعاقة يُشكل انتهاكاً للحقوق الموضوعية التي يقر بها الميثاق، مثل الحق في الكرامة الإنسانية.[80]

هذا كما تم إدماج عدد من الأحكام المتعلقة بحقوق الأشخاص ذوي الإعاقة في عدد من الصكوك الأفريقية لحقوق الإنسان التي تم اعتمادها لاحقاً، كما في الميثاق الأفريقي لحقوق الطفل ورفاهيته (المادة 13)، وبروتوكول حقوق المرأة (المادة 23)، وميثاق الشباب الأفريقي (المادة 15)، والميثاق الأفريقي لحقوق الإنسان والانتخابات والحكم (المادة 8)، وغير ذلك من الصكوك الأفريقية المتعلقة بحقوق الإنسان.[81] هذا وكان قد

[78] قرار الجمعية العامة للأمم المتحدة رقم 82/31 المؤرخ 13 كانون الأول/ديسمبر 1971، وثيقة الأمم المتحدة A/RES/31/82.

[79] See council of ministers' resolution no. 594 (1978), available at https://au.int/sites/default/files/decisions/9589-council_en_20_28_february_1978_council_ministers_thirtieth_ordinary_session.pdf, para. 2, accessed on 28 June 2021.

[80] See ACHRP, Purohit and Moore v. Gambia, 29 May 2003, available at https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2003/49, accessed on 28 June 2021.

[81] للمزيد راجع الصكوك الأفريقية المتاحة على https://au.int/en/treaties/1164، تاريخ الاطلاع 25 حزيران/يونيه 2021.

تم تأسيس المعهد الأفريقي للتأهيل في عام ،1985[82] واعتمد العقد الأفريقي الأول للمعوقين (2000-2009)،[83] وتلاه عقد ثاني (2010-2019).[84] واعتمدت اللجنة الأفريقية لحقوق الإنسان والشعوب بموجب قرارها 373(د-60) المتخذ خلال دورتها العادية الستين المنعقدة في أيار/مايو 2017 "خطة خمسية لمواجهة الهجمات والاعتداءات ضد الأشخاص المصابين بالمهق في منطقة جنوب الصحراء في أفريقيا (2017-2021)".[85] وتتألف الخطة من التوصيات المُقدّمة من قبل العديد من هيئات وآليات حقوق الإنسان على مستوى الأمم المتحدة والاتحاد الأفريقي والتي لُخّصت إلى تدابير محددة يمكن إنجازها على المدى الفوري، القصير والمتوسط (0 إلى 5 سنوات) بالتزامن مع إطلاق مبادرات طويلة المدى (أكثر من خمس سنين). وقسمت إلى أربع مجموعات من التدابير تتعلق بالوقاية والحماية والمساءلة وبالمساواة وعدم التمييز، وتناولت الخطة دور مختلف أصحاب المصلحة سواء الدول والمجتمع المدني ومؤسسات حقوق الإنسان الوطنية والآليات الإقليمية والدولية لحقوق الإنسان والتنمية، أو غيرها.

بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا

وفي عام 2007 اعتمدت اللجنة الأفريقية لحقوق الإنسان والشعوب نقطة اتصال بشأن حقوق كبار السن وذوي الإعاقة، ولتطورها لاحقاً لتصبح فريق عامل معني بحقوق كبار السن وذوي الإعاقة، ودعت الفريق إلى إعداد مشروع بروتوكول خاص بحقوق ذوي الإعاقة،[86] وفي منتصف عام 2010 قبلت اللجنة مسودة أولى للبروتوكول أعدها الفريق وطرحتها للتعليقات العامة من قبل كافة أصحاب المصلحة.

ثم اعتمد "بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا" بتاريخ 29 كانون الثاني/يناير 2018، من قبل الدورة الثلاثين لمؤتمر رؤساء دول الاتحاد الأفريقي، ولقد جاء النص النهائي للبروتوكول متقدمًا كثيرا عن المسودة السابقة.[87] وشأن اتفاقية الأمم المتحدة لحقوق الأشخاص ذوي الإعاقة فقد اعتمد بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا نهج اجتماعي/ قائم على حقوق الإنسان، كما اتبع في إعداد كلا من الاتفاقية والبروتوكول نموذج توليفي يجمع بين النموذج الكلي حيث يتناول

[82] https://au.int/en/treaties/agreement-establishment-african-rehabilitation-institute-ari، تاريخ الاطلاع 25 حزيران/يونيه 2021.

[83] https://afri-can.org/empowerment/CONTINENTAL%20PLAN%20OF%20ACTION%20(1999-2009).pdf، تاريخ الاطلاع 3 آب/أغسطس 2021.

[84] https://au.int/sites/default/files/pages/32900-file-cpoa_handbook._audp.english_-_copy.pdf، تاريخ الاطلاع 3 آب/أغسطس 2021.

[85] تقرير الخبيرة المستقلة المعنية بمسألة التمتع بحقوق الإنسان في حالة الأشخاص المصابين بالمهق عن خطة العمل الإقليمية المتعلقة بالمهق في أفريقيا (2017-2021)، وثيقة الأمم المتحدة A/HRC/37/57/Add.3.

[86] https://www.achpr.org/sessions/resolutions?id=228، تاريخ الاطلاع 25 حزيران/يونيه 2021.

[87] للاطلاع على نص مشروع البروتوكول راجع http://www.achpr.org/files/news/2016/04/d216/disability_protocol.pdf، وأيضا https://www.achpr.org/news/viewdetail?id=129، تاريخ الاطلاع 29 حزيران/يونيه 2021.

الصك كافة الحقوق ونموذج عدم التمييز حيث يركز الصك حصرا على مسألة عدم التمييز، وجرى إدماج معايير التنمية الاجتماعية وحقوق الإنسان في كلا من الاتفاقية والبروتوكول، وهو ما من شأن أن يكفل للأشخاص ذوي الإعاقة فرص متساوية للاستفادة من التقدم المحرز في التنمية الاجتماعية والاقتصادية لبلدانهم.

يتكون بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا من ديباجة و44 مادة. ونظرا لوجود قدر كبير من التماثل بين البروتوكول واتفاقية حقوق الأشخاص ذوي الإعاقة، فسوف أعمل في العرض التالي لمضمون البروتوكول على الوقوف على عدد من نقاط التمايز بينهما. ينوه البروتوكول إلى معاناة الأشخاص ذوي الإعاقة من مستويات قصوى من الفقر، ومعانتهم من انتهاكات حقوق الإنسان والتمييز الممنهج والاقصاء الاجتماعي والتحيز في الأصعدة السياسية والاجتماعية والاقتصادية، وإلى القلق البالغ إزاء الممارسات الضارة التي يعانيها الأشخاص ذوي الإعاقة في كثير من الأحيان، وإزاء تشويه أو قتل الأشخاص الذين يعانون من المهق في أجزاء كثيرة من القارة، وكذلك إزاء أشكال التمييز المتعددة، وارتفاع مستويات الفقر، وزيادة خطر العنف والاستغلال والإهمال وسوء المعاملة التي قد تتعرض إليها النساء والفتيات ذوات الإعاقة (الديباجة)، كما أقر البروتوكول بأن الأسر وأولياء الأمور ومقدمي الرعاية يلعبون أدواراً أساسية في حياة الأشخاص ذوي الإعاقة، وأكد على الحاجة لوضع إطار قانوني ثابت للاتحاد الأفريقي يكون أساساً للقوانين والسياسات والإجراءات الإدارية والموارد لضمان حقوق الأشخاص ذوي الإعاقة (الديباجة).

وتضمن البروتوكول عدد من التعريفات تخص ثقافة الصم والتمييز على أساس الإعاقة والتأهيل وإعادة التأهيل والممارسات الضارة والأهلية القانونية والترتيبات التيسيرية المعقولة والتصميم العالمي والشباب (المادة 1)، وأوضح البروتوكول أن عبارة الأشخاص ذوي الإعاقة تشمل "أولئك الذين يعانون من إعاقات بدنية أو عقلية أو ذهنية أو تنموية أو حسية، وبالتداخل مع الحواجز البيئية أو السلوكية أو المعوقات الأخرى يتم إعاقة مشاركتهم بصورة كاملة وفعالة في المجتمع على قدم المساواة مع الآخرين." (المادة 1)، وأن المقصود بالقتل الطقوسي "قتل الأشخاص بدافع من المعتقدات الثقافية أو الدينية أو الخرافية أن استخدام جسم أو جزء من الجسم له قيمة طبية، يمتلك قوى خارقة للطبيعة ويجلب حظاً سعيداً والازدهار والحماية للقاتل." (المادة 1). كما أوضح أن الغرض منه يتمثل في "تعزيز وحماية وضمان تمتع جميع الأشخاص ذوي الإعاقة تمتعاً تاماً وعلى قدم المساواة بجميع حقوق الإنسان وحقوق الشعوب، وكفالة احترام كرامتهم الأصيلة." (المادة 2)، واشتملت المبادئ العامة للبروتوكول على ضمان احترام وحماية الكرامة المتأصلة، والخصوصية، والاستقلالية الفردية، بما في ذلك حرية اختيار الخيارات الشخصية واستقلال الأشخاص، وعدم التمييز، والمشاركة الكاملة والفعالة والإدماج في المجتمع، واحترام الاختلاف وقبول الأشخاص ذوي الإعاقة كجزء من التنوع البشري والإنسانية، وتكافؤ الفرص، وإمكانية الوصول، والترتيبات التيسيرية المعقولة، والمساواة بين الرجل والمرأة، والمصالح الفضلى للطفل، واحترام القدرات المتطورة للأطفال ذوي الإعاقة واحترام حقهم في الحفاظ على هوياتهم (المادة 3).

هذا وتضمنت الالتزامات العامة للدول بموجب البروتوكول على اتخاذ التدابير المناسبة والفعالة، بما في ذلك السياسة والخطوات التشريعية، والإدارية، والمؤسسية، ومخصصات الميزانية لضمان وحماية وتعزيز حقوق وكرامة الأشخاص ذوي الإعاقة، دون تمييز على أساس الإعاقة، بما في ذلك: تضمين الإعاقة في السياسات والتشريعات وخطط التنمية والبرامج والأنشطة وفي جميع مجالات الحياة الأخرى. وتعديل، حظر، تجريم أو الحشد ضد أيا من الممارسات الضارة التي ترتكب بحق الأشخاص ذوي الإعاقة بحسب الاقتضاء. واتخاذ تدابير للقضاء على التمييز على أساس الإعاقة من قبل أي شخص أو منظمة أو مؤسسة خاصة. ورصد ما يكفي من الموارد، بما في ذلك مخصصات الميزانيات، لضمان التنفيذ الكامل لما تضمنه البروتوكول، وضمان المشاركة الفعالة للأشخاص ذوي الإعاقة أو المنظمات الممثلة لهم في جميع عمليات صنع القرار، بما في ذلك وضع وتنفيذ التشريعات والسياسات والعملية الإدارية للبروتوكول (المادة 4).

ونص البروتوكول على أن لكل شخص معوق الحق في التمتع بالحقوق والحريات المعترف بها والمضمونة في هذا البروتوكول دون تمييز من أي نوع على أي أساس (المادة 5)، وأن لكل شخص ذو إعاقة متساوي أمام القانون وله الحق في الحصول على حماية وفائدة متساوية في القانون. وأن المساواة تشمل التمتع الكامل والمتكافئ بجميع حقوق الإنسان والشعوب (المادة 6). وأن الأشخاص ذوي الإعاقة لديهم حق التمتع بالأهلية القانونية على قدم المساواة مع الآخرين في جميع جوانب الحياة (المادة 7).

أكد البروتوكول على تمتع كل شخص ذوي إعاقة بالحق في الحياة والسلامة (المادة 8)، والحرية والأمان (المادة 9)، واحترام كرامته المتأصلة والتحرر من التعذيب أو المعاملة القاسية أو اللاإنسانية أو المهينة أو الرق أو السخرة أو العقاب غير المشروع (المادة 10)، وألزم البروتوكول الدول باتخاذ جميع التدابير المناسبة وتقديم الدعم والمساعدة المناسبة لضحايا الممارسات الضارة، بما فيها السحر، والهجر، والإخفاء، والقتل الطقوسي أو ربط الإعاقة بالشؤوم. ولتثبيط الأفكار النمطية بشأن قدرات الأشخاص ذوي الإعاقة أو مظهرهم أو سلوكهم، وحظر استخدام لغة مهينة ضدهم (المادة 11). وأوضح البروتوكول التزامات الدول بشأن تمتع الأشخاص ذوي الإعاقة بالنفاذ إلى القضاء (المادة 13)، والعيش في المجتمع (المادة 14)، والوصول دون معوقات للمرافق والخدمات (المادة 15)، وحقهم في التعليم (المادة 16)، والصحة (المادة 17)، والتأهيل وإعادة التأهيل، والعمل (المادة 18 و19)، وفي مستوى معيشي لائق (المادة 20)، والمشاركة (المادتان 21 و25)، وتمثيل أنفسهم (المادة 22)، وحقهم في حرية التعبير والرأي الوصول إلى المعلومات (المادتان 23 و24)، وتكوين أسرة (المادة 26).

هذا وقد خصص البروتوكول مواد لتناول التزامات الدول بشأن حقوق ذوي الإعاقة من النساء والفتيات (المادة 27)، والأطفال (المادة 28)، والشباب (المادة 29)، وكبار السن (المادة 30). كما خصص مادة لتناول واجبات الأشخاص ذوي الإعاقة نصت

على أن عليهم واجبات، على قدم المساواة مع الأشخاص الآخرين، على النحو المبين في الميثاق الأفريقي، وأن على الدول تقديم أشكال المساعدة والدعم لهم، بما في ذلك الترتيبات التيسيرية المعقولة، التي قد يحتاجونها في أداء هذه الواجبات (المادة 31). كما أولى البروتوكول اهتماماً خاصاً لحالات الخطر مشيراً إلى أنه يتعين على الدول اتخاذ التدابير الخاصة لضمان حماية وسلامة الأشخاص ذوي الإعاقة في حالات الخطر، بما في ذلك حالات النزاع المسلح، والنزوح الجبري، والطوارئ الإنسانية، والكوارث الطبيعية. وضمان استشارتهم في جميع جوانب التخطيط والتنفيذ لإعادة الإعمار وإعادة التأهيل في مرحلة ما بعد النزاع (المادة 12)، كما تضمن البروتوكول أكثر من إشارة إلى أهمية رصد ما يكفي من الموارد لحقوق الأشخاص ذوي الإعاقة (المواد 4 و6 و19 و22 و27)، ونص على حق أفراد الأسرة المتصلين بالأشخاص ذوي الإعاقة في الحماية (المادة 5)، وبموجب البروتوكول على الدول ضمان أن لا تستخدم أشكال القضاء التقليدية شمولية تستخدم في حرمان الأشخاص ذوي الإعاقة من حقهم في الوصول إلى العدالة المناسبة (المادة 14)، كما تناول البروتوكول بقدر من التفصيل عدد من الحقوق المتعلقة بحقوق الأشخاص ذوي الإعاقة من بينها حقهم في عدم الخضوع للتعقيم أو لأي عملية جراحية أخرى دون موافقتهم الحرة والمسبقة والمستنيرة، وحقهم في الحماية سواء داخل المنزل أو خارجه، من جميع أشكال الاستغلال والعنف وسوء المعاملة (المادة 10)، ونص أيضاً على أن يكون تعليم الأشخاص ذوي الإعاقة موجهاً بـ "الحفاظ على القيم الأفريقية الإيجابية وتعزيزها" (المادة 16(4)(د)). وعلى خلاف الاتفاقية فقد أوكل البروتوكول ولاية فحص مدى وفاء الدول الأطراف فيه إلى اللجنة الأفريقية لحقوق الإنسان ولم يؤسس نظاما مستقلاً خاصاً به، حيث نص على أنه يتعين على الدول الأطراف أن تكفل تنفيذه، وأن تبين في تقاريرها الدورية المقدمة إلى اللجنة الأفريقية وفقاً للمادة 67 من الميثاق الأفريقي التدابير التشريعية وغيرها من التدابير المتخذة من أجل الإعمال الكامل للحقوق المعترف بها فيه (المادة 34(3))، ومنح البروتوكول للجنة ولاية تفسير أحكامه وإحالة مسائل التفسير والإنفاذ أو أي نزاع ينشأ عن تطبيقه أو تنفيذه على المحكمة الأفريقية لحقوق الإنسان والشعوب (المادة 34(د)).

هذا واهتمت اللجنة المعنية بحقوق الأشخاص ذوي الإعاقة باعتماد البروتوكول ووجهت للدول الأفريقية أسئلة بشأن الخطوات التي اتخذتها للتصديق عليه[88] كما أوصت عدد منها في إطار ملاحظاتها الختامية بالقيام بالتصديق على البروتوكول.[89]

[88] انظر على سبيل المثال قائمة المسائل المحالة من اللجنة المعنية بحقوق الأشخاص ذوي الإعاقة لملاوي لكي تعد بناء عليها تقريرها الأولي والثاني بموجب الاتفاقية، وثيقة الأمم المتحدة CRPD/C/MWI/Q/1-2، الفقرة 2؛ وقائمة الأسئلة المقدمة من اللجنة المعنية بحقوق الأشخاص ذوي الإعاقة في إطار النظر في التقرير الأولي لجيبوتي، وثيقة الأمم المتحدة CRPD/C/DJI/Q/1، الفقرة 34.

[89] راجع على التوالي الملاحظات الختامية للجنة المعنية بحقوق الأشخاص ذوي الإعاقة بشأن التقرير الأولي للجزائر، وثيقة الأمم المتحدة CRPD/C/DZA/CO/1، الفقرة 55؛ وبشأن التقرير الأولي للسنغال، وثيقة الأمم المتحدة CRPD/C/SEN/CO/1، الفقرة 56؛ وبشأن التقرير الأولي لرواندا، وثيقة الأمم المتحدة CRPD/C/RWA/CO/1، الفقرة 60؛ وبشأن التقرير الأولي للنيجر، وثيقة الأمم المتحدة CRPD/C/NER/CO/1، الفقرة 54.

وكذلك اهتم المقررون الخواص لمجلس حقوق الإنسان بالأمم المتحدة بالبروتوكول،[90] كما قدمت توصيات لعدد من الدول الأفريقية في إطار الاستعراض الدوري الشامل بالقيام بالتصديق على البروتوكول.[91] هذا وكرر المجلس الاقتصادي والاجتماعي بالأمم المتحدة دعوته للدول الأفريقية بالتصديق على البروتوكول.[92]

خاتمة

- قطعت كل من المنظومتين الدولية والأفريقية شوطاً كبيراً خلال العقدين الأخيرين في الإقرار بحقوق الأشخاص ذوي الإعاقة، إلا أن هناك فجوة كبيرة ما بين النص والواقع تحتاج إلى جهود متواصلة لنقل النص إلى الواقع.
- وإن كان من الهام مواصلة التطور على صعيد الاجتهادات والتصورات إلى أن الجانب الأكبر من الجهد ينبغي أن ينصب على الانتقال من النص إلى الواقع، حيث لا يخفى على المراقب مدى الإجحاف والظلم الذي يتعرض له الأشخاص ذوي الإعاقة في العديد من الدول الأفريقية.
- لقد انعكس الضعف العام للإرادة السياسية فيما يتعلق بتفعيل المنظومة الأفريقية لحقوق الإنسان أيضاً على ما يخص بروتوكول حقوق الأشخاص ذوي الإعاقة في أفريقيا، حيث لم يدخل البروتوكول حيز النفاذ بعد لأنه يتطلب تصديق خمسة عشرة دولة عليه (المادة 38(1))، وهو ما لم يتوفر بعد.[93]
- يجب في ظل ضعف الوعي بالمنظومة الأفريقية لحقوق الإنسان تخصيص المزيد من الموارد للتوعية بدورها، وإسهاماتها، بما في ذلك ما يتعلق بحقوق الأشخاص ذوي الإعاقة، ويجب أن يشمل ذلك تحديث قواعد البيانات ذات الصلة، وتوفير الوثائق ذات الصلة في المواقع الالكترونية لكل من الاتحاد الأفريقي واللجنة والمحكمة الأفريقية لحقوق الإنسان والشعوب بكافة اللغات الرسمية، وكذلك تشجيع عملية الترجمة للغات المحلية، وتوثيق الصلات مع مختلف أصحاب المصلحة.

[90] انظر على سبيل المثال تقريري المقررة الخاصة بالمعنية بحقوق الأشخاص ذوي الإعاقة، وثيقتي الأمم المتحدة A/74/186، الفقرة 15، وA/HRC/40/54، الفقرة 59؛ وتقريري الخبيرة المستقلة المعنية بمسألة التمتع بحقوق الإنسان في حالة الأشخاص المصابين بالمَهَق، وثيقتي الأمم المتحدة A/74/190، الفقرة 9، وA/HRC/40/62، الفقرة 26؛ وكذلك تقريرها عن زيارتها لجنوب أفريقيا خلال الفترة من 16 إلى 26 أيلول/سبتمبر 2019، وثيقة الأمم المتحدة A/HRC/43/42/ADD.1، الفقرة 15.

[91] انظر على سبيل المثال فيما يخص التوصيات المقدمة لمصر في الدورة الثالثة للاستعراض الدوري الشامل، وثيقة الأمم المتحدة A/HRC/43/16، الفقرة 31-17؛ وفيما يخص التوصيات المقدمة لكينيا في الدورة الثالثة للاستعراض الدوري الشامل، A/HRC/44/9، الفقرة 142-21؛ وفيما يخص التوصيات المقدمة لملاوي في الدورة الثالثة للاستعراض الدوري الشامل، A/HRC/46/7، الفقرة 122-2.

[92] انظر على سبيل المثال قراراي المجلس رقم 9/2021، المؤرخ 8 حزيران/يونيه 2021، وثيقة الأمم المتحدة E/RES/2021/9؛ وقراره رقم 2020/6، المؤرخ 18 حزيران/يونيه 2020، وثيقة الأمم المتحدة E/RES/2020/6، والمعنونان "الأبعاد الاجتماعية للشراكة الجديدة من أجل تنمية أفريقيا".

[93] https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa، تاريخ الاطلاع 29 حزيران/يونيه 2021.

- يجب العمل على تنظيم مزيد من حملات المناصرة والضغط من أجل تصديق أكبر عدد من الدول على الصكوك الأفريقية المختلفة لحقوق الإنسان بما فيها البروتوكول. ودعوة المنظمات غير الحكومية والمؤسسات الوطنية لحقوق الإنسان والمؤسسات الأكاديمية لتحقيق توزان ما بين اهتمامها بالمنظومتين الدولية والأفريقية لحقوق الإنسان.

Les organisations non gouvernementales dans le système africain des droits de l'homme: essai de systématisation du rôle des ONG dans le contentieux régional des droits de l'homme en Afrique

*Muriel Sognigbé-Sangbana**
https://orcid.org/0000-0001-6291-667X

RÉSUMÉ: Les organisations non gouvernementales font partie des acteurs les plus remarquables du paysage africain des droits de l'homme. Elles étaient déjà présentes à la genèse du système où elles se sont illustrées par leur plaidoyer en faveur de l'adoption des textes fondateurs: la Charte africaine des droits de l'homme et des peuples et ses protocoles. Leur présence est également notoire dans les différents mécanismes de mise en œuvre des droits garantis. Elles interviennent aussi bien dans les procédures dites administratives que dans les procédures quasi-juridictionnelles et juridictionnelles. Elles sont par ailleurs actives, tant dans les procédures contentieuses que consultatives. Cette prégnance des ONG dans le système africain des droits de l'homme soulève des questions. Sur leur contribution à la protection des droits de l'homme en Afrique. L'objet de cette étude est de mettre en lumière cette contribution des ONG en systématisant leur rôle dans le contentieux devant les trois organes de contrôle. Ce rôle est double. Il s'entend d'un droit de dénonciation des violations des droits de l'homme devant les organes de contrôle et d'un droit de participation aux procédures devant elles.

TITLE AND ABSTRACT IN ENGLISH:

Non-governmental organisations in the African human rights system: an attempt to systematise the role of NGOs in regional human rights litigation in Africa

Abstract: Non-governmental organisations are among the most notable actors in the African Human Rights landscape. They were already active at the genesis of the system where they stood out through their advocacy for the adoption of the founding instruments: the African Charter on Human and Peoples' Rights and its Protocols. Their participation in the various mechanisms for the implementation of the rights enshrined in the Charter is also well known. They are involved in both administrative and quasi-judicial and court proceedings. They are also active in litigation and advisory proceedings. This strong presence of NGOs in the African human rights system raises questions about their contribution to the protection of Human Rights in Africa. The purpose of this study is to highlight the contribution of NGOs by systematising their role in the cases brought before the three supervisory bodies. This role is twofold. It consists of a right to report human rights violations to the monitoring bodies and a right to participate in the proceedings before such bodies.

* Consultante et chercheuse associée au CECOJI-EA 7353, Université de Poitiers, Docteure en droit public de l'Université de Poitiers et de l'Université de Lomé; muriel.sognigbe@gmail.com

M Sognigbé-Sangbana 'Les organisations non gouvernementales dans le système africain des droits de l'homme: essai de systématisation du rôle des ONG dans le contentieux régional des droits de l'homme en Afrique'
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MOTS CLÉS: organisations non gouvernementales, *actio popularis*, tierce intervention, *amicus curiae*, Commission africaine des droits de l'homme et des peuples, Comité africain d'experts sur les droits et le bien-être de l'enfant, Cour africaine des droits de l'homme et des peuples, dénonciation, droits collectifs

SOMMAIRE:

1 INTRODUCTION

La protection des droits de l'homme est l'une des sphères du droit international où les organisations non-gouvernementales (ONG) ont une grande visibilité. Que ce soit dans le système onusien ou les systèmes régionaux des droits de l'homme, la présence des ONG ne relève plus de l'insolite.[1] En Afrique, la contribution des ONG à la promotion et la protection des droits de l'homme a été reconnue et affirmée par l'Organisation de l'Unité africaine lors de sa première conférence ministérielle sur les droits de l'homme.[2] Elle voit en elles des partenaires de la protection des droits de l'homme et des peuples en Afrique. Cependant, force est de constater qu'il n'est pas aisé de trouver une définition normative du terme dans les textes africains.

Le terme «organisation non gouvernementale» n'apparaît ni dans la Charte de l'Organisation de l'Unité africaine du 25 mai 1963; ni dans l'Acte constitutif de l'Union africaine du 11 juillet 2000 et ni dans la Charte africaine des droits de l'homme et des peuples.[3] Il est utilisé sans être défini dans le premier Règlement intérieur de la Commission africaine des droits de l'homme et des peuples (la Commission),[4] ainsi que dans les différents règlements successifs, ceux du Comité africain d'experts sur les droits et le bien-être de l'enfant (le Comité) et de la

1 J-F Flauss 'Les organisations non gouvernementales devant les juridictions internationales compétentes dans le domaine des droits de l'homme' in G Cohen-Jonathan & J-F Flauss (dirs) *Les organisations non gouvernementales et le droit international des droits de l'homme* (2005) 71.

2 Voir Déclaration et Plan d'action de Grand Baie, Maurice 12-19 avril 1999. Elle a été réitérée lors de la première conférence ministérielle de l'Union africaine sur les droits de l'homme le 8 mai 2003 à Kigali, Rwanda. Voir Déclaration de Kigali, Rwanda, 8 mai 2003.

3 Le terme est 'caché' dans l'article 55 de la Charte relatif aux autres communications voir BM Metou 'Article 5' 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, Commentaire article par article* (2011) 1008.

4 Règlement intérieur de la Commission africaine des droits de l'homme et des peuples (13 février 1988) articles 76 et 77.

Cour africaine des droits de l'homme et des peuples (la Cour), entre autres. Même les résolutions de la Commission posant les critères d'octroi du statut d'observateur aux ONG ne le définissent pas non plus. Tout paraît comme si la réalité recouverte par les ONG était unanimement admise. La définition que nous trouvons dans les textes africains et qui pourrait se rapprocher d'une définition juridique des ONG ressort des critères d'octroi du statut d'observateur et pour un système d'accréditation auprès de l'Union africaine de juillet 2005. Aux termes de l'article premier relatif aux définitions, une ONG est une «organisation non gouvernementale aux niveaux sous-régional, régional ou interafricain, ainsi qu'au niveau de la diaspora telle que définie par le Conseil exécutif». Comme tel, le terme ONG n'est pas défini, mais plutôt l'ONG africaine. Cette définition a été reprise, sans aucune précision du terme ONG, par le Protocole portant Statut de la Cour africaine de justice et des droits de l'homme adopté à Sharm-el-Sheikh le 1er juillet 2008[5] et appliqué par la Cour dans l'avis consultatif demandé par l'ONG *Socio-Economic Rights and Accountability Project* (SERAP).[6] La Cour y a estimé qu'une «ONG peut être considérée comme étant «africaine», si elle est enregistrée dans un État africain et est dotée de structures aux niveaux sous-régional, régional ou continental et si elle mène des activités au-delà du territoire dans lequel elle est enregistrée, de même que toute organisation de la diaspora reconnue comme telle par l'Union africaine». L'on peut relever ici l'ancrage africain, administratif et fonctionnel de l'organisation. Néanmoins, ces quelques critères ne permettent pas de préciser la notion d'ONG. Faute de définition normative satisfaisante dans les textes africains, nous emprunterons celle de la Convention européenne sur la reconnaissance de la personnalité juridique des organisations internationales non gouvernementales de 1986.

Cette Convention définit les organisations non gouvernementales comme des associations, fondations et autres institutions privées qui remplissent les conditions suivantes: avoir un but non lucratif d'utilité internationale; avoir été créées par un acte relevant du droit interne d'un État; exercer une activité effective dans au moins deux États; et d'avoir leur siège statutaire sur le territoire d'un État et leur siège réel sur le territoire de cet État ou d'un autre État.[7] Ce sont donc des entités privées qui se sont imposées, par leurs activités d'utilité générale dans la société internationale.

La reconnaissance en droit international de l'activisme des ONG et de leur stratégie d'influence des rapports internationaux fondamentalement interétatiques, et donc empreints de souveraineté, a été faite par la Charte des Nations unies dans son article 71. Ce dernier autorise le Conseil économique et social à prendre toutes dispositions utiles pour consulter les organisations non gouvernementales qui s'occupent de questions relevant de sa compétence. Il établit ainsi le

5 Article 1 - Définitions.

6 *Demande d'avis consultatif par Socio-Economic Rights and Accountability Project* (avis consultatif) (2017) 2 RJCA 593.

7 Article 1 de la Convention européenne sur la reconnaissance de la personnalité juridique des organisations internationales non gouvernementales, 24 avril 1986.

statut consultatif des ONG qui a grandement favorisé leur intrusion dans une société internationale interétatique. L'article 71 de la Charte des Nations unies a accéléré la transformation des rapports dans la société internationale, avec comme fer de lance les droits de l'homme. Le développement normatif fulgurant des droits de l'homme n'est donc pas étranger au militantisme et à l'action des ONG. Elles ont investi le champ normatif avec une contribution notable à l'élaboration des textes fondamentaux des droits de l'homme, tant au plan international que régional. En Afrique, le rôle de la Commission internationale des juristes dans la longue marche vers la création d'un système régional africain des droits de l'homme est constamment relevé dans les études sur la genèse de la Charte africaine des droits de l'homme et des peuples, ainsi que celles relatives à la Cour africaine.[8] Qu'en est-il de leur rôle dans le fonctionnement du système? Quid de la contribution des organisations de la société civile à la mise en œuvre des droits de l'homme en Afrique? Quelle est leur contribution à l'office des organes de contrôle chargés de la mise en œuvre des droits garantis? En somme, quel est le rôle des ONG dans le contentieux des droits de l'homme en Afrique?

Les textes portant création des trois organes africains de protection des droits de l'homme évoquent de manière plus ou moins expresse la participation des ONG à la garantie des droits proclamés. La Charte africaine des droits de l'homme et des peuples adoptée le 27 juin 1981 à Nairobi et entrée en vigueur le 21 octobre 1986, qui institue la Commission, ne fait aucune mention expresse des ONG. Toutefois, en tant qu'entités non étatiques, elles semblent être autorisées à saisir la Commission sur le fondement de l'article 55 de la Charte relatif aux communications autres que celles des États parties.[9] La Charte africaine des droits et du bien-être de l'enfant, adoptée le 11 juillet 1990 à Addis Abeba et entrée en vigueur le 29 novembre 1999, prévoit la création d'un Comité africain d'experts qui est habilité à recevoir les communications des ONG aux termes de son article 44.[10] Comme la Charte africaine des droits de l'enfant, le Protocole relatif à la Charte africaine des droits de l'homme et des peuples portant création de la Cour, adopté le 10 juin 1998 à Ouagadougou et entrée en vigueur le 25 janvier 2004, mentionne expressément les ONG parmi les entités habilitées à saisir la Cour au contentieux aux articles 5(3) et 34(6).[11] En matière consultative en revanche, la saisine des ONG semble être incluse dans «une organisation africaine reconnue par l'OUA»

8 L Burgorgue-Larsen *Les 3 Cours régionales des droits de l'homme in context. La justice qui n'allait pas de soi* (2020) 62.

9 Article 55: '1. Avant chaque session, le Secrétaire de la Commission dresse la liste des communications autres que celles des États parties à la présente Charte et les communique aux membres de la Commission qui peuvent demander à en prendre connaissance et en saisir la Commission. 2. La Commission en sera saisie, sur la demande de la majorité absolue de ses membres'.

10 Article 44: 'Le Comité est habilité à recevoir des communications concernant toute question traitée par la présente Charte, de tout individu, groupe ou organisation non gouvernementale reconnue par l'Organisation de l'Unité africaine, par un État membre, ou par l'Organisation des Nations unies. 2. Toute communication au Comité indique le nom et adresse de l'auteur et est traitée de façon confidentielle'.

conformément à l'article 4(1) du Protocole.[12] Ce sont les règlements intérieurs, les règles de procédures, et les guides des communications des différents organes de contrôle qui viennent détailler la contribution des ONG à la mise en œuvre des droits garantis. Ceux-ci font des organisations de la société civile des partenaires des organes de contrôle qui les accompagnent dans leur mandat de promotion et de protection des droits de l'homme. Dans cette optique, la Commission et le Comité mettent en place un statut d'observateur qu'ils octroient sous diverses conditions à certaines ONG.[13] Ce statut donne accès à des droits et obligations[14] et scelle un véritable partenariat entre eux. La Commission et le Comité ont attribué ce statut respectivement à 535[15] et 34[16] organisations de la société civile. Il s'agit essentiellement d'organisations de défense des droits de l'homme. Elles ont un droit d'accès privilégié aux mécanismes non contentieux devant les organes de contrôle. Elles disposent également de divers moyens d'action en matière contentieuse, qui vont de la saisine de l'organe de contrôle à la participation à la procédure juridictionnelle ou quasi-juridictionnelle. L'appui des ONG à la protection des droits de l'homme en Afrique est ainsi multiforme. Elles participent aux procédures de suivi et d'accompagnement des États pour l'exécution de leurs obligations et elles disposent aussi d'un *locus standi* dans les procédures contentieuses et consultatives.

L'objet de notre étude est de tenter une systématisation de la contribution des organisations de la société civile à la mise en œuvre des droits de l'homme en Afrique. L'étude prendra en compte les instruments juridiques et la pratique des trois organes de contrôle: la Commission, le Comité et la Cour. Cependant, son champ sera circonscrit aux procédures juridictionnelles et quasi-juridictionnelles. En effet, ces dernières offrent des champs communs d'analyse entre les

11 Article 5(3): 'La Cour peut permettre aux individus ainsi qu'aux organisations non-gouvernementales (ONG) dotées du statut d'observateur auprès de la Commission d'introduire des requêtes directement devant elle conformément à l'article 34(6) de ce Protocole'.

12 Article 4(1): 'A la demande d'un État membre de l'OUA, de l'OUA, de tout organe de l'OUA ou d'une organisation africaine reconnue par l'OUA, la Cour peut donner un avis sur toute question juridique concernant la Charte ou tout autre instrument pertinent relatif aux droits de l'homme, à condition que l'objet de l'avis consultatif ne se rapporte pas à une requête pendante devant la Commission'.

13 Règle 72 Nouveau Règlement intérieur de la Commission africaine des droits de l'homme et des peuples (2020); Rule 85 Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child.

14 Résolution sur les Critères d'octroi et de maintien du statut d'observateur aux Organisations non gouvernementales en charge des droits de l'homme et des peuples en Afrique – CADHP/Rés.361(LIX)2016, 4 novembre 2016; African Committee of Experts on the Rights and Welfare of the Child, Criteria for Granting Observer Status to Non-Governmental Organisations (NGOs) and Associations.

15 Concernant les chiffres les plus récents disponibles, voir Communiqué final de la 68ème Session ordinaire de la Commission africaine des droits de l'homme et des peuples, session virtuelle 14 avril – 4 mai 2021, p 15.

16 Chiffres tels que disponibles sur https://www.acerwc.africa/cso-engagements/ (consulté le 4 juin 2021).

organes concernés. Bien qu'il ne s'agisse pas d'une simple étude comparative, cette délimitation du sujet aux procédures de type juridictionnel vise à center la réflexion sur la place des ONG dans le contentieux des droits de l'homme en Afrique. Est donc exclu du champ d'analyse, l'examen de l'apport des ONG aux activités de promotion des droits de l'homme entrepris par les organes régionaux des droits de l'homme notamment les missions de visite, le forum des ONG (Commission), l'examen des rapports périodiques et initiaux.

L'examen croisé des textes relatifs au rôle des ONG révèle qu'elles se sont imposées dans le contentieux régional africain des droits de l'homme comme le pont entre les victimes et les organes de contrôle. Vu la spécificité de certains droits garantis (les droits collectifs) et les réalités sociales, économiques et politiques africaines peu favorables à l'accès aux droits, les ONG, de par leur expertise se sont rendues incontournables dans le système africain des droits de l'homme. Aussi, elles ont accès au prétoire des organes de contrôle et détiennent un droit d'initiative de l'action juridictionnelle. Ce droit est un véritable droit de dénonciation des violations des droits de l'homme (partie 2). Ainsi qu'un droit de participation à l'instance et au suivi de l'exécution des décisions (partie 3).

2 LES ONG, TITULAIRES DU DROIT DE DENONCIATION

L'initiative de la garantie juridictionnelle ou quasi-juridictionnelle des droits de l'homme dans le système africain appartient entre autres aux ONG[17] qui l'exercent pour défendre des intérêts objectifs. En effet, sur un continent où près du tiers de la population est analphabète, et qui est confronté à des régimes dictatoriaux où la dénonciation des violations des droits peut aboutir à des représailles, les organisations de la société civile se sont vu associer à la garantie des droits protégés en tant qu'acteur de saisine, d'une saisine de portée étendue, dépassant les intérêts subjectifs des victimes. L'initiative de la garantie de type juridictionnel par les ONG est une reconnaissance du droit objectif de dénonciation (partie 2.1). Toutefois, ce droit de garantie collective est encadré par des limites structurelles qui brident sa mise en œuvre (partie 2.2).

2.1 La reconnaissance du droit objectif de dénonciation

La reconnaissance du droit de dénonciation au bénéfice des organisations non gouvernementales s'est construite sur le principe de

17 Tel qu'il ressort des articles 55 de la Charte africaine des droits de l'homme et des peuples pour la Commission; 44 de la Charte africaine sur les droits et le bien-être de l'enfant pour le Comité; et 4 et 5 du Protocole portant création d'une Cour africaine des droits de l'homme et des peuples s'agissant de la Cour.

l'*actio popularis* qui caractérise l'action contentieuse régionale africaine. Elle emporte des conséquences procédurales s'agissant de la qualité de victime et de l'intérêt à agir.

2.1.1 Le principe de base du droit de dénonciation: l'actio popularis

Le principe de l'*actio popularis* n'apparaît pas comme tel dans les instruments africains des droits de l'homme. Il s'agit d'un principe de procédure apparu il y a plus de 2 000 ans dans la Rome antique.[18] Le terme est passé par la doctrine dans le langage courant du droit international sans véritable définition. De l'antique *actio popularis* à ses avatars modernes, l'utilisation du terme révèle des analogies conceptuelles qui en précisent son contenu. Ces analogies sont notamment au nombre de trois: l'objectif poursuivi, (la défense des intérêts communs); l'attribution du droit d'agir en justice à tous les membres de la société qu'ils aient été directement lésés ou non; et enfin, le postulat d'une convergence entre intérêt collectif et l'intérêt de chacun.[19] Ces trois points de définition de l'action populaire s'infèrent de l'application de l'article 55 de la Charte par la Commission. Il autorise la saisine individuelle de la Commission sans pour autant préciser les entités recevables au titre de cette communication non étatique. La Commission précisa rapidement le sens de cette disposition dans son premier règlement intérieur.[20] Selon celle-ci, ces communications peuvent être introduites par: une prétendue victime qui allègue une violation de ses droits par un État partie; toute personne, si la victime de la violation des droits de l'homme est dans l'incapacité de soutenir sa plainte; un individu ou une organisation alléguant, preuve à l'appui une situation de violations graves ou massives des droits de l'homme et des peuples. Une organisation de la société civile peut ainsi saisir la Commission dans ces trois hypothèses.

Cette énumération précisant les cas dans lesquels une saisine individuelle peut être faite n'apparaît plus dans les règlements suivants y compris le nouveau Règlement de la Commission de septembre 2020. Elle a laissé la place à la formule simplifiée de la Règle 115, qui indique que la Commission peut être saisie par toute personne physique ou morale, faisant ainsi disparaître totalement l'idée de saisine par les victimes. La saisine individuelle de la Commission ne se limite pas à la défense d'intérêts subjectifs mais elle est ouverte pour la dénonciation de toutes les violations de la Charte, pour la défense d'intérêts collectifs.

Les directives révisées pour l'examen des communications de l'article 44 de la Charte africaine des droits de l'enfant détaillent la saisine du Comité et précisent que:[21]

18 F Voeffray *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (2004) 3-5.

19 Voeffray (n 18) 35-41.

20 Règlement intérieur de la Commission africaine des droits de l'homme et des peuples, 13 février 1988, article 114.

> (1) In accordance with article 44 of the African Children's Charter and these Guidelines, the following persons may be entitled to submit communications to the Committee either on their own behalf or on behalf of third parties, alleging violations of one or more of the provisions of the African Children's Charter:
>
> (a) Any individual or group of natural or legal person including children;
>
> (b) Any state party to the African Children's Charter;
>
> (c) Any intergovernmental or non-governmental organization legally recognized in either one or more of the Member States of the African Union, a state party to the African Children's Charter or the United Nations;
>
> (d) Any specialised organ or agency of the African Union and United Nations.

Il ressort de cette disposition que tous les titulaires du droit de saisine devant le Comité l'exercent en leur nom et pour la défense de leurs intérêts propres ou au nom de tiers alléguant la violation d'une ou de plusieurs dispositions de la Charte des droits de l'enfant. Sur les 16 affaires dont a été saisi le Comité, et sur les six qui ont donné lieu à une condamnation au fond, cinq émanent d'ONG et ont été introduites au nom de tierces parties.[22]

La Cour, quant à elle, reprend à son compte l'approche généreuse du *locus standi* devant la Commission. L'article 5(3) du Protocole de Ouagadougou, qui dispose que les ONG peuvent saisir la Cour, ne conditionne pas celle-ci à la qualité de victime, comme c'est le cas à l'article 34 de la Convention européenne de sauvegarde des droits de l'homme (Convention européenne) qui pose expressément que seules les prétendues victimes d'une violation par l'une des Hautes parties contractantes des droits reconnus dans la Convention et ses protocoles peuvent saisir la Cour européenne des droits de l'homme. La Cour a donc été saisie par des ONG qui n'ont pas la qualité de victime, mais qui ont agi devant elle pour la défense de droits objectifs.

Dans des affaires relatives au contentieux électoral, la Cour a été saisie par des ONG aux fins de constater qu'une disposition nationale n'est pas conforme aux instruments internationaux des droits de l'homme ratifiés par l'État défendeur et, en conséquence, condamner cet État à l'amender au regard de ses engagements internationaux.[23] Dans une affaire relative aux droits des femmes, la Cour a été saisie par des ONG estimant qu'une loi violait plusieurs dispositions des instruments internationaux des droits de l'homme, ratifiés par l'État défendeur.[24] Cette forme d'objectivation du recours individuel devant la Cour a fait de cette dernière le juge de la conventionalité des lois nationales et lui a offert le cadre adéquat pour le développement de sa

21 ACERWC *Revised guidelines for the consideration of communications* – Section I (2014) 3 (ce texte est uniquement disponsible en Anglais).

22 Selon le tableau des communications disponible sur https://www.acerwc.africa/table-of-communications/ (consulté le 29 juin 2021).

23 *Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R Mtikila c. Tanzanie* (fond) (2013) 1 RJCA 34, para 1; *Actions pour la protection des droits de l'homme c. Côte d'Ivoire* (fond) (2016) 1 RJCA 697, para 3.

24 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes et Institute for Human Rights and Developement in Africa c. Mali* (fond) (2018) 2 RJCA 393, para 8.

jurisprudence en matière de contentieux électoral. Elle est venue également conforter les organisations de la société civile dans leur rôle de dénonciation des violations des droits de l'homme qui ne se limite plus aux moyens médiatiques mais s'étend à la reconnaissance d'un *locus standi* de ces derniers devant les organes africains pour la défense non des droits mais du droit.

2.1.2 Les conséquences procédurales du droit de dénonciation

Le large accès des ONG au prétoire de la Commission, du Comité et de la Cour qui n'est pas réservé aux seules victimes, se confirme à la lecture des conditions de recevabilité des requêtes individuelles de l'article 56[25] de la Charte qui ne fait aucune mention de la qualité de victime. L'absence de la qualité de victime des conditions de recevabilité devant les trois organes de contrôle est la principale conséquence de la reconnaissance du droit de dénonciation.

En application de l'article 56 de la Charte, la Commission affirme que: «*the African Commission has, through its practice and jurisprudence, adopted a generous access to its Complaint Procedure. It has adopted the actio popularis principle, allowing everyone the legal interest and capacity to file a Communication, for its consideration. For this purpose, non-victim individuals, groups and NGOs constantly submit Communications to the African Commission. More so, the African Commission, has, through its Guidelines on the Submission of Communications, encouraged the submission of Communications on behalf of victims of human rights violations, especially those who are unable to represent themselves*».[26] En effet, l'article 56 n'exige pas que seules les victimes puissent soumettre une communication, mais simplement qu'il y ait une indication de l'identité de l'auteur de la communication, qu'il soit ou non la victime effective de

25 Article 56: 'Les communications visées à l'article 55 reçues à la Commission et relatives aux droits de l'homme et des peuples doivent nécessairement, pour être examinées, remplir les conditions ci-après:

1. Indiquer l'identité de leur auteur même si celui-ci demande à la Commission de garder l'anonymat;
2. Être compatibles avec la Charte de l'Organisation de l'Unité Africaine ou avec la présente Charte;
3. Ne pas contenir des termes outrageants ou insultants à l'égard de l'État mis en cause, de ses institutions ou de l'OUA;
4. Ne pas se limiter à rassembler exclusivement des nouvelles diffusées par des moyens de communication de masse;
5. Être postérieures à l'épuisement des recours internes s'ils existent, à moins qu'il ne soit manifeste à la Commission que la procédure de ces recours se prolonge d'une façon anormale;
6. Être introduites dans un délai raisonnable courant depuis l'épuisement des recours internes ou depuis la date retenue par la Commission comme faisant commencer à courir le délai de sa propre saisine;
7. Ne pas concerner des cas qui ont été réglés conformément soit aux principes de la Charte des Nations Unies, soit de la Charte de l'Organisation de l'Unité Africaine et soit des dispositions de la présente Charte'.

26 African Commission, *Spilg and Mack & Ditshwanelo v Botswana*, Communication 277/2003 (12 October 2013) para 76.

la violation alléguée. La Commission autorise devant elle toute personne ayant l'intérêt et la capacité juridiques d'introduire une communication, permettant aux victimes de violations des droits de l'homme de recevoir une assistance de la part d'ONG. Elle en vient à féliciter d'ailleurs des ONG de porter des violations des droits de l'homme à son examen. C'était le cas dans la célèbre affaire *Social and Economic Rights Action Center* (SERAC)*, Center for Economic and Social Rights* (CESR) *c. Nigeria* dite affaire *Ogonie* portée devant la Commission par des ONG basées respectivement au Nigeria et aux États-Unis. Ce type de saisine est, selon les termes de la Commission, une démonstration de l'utilité pour la Commission et pour les individus de l'*actio popularis*, qui est sagement autorisée par la Charte.[27] Cette affaire a fait émerger une question: quelle ONG peut saisir la Commission?

La Commission ne semble pas se préoccuper de cette interrogation. En effet, ni dans ses textes de procédure, ni dans sa pratique, la Commission n'a tenté de limiter *ratione personae* l'accès à son prétoire. L'on peut en déduire que toute organisation de la société civile nationale, régionale et internationale est recevable devant la Commission, dès lors que la requête de cette dernière est relative à la violation d'un ou de plusieurs droits garantis par la Charte.[28]

Le Comité, pour sa part, dresse la liste des entités autorisées à le saisir au contentieux. Et cette liste est très variée.[29] Elle précise au point 1(c), que le Comité peut être saisi par toute organisation intergouvernementale ou non gouvernementale légalement reconnue dans un ou plusieurs des États membres de l'Union africaine, un État partie à la Charte africaine de l'enfant ou les Nations unies. Ici aussi, aucune condition ne limite les ONG habilitées à saisir le Comité.

L'article 56 de la Charte s'applique également aux conditions de recevabilité devant la Cour. Sa pratique n'est donc pas différente de celle de la Commission.

Dans une des nombreuses affaires opposant Sébastien Germain Marie Aïkoué Ajavon au Bénin, la Cour a été amenée à se prononcer sur une exception tirée du défaut de qualité de victime. L'État défendeur faisait valoir que la requête devait être déclarée irrecevable au moyen que le requérant n'avait pas la qualité de victime de violations de droits de l'homme puisqu'il n'invoquait aucun acte pris par l'administration pour nuire à ses droits civiques. Il relevait que la Cour de Justice de la CEDEAO a débouté un requérant qui ne pouvait se prévaloir de la qualité de victime de violations de ses droits puisqu'il n'avait pas pu être candidat aux élections présidentielles de son pays. En réponse à cette exception d'irrecevabilité, la Cour a noté que ni la Charte, ni le

27 African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) c. Nigeria*, Communication 155/96 (27 October 2001) para 49.

28 Pour une vue globale des ONG qui ont porté une affaire devant la Commission voir https://www.chr.up.ac.za/editions-francais et ici https://www.chr.up.ac.za/english-editions.

29 ACERWC *Revised guidelines for the consideration of communications* – Section I.

Protocole, encore moins le Règlement n'exigent de l'auteur d'une requête qu'il soit la victime des violations qui y sont alléguées. Elle souligne qu'il s'agit là d'une particularité du système régional africain des droits de l'homme. Elle conclut que la qualité de victime et l'intérêt à agir, tels qu'exigés devant la Cour de justice de la CEDEAO, ne sont pas requis devant la Cour continentale, l'allégation de la violation des instruments juridiques régionaux étant la condition essentielle.[30] *In casu*, le requérant faisait valoir que dans une affaire l'opposant à l'État défendeur, la Cour a rendu, à son profit, une ordonnance de mesures provisoires le 7 décembre 2018 et un arrêt au fond le 29 mars 2019 qui n'ont pas été exécutés par l'État défendeur. La requête visait à faire constater par la Cour: la non-exécution des décisions susmentionnées, constitutives d'une violation de l'article 30 et plusieurs violations des droits de l'homme consécutives à cette non-exécution.

La réponse de la Cour relativement à l'exception d'irrecevabilité tenant à la qualité de victime, apporte un enseignement essentiel au droit processuel devant la Cour. Faute de qualité de victime, la condition de recevabilité déterminante devant la Cour est l'allégation d'une violation de la Charte et de tous textes relatifs aux droits de l'homme auquel l'État en question est partie. Ce positionnement de la Cour fait penser aux Articles de la Commission de droit international sur la responsabilité de l'État pour fait internationalement illicite. En écartant la qualité de victime et en mettant en avant l'allégation de la violation de ses obligations internationales par l'État, la Cour souscrit à l'article 2 des Articles sur la responsabilité de l'État pour fait internationalement illicite aux termes duquel: «Il y a fait internationalement illicite de l'État lorsqu'un comportement consistant en une action ou une omission: a) est attribuable à l'État en vertu du droit international; et b) constitue une violation d'une obligation internationale de l'État».

L'admission du principe de l'*actio popularis* dans le système africain des droits de l'homme, avec pour conséquence l'absence de la qualité de victime dans les conditions de recevabilité, a fait du droit d'action contentieuse des ONG un droit de dénonciation. Si ce droit de dénonciation est largement exercé devant la Commission et le Comité sans aucune restriction quant aux ONG, son exercice devant la Cour est encadré par des limites structurelles.

2.2 La dénonciation devant la Cour, un droit bridé

Le *locus standi* des ONG devant la Cour est doublement conditionné en matière contentieuse et strictement limité en matière consultative.

En matière contentieuse, deux conditions sont assorties au droit de saisine individuelle directe de la Cour. L'article 5(3) du Protocole de Ouagadougou dispose: «La Cour peut permettre aux individus ainsi qu'aux organisations non gouvernementales (ONG) dotées du statut

30 Arrêt du 29 mars 2021, *Sébastien Germain Marie Aïkoué Ajavon c. République du Benin,* Req. 065/2019, paras 43-49 et paras 56-62.

d'observateur auprès de la Commission d'introduire des requêtes directement devant elle conformément à l'article 34(6) de ce Protocole».

Premièrement, seules les ONG dotées du statut d'observateur auprès de la Commission peuvent introduire une requête devant la Cour. L'accès à la Cour se trouve ainsi limité aux 538 ONG dotées du statut d'observateur auprès de la Commission.[31] Par cette condition, les États ont fait le choix de limiter l'accès à la Cour aux organisations de la société civile qui sont reconnues par la Commission et qui ont rempli les critères d'octroi du statut d'observateur.[32] Inexistante devant la Commission et le Comité, cette condition exprime la réticence des États à l'égard de l'organe juridictionnel. Les États n'ont pas voulu autoriser n'importe quelle ONG à saisir la Cour, mais seulement celles qui se seront pliées aux conditions pour obtenir le statut d'observateur. En effet ce dernier crée des droits, mais également des obligations pour ses titulaires. Ils ont une participation privilégiée aux travaux de la Commission et doivent étroitement coopérer avec celle-ci pour la réalisation de son mandat. L'inexécution de leurs obligations peut d'ailleurs donner lieu à des mesures de sanction.

La Cour retient une application stricte de cette condition relative au statut d'observateur. Par le biais du greffe, elle vérifie auprès de la Commission si l'ONG est dotée du fameux statut d'observateur. En cas de réponse négative, elle rejette la requête pour incompétence personnelle. La Cour a en effet rejeté la requête de l'ONG ivoirienne dans l'affaire *Association Juristes d'Afrique pour la Bonne Gouvernance c. Côte d'Ivoire*, celle-ci n'étant pas dotée du statut d'observateur auprès de la Commission africaine.[33]

Au regard de la nature de l'action contentieuse dans le système africain des droits de l'homme marquée par l'*actio popularis*, cette exigence faite aux ONG d'être dotées du statut d'observateur auprès de la Commission n'est pas insurmontable et ne compromet pas le droit de dénonciation admis dans le système africain. D'une part, car les conditions exigées par la Commission relèvent d'un souci de bonne gestion et de responsabilisation des organisations de la société civile, sachant les critiques dont elles sont souvent l'objet.[34] D'autre part, car le droit de dénonciation et l'*actio popularis* leur donne accès au prétoire de la Cour pour toute allégation de violation de la Charte. En

31 Voir Communiqué final de la 69ème Session ordinaire de la Commission africaine des droits de l'homme et des peuples, Session virtuelle, 15 novembre - 5 décembre 2021, para 41, https://www.achpr.org/fr_sessions/info?id=377 (consulté le 3 mars 2022).

32 Pour les critères voir: Résolution sur les Critères d'octroi et de maintien du statut d'observateur aux Organisations non gouvernementales en charge des droits de l'homme et des peuples en Afrique - CADHP/Rés.361(LIX) 2016.

33 *Association Juristes d'Afrique pour la Bonne Gouvernance c. Côte d'Ivoire* (compétence) (2011) 1 RJCA 29.

34 Interview de Sylvie Brunel par Jean-Dominique Merchet, 'Les organisations humanitaires sont devenues un business' https://www.liberation.fr/evenement/2002/03/07/les-organisations-humanitaires-sont-devenues-un-business_396152/ (consulté le 30 juin 2021).

revanche, la restriction tenant à la déclaration de l'article 34(6) est rédhibitoire.

Deuxièmement, la saisine individuelle est soumise à la déclaration d'acceptation de compétence de la Cour. Cette condition de l'article 34(6) du Protocole de Ouagadougou fait de la compétence de la Cour pour connaître des recours individuels, une compétence facultative. La requête d'une ONG dotée du statut d'observateur auprès de la Commission africaine contre un État qui n'a pas déposé de déclaration d'acceptation de la compétence de la Cour pour examiner de tels recours est frappée d'incompétence personnelle de la Cour. Ce fut le sort de la requête introduite par la Convention Nationale des Syndicats du Secteur éducation (CONASYSED) pour incompétence personnelle de la Cour, l'État gabonais contre qui la requête était dirigée n'ayant pas fait de déclaration au titre de l'article 34(6), et l'ONG en question n'étant pas non plus dotée du statut d'observateur auprès de la Commission.

Cette dernière condition limite drastiquement l'accès des ONG à la Cour puisque sur les 32 États qui ont ratifié le Protocole sur la Cour, seuls 12 ont fait la déclaration,[35] et quatre l'ont retirée en quatre ans.[36] L'exercice du droit de saisine des ONG ne peut, dès lors, s'exercer actuellement qu'à l'encontre des huit États restants.

En matière consultative, l'accès des ONG à la Cour n'apparait pas expressément dans le Protocole portant création de la Cour. Il résulte de l'œuvre interprétative de l'article 4(1) qui ouvre la saisine consultative à quatre entités. Il s'agit des États membres de l'UA, de l'UA, des organes de l'UA, ainsi que des organisations africaines reconnues par l'UA. La demande d'avis consultatif de la *Socio-Economic Rights and Accountability Project (SERAP)* a offert l'occasion à la Cour de développer l'interprétation de l'article 4(1) du Protocole qui lui a permis d'intégrer les ONG dans la 4ème catégorie d'entités autorisées à introduire une demande d'avis consultatif devant la Cour. Elle acta le *locus standi* des ONG en matière consultative et adopta une interprétation systémique de l'article 4(1), qui lui permit d'intégrer les entités non gouvernementales dans les «organisations africaines».[37] Elle retint et confirma quelques mois plus tard cette approche somme toute sensée contre la position de certains États comme l'Ouganda,[38] la Côte d'Ivoire et l'Éthiopie,[39] mais prit le soin d'énoncer les conditions à remplir pour que ladite ONG soit considérée comme «africaine».[40] Notons qu'une telle ouverture de la compétence personnelle de la Cour africaine en matière consultative n'a pas d'égale

35 Le Burkina Faso (1998), le Malawi (2008), le Mali (2010), la Tanzanie (2010), le Ghana (2011), la Côte d'Ivoire (2013), le Rwanda (2013), le Benin (2016), la Tunisie (2017), la Gambie (2020), le Niger (2021) et la Guinée Bissau (2021).

36 Le Rwanda en 2016, la Tanzanie en 2019, la Côte d'ivoire et le Benin en 2020.

37 *Demande d'avis consultatif par Socio-Economic Rights and Accountability Project (SERAP)* (avis consultatif) 26 mai 2017 (2017) 2 RJCA 593, paras 43-51.

38 Avis *SERAP* précité, para 25.

39 Demande d'avis consultatif par le *Centre des droits de l'homme de l'Université de Pretoria (CHR) et la Coalition des lesbiennes africaines*, (Avis consultatif), 28 septembre 2017 (2017) 2 RJCA 628, paras 32-45.

dans les systèmes régionaux de protection des droits de l'homme. En effet, la compétence consultative de la Cour interaméricaine des droits de l'homme n'est ouverte qu'aux États et aux organes de l'Organisation des États Américains (OEA) (article 64 de la Convention américaine des droits de l'homme) et celle de la Cour européenne des droits de l'homme au Comité des ministres du Conseil de l'Europe (article 47 de la Convention européenne) et, depuis l'entrée en vigueur du Protocole No. 16, les plus hautes juridictions des États parties.

Contrairement à la position exprimée par la Zambie[41] et le Cap-Vert,[42] ainsi que le Centre des droits de l'homme de l'Université de Pretoria au titre d'*amicus curiae*[43] qui entendaient la reconnaissance de l'UA comme celle de tout organe de l'UA, en l'occurrence celle de la Commission africaine des droits de l'homme et des peuples en tant qu'observateur, la Cour a retenu plutôt la reconnaissance du statut d'observateur auprès de l'Union africaine dans l'avis *SERAP*,[44] excluant d'emblée un nombre important d'entités non gouvernementales.[45] Selon les termes du juge Rafâa Ben Achour, tels qu'exprimés dans son opinion individuelle dans l'avis *SERAP*, «la Cour n'avait pas le choix et ne pouvait faire autrement. Elle était 'ligotée' par les termes explicites de l'article 4(1) de son Protocole et par la pratique restrictive de l'Union en matière d'octroi de la qualité d'observateur auprès d'elle aux ONG».[46] L'interprétation systémique et restrictive des juges dans cet avis consultatif ferme l'accès de la Cour aux ONG ne disposant pas de cette reconnaissance de l'Union africaine. Elle limite l'accès de la Cour en matière consultative aux États et aux entités intergouvernementales africaines.[47]

En matière contentieuse comme en matière consultative, le droit de dénonciation des ONG est strictement encadré, victime de la méfiance des États à l'égard de l'organe juridictionnel, d'une part, et du

40 Demande d'avis consultatif par *Socio-Economic Rights and Accountability Project (SERAP)*, avis consultatif, 26 mai 2017.

41 Avis *SERAP*, para 27.

42 Avis *SERAP*, para 31.

43 Avis *SERAP*, paras 33-36.

44 Avis *SERAP*, paras 52-65.

45 Demande d'avis consultatif introduite par *l'Association africaine de défense des droits de l'homme*, avis consultatif, 28 septembre 2017, Demande d'avis consultatif introduite par la *Rencontre africaine pour la défense des droits de l'homme*, avis consultatif, 28 septembre 2017

46 L Burgorgue-Larsen et GF Ntwari 'Chronique de jurisprudence de la Cour africaine des droits de l'homme et des peuples (2018) 116 *Revue trimestrielle des droits de l'homme* 911-951; 922-928; A Jones 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 320-328.

47 Paradoxalement la saisine de la Cour en matière consultative est très majoritairement celle des ONG. Voir SH Adjolohoun 'Les grands silences jurisprudentiels de la Cour africaine des droits de l'homme et des peuples' (2018) 2 *Annuaire africain des droits de l'homme* 24-46; TM Makunya et ZB Salomon 'La compétence consultative de la Cour africaine des droits de l'homme et des peuples: entre restrictions organiques et limitations matérielles' in EB Bope & S Makaya (dirs) *Droit international des droits de l'homme, justice transitionnelle et droit international pénal* (2020) 9-49.

fonctionnement des organes politiques du système, d'autre part. Cela dit, elles jouissent d'un droit de participation à la procédure devant les trois organes de contrôle.

3 LES ONG, TITULAIRES DU DROIT DE PARTICIPATION À L'INSTANCE ET AU SUIVI DE L'EXÉCUTION DES DÉCISIONS

En plus du droit de saisine dont disposent les organisations de la société civile auprès des trois organes de contrôle africains, elles ont un droit de participation à la procédure devant ceux-ci, même si elles ne sont pas à l'initiative de l'instance (partie 3.1) et disposent de moyens d'action afin de contribuer au suivi de l'exécution de leurs décisions (partie 3.2).

3.1 Une participation multiforme à la procédure

La participation des ONG à la procédure devant les cours régionales des droits de l'homme est multiforme. Elle peut prendre la forme d'une assistance aux requérants. Toutefois, ce rôle discret et informel est difficilement quantifiable. L'appui intellectuel et logistique offert par les ONG est généralement bienvenu auprès de victimes qui, souvent, ignorent leurs droits. Il s'agit pour les ONG d'aiguiller le requérant dans sa demande devant la Cour, afin de donner plus de chance de succès à sa saisine. Il est difficile de mettre en lumière cette forme de participation des ONG devant les organes de contrôle africains, tant l'absence de la qualité de victime dans les conditions de recevabilité amène plutôt les ONG à sortir de l'ombre pour porter elles-mêmes l'affaire devant le juge africain.

La participation des ONG peut aussi prendre la forme de représentation des requérants. Les ONG agissent devant la Cour européenne des droits de l'homme comme conseils des requérants. La représentation du requérant par une ONG conseil, et non par un avocat, est désormais courante devant les organes de contrôle des droits de l'homme. Il s'agit souvent d'un conseil délégué par une ONG, celui-ci apparaissant le cas échéant en qualité de directeur de l'organisation, ou de juriste travaillant pour l'organisation. Cette forme de participation est présente devant la Cour africaine.

C'est la caractéristique de la plupart des affaires portées devant la Cour par les prisonniers Tanzaniens. Andrew Cheusi,[48] Nguza Viking and Johnson Nguza[49] représentés par l'Union panafricaine des avocats, et James Wanjara et quatre autres,[50] Kalebi Elisamehe[51] par la

48 *Andrew Ambroise Cheusi c. Tanzanie* Arrêt (fond et réparation), 26 juin 2020, Req 033/2015.

49 *Nguza Viking (Baby Seya) et Johnson Nguza (Papi Kocha) c. Tanzanie* Arrêt (fond), 23 mars 2018 (2018) 2 RJCA 297.

50 *James Wanjara et quatre autres c. Tanzanie* Arrêt (fond et réparation), 25 septembre 2020, Req 033/2015.

East Africa Law Society. Dans une affaire contre le Mali dont l'arrêt sur la compétence et la recevabilité a été rendu le 27 novembre 2020, le requérant, le collectif des anciens travailleurs de la Semico Tabakoto, a été représenté par le Secrétaire général de la Fédération nationale des mines et de l'énergie du Mali (FENAME).

Par le biais du greffe, la Cour peut demander à une ONG d'être conseil d'un requérant. Elle n'hésite pas à faire le choix de l'ONG conseil en tenant compte, à juste titre, du champ d'action de l'organisation. Aussi, dans le contentieux massif contre la Tanzanie, la Cour a souvent fait appel à l'Union panafricaine des avocats qui est une association d'avocats et de barreaux africains pour agir en tant que conseil des requérants[52] qui allèguent la violation du droit à un procès équitable. En revanche, pour défendre un requérant qui allègue la violation du droit à la nationalité, elle a fait appel à l'ONG *Asylum Access Tanzania* qui s'intéresse aux questions d'asile et de nationalité.[53] Cet appel adressé par la Cour aux ONG à participer à la procédure devant elle en tant que conseil d'un requérant offre à ce dernier une défense efficace de ses droits et contribue au bon fonctionnement de la Cour, en ce qu'elle garantit le débat contradictoire.

Ces formes de participation à la procédure devant les organes de contrôle des droits de l'homme ne sont pas les plus pertinentes pour mettre en lumière le rôle des organisations de la société civile dans l'instance. En effet, dans ces cas de figure elles participent à la procédure en tant que parties. Nous nous attarderons ici sur leur participation en tant que tiers à la procédure.

La recherche de la vérité judiciaire dans le contentieux international nécessite souvent que le juge, en plus des preuves soumises par les parties à l'instance, recourt à d'autres sources. Selon l'ancien juge Fatsah Ouguergouz les articles 45 et 46 (ancien règlement de la Cour) sont des ressources prévues à cet égard.[54]

L'examen des textes procéduraux des trois organes de contrôle révèle que la participation des ONG non requérantes à l'instance est double. D'abord, en tant que témoin et expert, la participation se limite à la phase orale de la procédure.[55] Ensuite, les ONG peuvent également intervenir en tant qu'*amici curiae* ou tierces intervenantes aussi bien dans la procédure écrite qu'orale. Si leur objet est d'aider les organes de

51 *Kalebi Elisamehe c. Tanzanie* Arrêt (fond et réparation), 26 juin 2020, Req 28/2015.

52 Voir *Kennedy Owino Onyachi et Charles John Mwanini Njoka c. République-Unie de Tanzanie*, arrêt, 28 septembre 2017, *Armand Guehi c. Tanzanie* (fond et réparations) (2018) 2 RJCA 497, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) c. République de Tanzanie*, Thomas Mang'ara Mango et Shukurani *Masegenya Mango c. République-Unie de Tanzanie*; *Ramadhani c. Tanzanie* (fond) (2018) 2 RJCA 356.

53 *Anudo c. Tanzanie* (fond) (2018) 2 RJCA 257.

54 *Commission africaine des droits de l'homme et des peuples c. République de Libye*, arrêt du 3 juin 2016, opinion individuelle du Juge Fatsah Ouguergouz, para 17.

55 Voir les articles 56 du nouveau Règlement de la Cour; 103 du nouveau Règlement de la Commission; section XI -5 des Directives révisées des communications du Comité.

contrôle à statuer sur un problème factuel ou juridique, les deux interventions se distinguent par la nature de l'intérêt qui motive l'intervention.

L'intervention des *amici curiae* vise un intérêt juridique. Ils interviennent sur invitation ou sur autorisation de l'organe de contrôle.[56] Des experts (personnes physiques) mais aussi des ONG interviennent ainsi dans la procédure en tant qu'amis de la Cour.[57] Ainsi dans l'affaire *Armand Guehi c. Tanzanie*, la Cour a autorisé l'intervention en qualité d'*amicus curiae* de deux universitaires (para 14). Elle a également sollicité un avis juridique sur la question de la peine capitale en Afrique auprès des organisations *Penal Reform International*, *Legal and Human Rights Centre – Tanzania,* et *Death Penalty Project*. La Coalition pour une Cour africaine efficace est intervenue en tant qu'*amicus curiae* dans l'examen par la Cour de la validité et des conséquences juridiques du retrait par le Rwanda de sa déclaration au titre de l'article 34(6);[58] dans l'affaire *Konate c. Burkina Faso*, un groupe de huit ONG a soumis un mémoire *amicus* commun.[59]

Les observations des *amici curiae* portent le plus souvent sur les faits de l'espèce. Elles font ici œuvre pédagogique en informant la Cour sur les pratiques et comportements de l'État défendeur, dénoncés par le requérant. Elles peuvent aussi faire le point sur l'état du droit sur une question donnée. Si la participation des *amici curiae* à la procédure devant la Cour africaine est sans doute un outil d'information de la Cour, mais pour les ONG il s'agit d'un outil d'influence sur l'analyse et les conclusions de la Cour.

Dans son nouveau règlement intérieur, la Cour ouvre les demandes aux fins d'intervention à toute personne ayant un intérêt dans une affaire, et ce, dans l'intérêt de la justice. C'est ce qui ressort de l'article 61(2) du nouveau Règlement intérieur de la Cour de septembre 2020. Dans l'intérêt de la justice, la Cour fait preuve de générosité à l'égard des individus et des ONG, en allant au-delà de la limite *ratione personae* de l'article 5(2). Sur le fondement de l'article 61(2) du nouveau Règlement de la Cour, les ONG en plus d'être des *amici curiae*, peuvent agir en tant que tierces intervenantes devant la Cour. En effet, dans l'affaire *Commission africaine des droits de l'homme et des peuples c. Kenya,*[60] la Cour a examiné la recevabilité des demandes d'intervention (avec un intérêt direct dans l'affaire) à la lumière des

56 Voir article 104 du nouveau Règlement de la Commission, Instructions de Procédure de la Cour, para 49; section XVII – 2 des Directives révisées des communications du Comité.

57 En application de l'article 45(2) de son Règlement, le 4 janvier 2017, la Cour a demandé à l'ONG Open Society Justice Initiative - dont l'expertise sur le régime des nationalités et de l'apatridie est reconnue en droit international, son avis juridique sur cette question.

58 *Ingabire Victoire Umuhoza c. Rwanda* (compétence) (2014) 1 RJCA 585, para 43-47.

59 *Lohé Issa Konaté c. Burkina Faso* (fond) (2014) 1 *RJCA* 324, para 141-143.

60 Affaire *Commission Africaine des droits de l'homme et des peuples c. République du Kenya*, Demandes d'intervention de Wilson Barngetuny Koimet et 119 autres et de Peter Kibiegon Rono et 1300 autres, Ordonnance (intervention), 4 juillet 2019, Req. 006/2012.

dispositions pertinentes de son corpus de base, le Protocole (art 5(2)), le Règlement intérieur et intérimaire (art 33(2), art 53). Elle en tire deux conditions de recevabilité de l'intervention d'une tierce partie dans une procédure en cours. D'une part, *ratione personae*, le tiers-intervenant doit être un État (art 5(2) du Protocole), d'autre part, *ratione temporis*, la demande d'intervention doit être soumise avant la clôture de la procédure (art 53(1) du Règlement). *In casu*, il est manifeste que les demandes d'intervention ont été déposées tardivement et rien ne pouvait expliquer, selon la Cour, un tel dépassement des délais, vu la médiatisation de l'affaire dans l'État défendeur. La Cour a donc légitimement rejeté les demandes d'intervention pour ce motif. En revanche, s'agissant du motif tenant à l'auteur de la demande, la Cour n'a pas argumenté son rejet, se contentant d'invoquer l'article 5(2) du Protocole.[61] Ce qui amène à s'interroger sur la réponse qu'auraient reçu les requérants si les conditions de délais avaient été respectées. En effet, tant le Règlement intérieur que la pratique de la Cour montrent que les tierces interventions des entités non étatiques sont recevables devant la Cour, non sur le fondement de l'article 5(2) du Protocole mais des articles 45 et 46 du Règlement intérieur (ancien). L'article 61(2) du nouveau RI vient donner une base légale à la tierce intervention pour un intérêt direct dans l'affaire aux entités non étatiques et s'aligne sur les textes de procédure de la Commission et du Comité.[62]

Par ces différentes participations à la procédure devant les organes de contrôle, les organisations de la société civile contribuent à l'examen par la Cour des différentes affaires dont elle est saisie. La Cour s'appuie de même sur elles pour le suivi de l'exécution des décisions.

3.2 Un appui au suivi de l'exécution des décisions

Les difficultés d'exécution des décisions des organes de contrôle des droits de l'homme sont un problème récurrent qui affecte tous les systèmes de protection des droits de l'homme. Comme les autres branches du droit international, le droit international des droits de l'homme ne dispose pas de moyen d'exécution forcée de ses décisions. Le système continental africain des droits de l'homme n'est pas à l'abri de ces problèmes d'exécution comme le relèvent les rapports d'activités de la Cour et de la Commission. Ces derniers dressent un faible état d'exécution des arrêts[63] et des décisions sur communications.[64] Face à

61 Voir M Sognigbe-Sangbana 'Cour africaine des droits de l'homme et des peuples: *affaire Commission africaine des droits de l'homme et des peuples c. République du Kenya, Demandes d'intervention de Wilson Barngetuny Koimet et 119 autres et de Peter Kibiegon Rono et 1300 autres, Ordonnance* (intervention), 4 juillet 2019, Req. 006/2012' (2019) 4 *Revue générale de droit international public* 995.

62 Article 106 du nouveau Règlement intérieur de la Commission; section XVII – 1 des Directives révisées des communications du Comité.

63 Rapport d'activités de la Cour africaine des droits de l'homme et des peuples, 1 janvier-31 décembre 2020, EX.CL/1258(XXXVIII), para 16.

64 48ème et 49ème Rapports d'activités combinés de la Commission africaine des droits de l'homme et des peuples, para 43.

ce constat, l'on s'interroge sur le rôle des organisations de la société civile dans le suivi de l'exécution des décisions des organes de contrôle.

Il faut relever d'emblée que les procédures de suivi prévues par les trois organes ne font pas mention des ONG. Elles s'articulent autour de deux organes: l'organe en contrôle qui a rendu la décision à exécuter et l'organe politique de l'Union africaine, le Conseil exécutif. Il s'agit d'un système mixte à mi-chemin entre le système interaméricain et le mécanisme européen.[65] Mais à y regarder de près, la participation des ONG est présente mais demeure perfectible.

Devant la Commission et le Comité, outre la participation des ONG en tant que parties demanderesses bénéficiaires de la décision à exécuter, celles-ci interviennent dans la procédure de suivi lors des sessions publiques portant sur l'exécution des décisions. La procédure de suivi de la Commission et celle du Comité[66] sont similaires.

La procédure de suivi des décisions au fond sur communications de la Commission relève de l'article 125 du Règlement intérieur de 2020. Elle se déroule en deux phases, pilotées par un rapporteur désigné parmi les membres de la Commission. Dans la première phase, il s'agit d'une procédure écrite d'échange de rapports des parties intéressées avec la Commission[67] dans des délais déterminés. La deuxième phase est une audition en séance publique lors des sessions ordinaires de la Commission. Cet article autorise le rapporteur à nouer des contacts et prendre les mesures requises pour bien remplir les fonctions qui lui sont confiées, notamment en formulant des recommandations concernant d'autres mesures que la Commission pourrait prendre, le cas échéant. Le rapporteur peut, à toute étape de la procédure de suivi, demander des informations aux parties intéressées ou prendre en compte les informations fournies par ces dernières sur le degré auquel l'État s'est conformé à la décision de la Commission[68].

L'intervention des ONG dans la procédure de suivi se déduit de la deuxième phase qui se déroule en séance publique lors des sessions ordinaires. En effet, les organisations de la société civile dotées du statut d'observateur auprès de la Commission peuvent participer aux sessions devant la Commission. Elles peuvent prendre part aux séances publiques de suivi de l'exécution des décisions de la Commission et du Comité. De plus, par le biais de la procédure d'examen des rapports étatiques et par la possibilité de soumettre un rapport alternatif à la Commission, les ONG peuvent attirer l'attention de la Commission sur les décisions restées inexécutées par l'État dont le rapport est examiné. Ce décloisonnement des procédures devant la Commission et le Comité devrait aussi concerner les décisions de la Cour. Le suivi de l'exécution des arrêts de la Cour pourrait se poursuivre devant la Commission et le Comité à l'occasion de l'examen des rapports étatiques. Cette forme de

65 L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2016) 1441.

66 Voir Les directives pour la mise en œuvre des décisions sur les communications pour la procédure de suivi des décisions de la CADBE.

67 Article 125 paras 1-4, Règlement de la Commission du 4 mars 2020.

68 Article 125 para 6.

complémentarité entre les organes de contrôle des droits de l'homme en Afrique serait un soutien bienvenu à la Cour en quête d'amélioration du taux d'exécution de ses décisions. Elle relève dans son rapport d'activités de l'année 2020 que l'un des principaux obstacles auxquels elle est actuellement confrontée est le manque apparent de coopération de la part des États membres de l'Union africaine, en particulier au regard du faible niveau d'exécution des décisions de la Cour. Les statistiques ne sont pas en effet reluisantes. Sur plus de 100 arrêts et ordonnances rendus par la Cour, au moment de la rédaction du rapport, un seul État partie, à savoir le Burkina Faso, avait pleinement exécuté un arrêt de la Cour, tandis qu'un autre État, en l'occurrence la Tanzanie, s'était partiellement conformée à certains des arrêts et ordonnances rendus à son encontre. La Côte d'Ivoire a déposé son rapport sur la mise en œuvre des décisions de la Cour, mais les requérants dans les affaires auxquelles elles se rapportaient en ont contesté la teneur.[69] D'autres États, tels que le Bénin, la Libye et le Rwanda, ne se sont pas conformés du tout, certains indiquant clairement qu'ils n'entendaient pas le faire. La recherche de solutions pour redresser la barre de l'exécution des décisions de la Cour est une urgence. Aussi, le Conseil exécutif de l'Union africaine a-t-il demandé à la Cour[70] de proposer, en vue de son examen par le Comité des représentants permanents (COREP), «un mécanisme concret de rapport qui lui permettra de porter à tout moment à l'attention des organes politiques compétents, des situations de non-respect des décisions et d'autres questions relevant de son mandat, lorsque l'intérêt de la justice l'exige». Le projet de cadre pour la mise en place d'un mécanisme d'établissement de rapports et de suivi de l'exécution des arrêts et autres décisions de la Cour africaine des droits de l'homme et des peuples[71] prévoit au point 11: «le cas échéant, la Cour peut solliciter des informations auprès de sources et d'institutions fiables sur la mise en œuvre des décisions rendues. Ces informations peuvent inclure des rapports pertinents émanant d'institutions spécialisées des Nations unies ou d'institutions et organes de l'Union africaine, d'institutions nationales des droits de l'homme et d'ONG. Sous la supervision du Greffier l'unité de suivi tient à jour ces informations et les partage avec les parties pour observations». Les ONG sont ainsi appelées à participer au suivi des décisions de la Cour en tant que source fiable d'informations de cette dernière.

En plus de cette initiative du Conseil exécutif, la Cour semble se diriger vers la juridictionnalisation du suivi de l'exécution de ses décisions dans l'affaire *Sébastien Ajavon c. Bénin*.[72] Sur le fondement de l'article 30 du Protocole,[73] elle semble ouvrir aux requérants, dont les ONG, la possibilité d'introduire une requête pour inexécution d'une

69 Rapport d'activités de la Cour africaine des droits de l'homme et des peuples, 1 janvier-31 décembre 2020, EX.CL/1258(XXXVIII).

70 En application des décisions Ex.Cl /Dec.806 (XXIV) de janvier 2016 et Ex.Cl/1012 (XXXIII) de juin 2018.

71 EX.CL/1126(XXXIV) Annexe 1.

72 Arrêt du 29 mars 2021, affaire *Sébastien Germain Marie Aïkoué Ajavon c. République du Benin,* Req 065/2019.

décision rendue par la Cour, donnant à cette dernière l'occasion de faire le suivi de l'exécution de ses décisions.[74]

Dans cet arrêt du 29 mars 2021, le requérant a fait valoir que dans une affaire l'opposant à l'État défendeur, la Cour a rendu, à son profit, une ordonnance de mesures provisoires le 7 décembre 2018 et un arrêt au fond le 29 mars 2019 qui n'ont pas été exécutés. L'objet de la requête était de faire constater par la Cour: la non-exécution des décisions susmentionnées, constitutives de violation de l'article 30 et plusieurs violations des droits de l'homme consécutives à cette non-exécution. Le juge africain a conclu à sa compétence matérielle, en relevant que le requérant a allégué des violations des droits de l'homme protégés par la Charte et par le Protocole auxquels l'État défendeur est partie. Il a précisé dans cette optique que la requête était relative aux violations alléguées de droits de l'homme consécutives à l'inexécution de ses décisions et, ainsi, à l'interprétation et l'application de l'article 30 du Protocole. La Cour a situé cette affaire dans sa compétence générale de garantie de l'application des droits reconnus par les textes dont il a la surveillance. Elle a toutefois rappelé que sa compétence matérielle, en l'espèce, ne remettait pas en cause le rôle du Conseil exécutif de l'UA de veiller à l'exécution des décisions de la Cour, au nom de la Conférence des chefs d'État et de gouvernement, tel que conféré par l'article 29(2) du Protocole.

4 CONCLUSION

La présente réflexion met en lumière le rôle des ONG dans la protection des droits de l'homme en Afrique, en particulier en matière contentieuse. Ce rôle est teinté des particularismes du système africain tels que la garanti des droits collectifs, le droit des peuples, ainsi que l'environnement social, économique et politique dans lequel il s'est développé. Dans ce contexte, les ONG sont devenues des acteurs essentiels de la protection juridictionnelle et quasi juridictionnelle des droits. Elles sont à l'initiative de la procédure, participent à l'instance, et sont associées au suivi de l'exécution des décisions rendues. En somme, elles sont de véritables partenaires des organes de contrôle. Cette collaboration des ONG avec les différents organes de contrôle et en particulier avec la Cour est largement reconnue et encouragée par cette dernière, comme en témoigne le communiqué final de la première retraite judiciaire des juges de la Cour africaine qui s'est tenu virtuellement du 2 au 4 juin 2021. Après avoir présenté le bilan des 15 années de la Cour et dévoilé ses perspectives, les juges ont appelé les organisations de la société civile à renforcer leur coopération avec elle, en la faisant connaître et en participant au suivi de l'exécution des

73 Aux termes de cet article: 'Les États parties au présent Protocole s'engagent à se conformer aux décisions rendues par la Cour dans tout litige où ils sont en cause et à en assurer l'exécution dans le délai fixé par la Cour'.

74 M Sognigbe-Sangbana, 'Cour africaine des droits de l'homme et des peuples, Arrêt du 29 mars 2021, *Sébastien Germain Marie Aïkoue Ajavon c. Republique du Benin*, req 065/2019' (2021) 2 *Revue Générale de Droit International Public* 406.

arrêts, entre autres.[75] En effet, au-delà des moyens d'action dont disposent les organisations non gouvernementales dans le contentieux devant la Cour, la protection des droits de l'homme en Afrique a encore plus besoin de leur capacité à sensibiliser et à mobiliser l'opinion. Celles de faire connaître la Cour en particulier et en général les différents organes de contrôle, et travailler aux côtés de ceux-ci pour assurer une meilleure vulgarisation de leur office.

75 Final communiqué, First judicial retreat of judges of the African Court, 2-4 June 2021, Virtual, paras 29,33,35,82.

Addressing statelessness in Kenya through a confluence of litigation, transitional justice, and community activism: reflecting on the cases of the Nubian, Makonde and Shona communities

*Andrew Songa**
https://orcid.org/0000-0002-6691-2403

ABSTRACT: This article outlines the challenge of statelessness in Kenya and proceeds to focus on two seminal cases filed by the Nubian community against the Kenyan state: one before the African Commission on Human and Peoples' Rights and the other at the African Committee of Experts on the Rights and Welfare of the Child. Attention then turns to Kenya's transitional justice agenda and its interaction with the plight of stateless persons in Kenya. Through the experiences of the Nubian, Makonde and Shona communities, the article also explores the role of community-led activism in furthering the cause of ending statelessness in Kenya. It concludes with key lessons to be learned from utilising litigation, transitional justice and community-led activism as part of the struggle for the rights of stateless persons in Kenya. It relies on desk-review and research of the Nubian cases, Kenya's truth commission report and other official inquires, civil society reports, the 2010 Constitution and related laws.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'apport du contentieux, de la justice transitionnelle et de l'activisme communautaire à l'éradication de l'apatridie au Kenya: réflexion à partir des cas des communautés nubienne, makonde et shona

RÉSUMÉ: Cet article décrit le défi de l'apatridie au Kenya à travers l'examen de deux affaires importantes initiées par la communauté nubienne contre l'État kenyan: l'une devant la Commission africaine des droits de l'homme et des peuples et l'autre devant le Comité africain d'experts sur les droits et le bien-être de l'enfant. L'emphase est mise sur le programme de justice transitionnelle du Kenya et son interaction avec la situation critique des apatrides dans ce pays. Partant des expériences des communautés nubienne, makonde et shona, l'article explore également le rôle de l'activisme communautaire dans la promotion des activités tendant à éradiquer l'apatridie au Kenya. En conclusion, l'article tire les leçons principales que le recours au contentieux, à la justice transitionnelle et à l'activisme communautaire apporte à la cause des apatrides au Kenya. Différentes méthodes sont mobilisées pour répondre à la question de recherche, à savoir une étude documentaire et des recherches sur les affaires nubiennes, le rapport de la commission de vérité du Kenya et d'autres enquêtes officielles, des rapports de la société civile, la Constitution de 2010 et les lois connexes.

* LLB (Nairobi) MA (Geneva), Independent Consultant: Transitional Justice, Human Rights and the Rule of Law; andrewsonga84@gmail.com

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KEY WORDS: statelessness, transitional justice, community led activism, litigation, Kenya

CONTENT:

1 INTRODUCTION

1.1 The concerns of stateless persons in Kenya

The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) defines a stateless person as one who is not considered as a national by any state under the operation of its law. This is complemented by the 1961 Convention on the Reduction of Statelessness (1961 Convention) which outlines the rules that govern the conferment and non-withdrawal of citizenship. There is also *de facto* statelessness which denotes people who are denied the rights and protections of citizenship due to being unable to obtain proof of their nationality, residency or other form of qualifying for citizenship.[1] Despite this guidance, the United Nations High Commissioner for Refugees (UNHCR) estimates that there are at least 3.9 million stateless people around the world and that this number could actually be as high as 10 million.[2]

Statelessness contravenes the right to nationality which is enshrined in the Universal Declaration of Human Rights, in other treaties, jurisprudence and state practice.[3] With the right to nationality violated, stateless persons are consequently hindered from fully participating in public life and are denied access to basic rights such as education, health, property ownership and free movement.[4] These

1 BK Blitz 'Statelessness, protection and equality' (2009) 3 *RSC Policy Briefing Series* 1.

2 https://www.unhcr.org/blogs/better-statistics-to-help-end-statelessness/ (accessed 3 September 2021).

3 CA Batchelor 'Statelessness and the problem of resolving nationality status' (1998) 10 *International Journal of Refugee Law* 156.

4 Batchelor (n 3) 159.

challenges are compounded by the fact that numerous states are yet to institute procedures to determine statelessness, yet these are essential to facilitating a pathway to nationality for stateless persons.[5] Additionally, some nationality laws have embedded discriminatory practices in relation to conferring of nationality and created gaps by failing to fully contemplate safeguards in relation to the acquisition, loss and deprivation of nationality. It is in this context that Kenya grapples with the issue of statelessness.

Both *de jure* and *de facto* statelessness have in fact been the experience for various communities in Kenya. The 2008 report of the Presidential Special Action Committee to address specific concerns of the Muslim community in regard to alleged harassment and discrimination in the application and enforcement of the law stated that

> there are stateless persons of African origin, e.g. the Nubians, Makonde, Wachangamwe, Washirazi and other ethnic groups from East Africa, whose issues have not been resolved despite there being a constitutional provision on their right to apply for Kenyan citizenship.[6]

In 2016, UNCHR estimated that the population of stateless persons in Kenya stood at 18 500. The origins of statelessness for these communities lay in both legal and administrative causes. Prior to 27 August 2010, Kenya's constitution and legal framework on the acquisition, restoration, retention and loss of citizenship had gaps and insufficient safeguards which occasioned statelessness for some individuals.[7]

In addition to not ratifying the 1954 Convention, Kenya's laws had failed to domesticate the safeguards on statelessness that are in its treaty obligations under the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Kenya's laws on nationality were also discriminatory in as far as conferring citizenship to children and spouses was concerned. Illustratively, only Kenyan fathers were deemed as being capable of conferring citizenship to their children and in the case of marriage, foreign women, would gain citizenship only if they were married to Kenyan men.[8]

The lack of sufficient regulation as well as improper outcomes with regard to administrative practices on citizenship also occasioned statelessness.[9] One such key example is the vetting policy which

5 A Edwards & L Van Waas 'Statelessness' in Fiddian-Qasmiyeh, Loescher, Long & Sigona (eds) *The Oxford handbook of refugee and forced migration studies* (2014) 5.

6 Truth, justice and reconciliation commission 'Volume IIC' (2013) 328.

7 Kenya National Commission on Human Rights 'Out if the shadows: towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya' (2010) 5.

8 Kenya National Commission on Human Rights (n 7) 38-39.

9 Kenya National Commission on Human Rights (n 7) 6.

precedes the acquisition of national identity cards and passports for selected groups. Against a historical backdrop of ethnic stigmatisation, some of the communities saw their right to nationality prejudiced rather than protected by this vetting policy. A seminal example of this was in the period of 13 November to 4 December 1989 when the Kenyan government through a legal notice subjected Kenyans of Somali descent to a screening exercise which resulted in many of them either being denied registration or having their already issued identity cards cancelled.[10] Furthermore, a 2007 report by the Kenya National Commission on Human Rights (KNCHR) concluded that the vetting process in addition to not being properly anchored in law, introduced unjustified hurdles in accessing national identity cards for Kenyan Somalis, Nubians and Kenyan Arabs.[11]

These legislative and administrative causes of statelessness have had far-reaching ramifications on the enjoyment of other fundamental rights and freedoms for the persons concerned. In July 2010 KNCHR indicated that stateless persons and those at risk of statelessness endured various degrees of curtailment of their right to education, the right to work and the right to property.[12] The affected communities have deployed various strategies to challenge the violation of their rights and seek legal reform. This article will now turn its attention to these strategies and how they intersected to bring about change, namely: strategic litigation, transitional justice and community activism.

2 ENFORCING THE RIGHTS OF STATELESS PERSONS THROUGH STRATEGIC LITIGATION IN THE AFRICAN HUMAN RIGHTS SYSTEM: THE NUBIAN CASES

Strategic litigation refers to 'legal action in a court that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)'.[13] In this sense litigation becomes an instrument of transformation to advance social progress and the lawyer a 'social engineer and group interpreter'.[14] Strategic litigation can be an essential tool in the promotion and protection of the fundamental

10 Kenya Human Rights Commission 'Foreigners at home: the dilemma of citizenship in Northern Kenya' (2008) 37.

11 Kenya National Commission on Human Rights 'An identity crisis? A study on the issuance of national identity cards in Kenya' (2007) 24.

12 Kenya National Commission on Human Rights (n 7) 5.

13 Open Society Justice Initiative 'Strategic litigation impacts: insights from global experience' (2018) 25.

14 CH Houston http://law.howard.edu/brownat50/BrownBios/BioCharlesH Houston.html (accessed 13 July 2021).

rights and freedoms for vulnerable groups as anchored on the respect for the rule of law and legal accountability.[15] Over time, such litigation has acquired a credible track record of furthering the domestication of human rights norms by way of judicial recognition and enforcement.[16]

At its best, strategic litigation yields multi-dimensional impact which includes material changes to the case petitioners such as compensation; instrumental changes as reflected in policy, law, jurisprudence and institutional operations; and non-material changes such as indirect shifts in attitudes, behaviours, discourse, and community empowerment.[17] At its worst, strategic litigation can be time consuming, frustrating and occasion backlash against the group seeking redress while also being ineffective towards reforms.[18] It is in this context that two cases by the Kenyan Nubian community within the African human rights system, stand out as a pivotal turning point for the protection of stateless persons in Kenya and throughout the continent.

2.1 Communication 317/2006: *The Nubian Community in Kenya v Kenya*

This case was filed before the African Commission on Human and Peoples' Rights (African Commission) on 23 January 2006 by the Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA) on behalf of the Nubian community of Kenya as the complainants. The case stemmed from the historical plight of the Nubian community whose recognition as Kenyan citizens remained contested and occasioned challenges to accessing citizenship-related documents despite them being in the country for over a century. Estimated to be a population of around 100 000 at the time of filing the complaint, the Nubian community in Kenya are descendants of a group that was originally brought from Sudan to form part of the East Africa Rifles within the British colonial army. After discharging their responsibilities, the Nubians were neither granted British citizenship nor repatriated to their original home in the Nuba Mountains in the central part of the Republic of Sudan. Instead, they were allowed to settle in various parts of Kenya but with a considerable number of the community residing in what would become modern-day Kibera within Kenya's capital city Nairobi.

15 M Roa & B Klugman 'Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia' (2014) 44 *Reproductive Health Matters* 31.

16 CM Forster & V Jivan 'Public interest litigation and human rights implementation: the Indian and Australian experience' (2008) 3 *Asian Journal of Comparative Law* 1.

17 Open Society Justice Initiative (n 13) 19.

18 H Duffy 'Strategic human rights litigation: bursting the bubble on the champagne moment' (2017) https://hdl.handle.net/1887/59585 (accessed 7 September 2021).

Kenya gained its independence on 1 June 1963 but the citizenship status of the Nubian community remained unresolved and cascaded into a series of grievous violations, the primary of which was their non-recognition as Kenyan citizens and denial of access to identity papers. This then opened the door to further violations in the realm of political participation and in the enjoyment of economic, social and cultural rights. It was on this basis that the Nubian community embarked on the journey to seek legal redress. The litigation commenced at the Kenyan judiciary but this was ultimately frustrated on procedural and substantive grounds.

Procedurally, the Nubian community saw its case, which was filed at the Kenyan High Court in March 2003, frustrated by a series of unreasonable administrative obstacles that would play out for over a year. Illustratively, the community was instructed to obtain 100,000 affidavits as a way of ascertaining the identity of the persons on whose behalf the case had been filed.[19] Additionally, the case file was brought before five different judges but failed to proceed on to the merits; numerous correspondences to the Chief Justice to request for direction on the matter would go unanswered.[20] Substantively, the Kenyan Constitution prior to 27 August 2010 contained a Bill of Rights that only guaranteed the civil and political rights of the individual. This meant that there would be insufficient remedies at the national level to address the violations raised by the Nubian community that pertained to group rights and economic, social and cultural rights. It is on this basis that the community sought recourse before the African Commission.

In considering the admissibility of the case, the African Commission allowed the case to proceed and affirmed its well established test that local remedies ought to be available, effective and sufficient. It expressed itself as follows:[21]

> A remedy is considered available if the petitioner can pursue it without impediment. After more than four years, there does not seem to be any realistic prospect of the Complainants' case being heard.

It also concurred that the Kenyan Constitution did not protect economic rights and group rights.[22]

On the merits, the Kenyan state was found to have violated various rights under the African Charter with respect to the Nubian community. Kenya was held to have violated the right to freedom from discrimination (article 2) and the right to equality before the law and equal protection of the law (article 3) as it was established that the Nubian community had been subjected to the vetting process which was deemed arbitrary, lacking foundation in Kenyan law, prone to abuse and furthered marginalisation which made it both irrational and

19 *The Nubian Community in Kenya v Kenya,* Communication 317/2006, African Commission on Human and Peoples' Rights, Thirty Eighth Annual Activity Report (2015) para 31.

20 *The Nubian Community in Kenya v Kenya* (n 19) para 31 & 32.

21 *The Nubian Community in Kenya v Kenya* (n 19) para 55.

22 *The Nubian Community in Kenya v Kenya* (n 19) para 60.

unjustifiable.[23] This exposed the Nubian community to statelessness and hence a violation of the right to recognition of one's legal status as provided for under article 5 of the African Charter.

On the right to property under article 14 of the African Charter, the African Commission held that the occupation and use rights that were granted to the Nubians for over a century with respect to Kibera was sufficient for that land to be considered the Nubian's communal property. This was essential as the community had been subjected to a series of forced evictions under the guise that they were residing on government land.[24] In recognition of how obtaining identity documents were a facilitator to effective public participation and access to basic services, the African Commission held that Kenyan state was consequently liable for violating the Nubian community's right to freedom of movement, right to participate in government, right to work, right to health, right to education and the protection of the family and vulnerable groups.

In a decision rendered in February 2015, the African Commission instructed the Kenyan state to implement various remedies. First, they were required to put in place objective, transparent and non-discriminatory criteria and procedures for the determination of Kenyan citizenship. Second, they were required to accord recognition and security of tenure for the Nubian community with respect to Kibera while also ensuring that any evictions from Kibera were compliant with international human rights standards.

2.2 Communication 2/2009: *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*

This case was filed on 20 April 2009 in keeping with the overall plight of the Nubian community as stated in the case filed before the African Commission but this time with a focus on the Nubian children; hence its filing before the African Committee of Experts on the Rights and Welfare of the Child (African Committee) and reliance on the African Children's Charter. The essence of the case was that the right to nationality for Nubian children was prejudiced by their parent's difficulty to access identity documents on the basis of discriminatory practices by the state. Nubian parents who had difficulty in accessing identity documents themselves encountered difficulties in having the birth of their children registered. Additionally, under Kenyan law, a birth registration certificate was not proof of citizenship and thus Nubian children whose parents' citizenship status remained precarious would also have their status rendered ambiguous until reaching the of

23 *The Nubian Community in Kenya v Kenya* (n 19) para 133.
24 *The Nubian Community in Kenya v Kenya* (n 19) para 161.

18 years when they could themselves apply for a national identity card and be subjected to the vetting process.

As with the African Commission, the African Committee declared this case to be admissible on account of the fact that the Nubian community had endured unduly and unreasonably prolonged delays before the Kenyan High Court when they sought redress at the national level.[25] In the absence of a response from the Kenyan state, the African Committee proceeded to find them liable for various violations under the African Children's Charter. The fact that children of Nubian descent were essentially left without acquiring nationality until attaining the age of 18 years was deemed to be a violation of the right to acquire nationality as provided for in article 6 of the African Children's Charter. The African Committee further concurred with the complainants that despite the existing pathways to citizenship by birth, descent, registration and naturalisation, a significant number of Nubian children in Kenya had been left stateless.[26]

The Kenyan state was also found to have violated the principle of non-discrimination under article 3 of the African Children's Charter. This violation stemmed from the lengthy and arduous process of vetting (including requiring them to demonstrate the nationality of their grandparents, as well as the need to seek and gain the approval of Nubian elders and governmental officials).[27]

This was deemed to be a deprivation of any legitimate expectation of nationality and rendering them effectively stateless.[28] The vetting process was also castigated for its erosion of the dignity of Nubian children and its non-compliance with the principle of the best interests of the child. In addition to violating the right to nationality and the principle of non-discrimination, the Kenyan state was also found to have consequently violated the right to health and the right to education as enshrined in articles 14 and 11(3) of the African Children's Charter respectively.[29]

The African Committee on 22 March 2011 pronounced a series of remedial measures to be undertaken by the Kenyan state. The Kenyan government was required to institute all necessary legislative, administrative and other measures to ensure that Nubian children who

25 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*, Communication 002/2009, African Committee of Experts on the Rights and Welfare of the Child, Seventeenth Session Report (2011) para 34

26 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 49

27 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 49.

28 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 55.

29 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 62 & 65.

had otherwise been rendered stateless could acquire Kenyan nationality and the proof of such nationality at birth. These measures were also required to promptly apply to existing Nubian children whose Kenyan nationality had not been recognised. The Kenyan government was directed to implement a non-discriminatory birth registration process that would see Nubian children registered immediately after birth. On health and education, the Kenyan government was directed to adopt a short term, medium term and long term plan for the realisation of these rights in consultation within the community.

2.3 The challenge of implementing the *Nubian* cases

The Nubian cases before the African Commission and African Committee are indicative of the transformative potential of strategic litigation as seen in the jurisprudential value they provided on the right to nationality and remedies for statelessness. The African Committee decision has been heralded as 'a trailblazing interpretation of children's right to a nationality that propels its justiciability in tandem with their economic, social and cultural rights (ESCRs).'[30] In a similar vein, the case at the African Commission affirmed that rendering someone stateless through legislative, policy or administrative processes was antithetical to the right to recognition of one's legal status. In both cases, the adjudicative bodies prescribed legislative, policy and administrative measures of reform as part of the remedial actions to address the plight of the Nubian community while also tending to the material impact of strategic litigation by issuing directions on securing community land rights as well as the rights to health and education. These decisions were vital in bridging a gap of protection that lay in the non-responsiveness of the Kenyan government and a constitutional framework that did not sufficiently guard against the risk of statelessness.

Despite these jurisprudential gains, the familiar challenge of non-implementation of judicial decisions emerged in these cases. With respect to the Nubian Children case, a briefing paper submitted to the African Committee by the complainants in February 2014 (3 years after the decision was issued) painted a grim picture in terms of implementation:[31]

> Three years after the Committee's decision, the data gathered in Kibera shows that Nubians still face overtly discriminatory hurdles in obtaining birth certificates. Registration officers retain blanket discretion to request documentary proof before issuing identity documents including birth certificates, and Nubians are disproportionately required to provide additional documentation in support of applications. Requests for additional documents trigger multiple trips to different government buildings, additional travel costs and fees, and a prolonged and intimidating process.

30 E Fokala & L Chenwi 'Statelessness and rights: protecting the rights of Nubian children in Kenya through the African Children's Committee' (2014) 6 *African Journal of Legal Studies* 358.

31 Open Society Justice Initiative 'Briefing paper: implementation of *Nubian minors v Kenya*' (2017) 2.

Similarly, a commentary sent to the African Commission by the complainants in February 2016 (one year after the decision was issued) indicated that despite a number of positive steps undertaken by the Kenyan government, it was yet to take the necessary steps required to address the African Commission's findings on discrimination in accessing identity documents, including access to proof of citizenship and; property rights and forced evictions.[32]

Yet, occurring alongside these challenges was a pivotal turning point in Kenya's history that would enliven the prospects for constitutional reform and the redress of historical injustices; the reform agenda which emerged from the 2007-08 Post-Election Violence (PEV). The rendering of these decisions from the African human rights system fortuitously converged with an inflection point for the country that would see it reconsider the social contract and seek to further national cohesion and reconciliation. The next section will now turn attention to how the intersection of strategic litigation and transitional justice impacted the rights of stateless persons in Kenya.

3 KENYA'S TRANSITIONAL JUSTICE AGENDA, A CONNECTION WITH STRATEGIC LITIGATION AND ITS IMPACT ON THE RIGHTS OF STATELESS PERSONS IN KENYA

The African Union Transitional Justice Policy (AUTJP) defines transitional justice as

> the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.[33]

The measures utilised to this end include truth commissions, criminal prosecutions, reparation programmes, legal and institutional reforms and vetting of public officials but to name a few. In Kenya, while the discussion of establishing a truth commission was broached in 2003, the impetus to finally implement transitional justice measures emerged from the fallout of the country's 2007 general elections.

The 2007 Presidential elections were highly contested and ended in a dispute which triggered an unprecedented level of violence in the country. This caused an estimated 1 300 deaths and the internal displacement of 663 921 persons.[34] This violence attracted the intervention of the international community and the leadership of the

32 Open Society Justice Initiative 'The *Nubian Community in Kenya v Kenya* – Communication 317/06: Comments under Rule 112 relating to implementation' (2016) para 6.

33 African Union Transitional Justice Policy para 19.

34 Government of Kenya, Ministry of State for Special Programmes, 'Progress on resettlement of internally displaced persons' (2012).

African Union (AU) would see the intervention distilled into the Kenya National Dialogue and Reconciliation (KNDR) process which was mediated by a group of eminent personalities led by HE Kofi Anan. The KNDR mediation effort would ultimately see the protagonists of the dispute ratify a roadmap consisting of four agenda items as a pathway out of the crisis. The agenda items were: Immediate Action to Stop Violence and Restore Fundamental Rights and Liabilities (Agenda 1); Immediate Measures to Address the Humanitarian Crisis, Promote Reconciliation, Healing and Restoration (Agenda 2); How to Overcome the Current Political Crisis (Agenda 3); and Long-term Issues and Solutions (Agenda 4).[35]

Through these agenda items and in particular Agenda 2 and 4, a transitional justice framework would emerge with the aim of furthering accountability, healing, reconciliation and undertaking reforms. They yielded the Commission of Inquiry into Post-Election Violence (CIPEV) which was mandated to identify those criminally responsible for the violence while also diagnosing the gaps within the country's security apparatus which had enabled the scale of the violence. The Truth, Justice and Reconciliation Commission (TJRC) was also established with a temporal scope of 12 December 1963 to 28 February 2008 and the mandate to inquire into human rights violations, economic crimes, historical land injustices and other historical injustices within that period. There were also institutional reforms aimed at various public sectors such as the judiciary, police and the electoral management body but to name a few. However, the centrepiece of reform was constitutional reform to usher in a new dispensation. While this article cannot exhaustively discuss the breadth of this transitional justice agenda, it will confine itself to highlighting aspects that had an impact on addressing the plight of statelessness.

3.1 How the transitional justice agenda addressed the rights of stateless persons

3.1.1 The Truth, Justice and Reconciliation Commission

With the breadth of its temporal scope and thematic mandates, the TJRC has been appreciated for providing 'an official record of the state's complicity in serial human rights violations'.[36] The TJRC discharged its mandate over a 4-year period from August 2009 to May 2013 and yielded a 4-volume report of 2 210 pages. The report was based on public hearings conducted across the country, 42 465 statements, 1 828 memoranda from Kenyans and an extensive review of past public inquiries and documentation from civil society. The report's findings were organised thematically and it is in this context

35 Kenya Human Rights Commission 'Wanjiku's journey: tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum' (2010) 14.

36 International Center for Transitional Justice 'Lessons to be learned: An analysis of the final report of Kenya's Truth, Justice and Reconciliation Commission' https://www.ictj.org/publication/kenya-TJRC-lessons-learned (accessed 28 July 2021).

that Volume II C addressed the issue of statelessness under the broader discussion of the gross violation of human rights experienced by minority groups and indigenous peoples. As a violation of the right to identity, the TJRC found that Kenya's legal provisions had historically been applied in a manner that excluded certain ethnic groups from accessing citizenship.[37]

Previous reports such as those by KNCHR and indeed the arguments averred in the Nubian cases within the African human rights system were affirmed during the public hearings of the TJRC. Members of the Nubian community at these hearings decried the lack of effective political representation and participation as well as the loss of economic opportunities which came with the lack of access to identity documents.[38] Furthermore, the TJRC report acknowledged that the Nubians and other minority communities had been negatively portrayed within school curricula, government documents as well as in the public pronouncements of state officials and this had the effect of enhancing the discrimination endured by these communities.[39] The TJRC hearings also accorded the Nubians an opportunity to highlight the violation of their land rights as a result of the non-recognition of their claim to Kibera and the episodes of forced evictions that they had endured over time.[40]

The Nubian cases were cited by the TJRC as a demonstration of the importance of rights-based education and legal literacy development as a facilitator of access to justice for minority communities. An essential dividend of litigation such as the Nubian cases was that 'they have been empowered to advocate on their own behalf using their understanding of their rights as a group and the Kenya government's duty to protect, promote and fulfil those rights'.[41] The inordinate delays within the national justice system were also recognised by the TJRC as barriers to accessing justice for minority communities such as the Nubians.

Among its findings, the TJRC held that the Nubian, Somali, Galjeel and other Muslim communities in the country had suffered discrimination at the hands of the state due to provisions within laws and regulations on citizenship which denied them equality before the law.[42] The TJRC also held that the state's non-implementation of judicial decisions eroded minority groups' confidence that the national justice system could in fact promote and protect substantive equality.[43] Taking cognisance of the Nubian cases as well as the testimonies adduced during the public hearings, the TJRC recommended that 'obstacles experienced by minority groups such as members of Somali and Nubian ethnic communities in accessing the national identity cards

37 Truth, Justice and Reconciliation Commission (n 6) 226.
38 Truth, Justice and Reconciliation Commission (n 6) 231.
39 Truth, Justice and Reconciliation Commission (n 6) 236.
40 Truth, Justice and Reconciliation Commission (n 6) 252.
41 Truth, Justice and Reconciliation Commission (n 6) 268.
42 Truth, Justice and Reconciliation Commission 'Vol IV' (2013) at 45.
43 Truth, Justice and Reconciliation Commission (n 42) 46.

be removed within 12 months of issuance of this Report'.[44] The implementation matrix developed by the TJRC for its recommendations then went on to emphasise that Nubian case decisions from the African Commission and the African Committee needed to be implemented within 12 months of the TJRC report's publication.

The findings and recommendations of the TJRC report point to the confluence of litigation and truth-seeking processes in a manner that mutually reinforced the objectives of each process. Through the Nubian cases, the TJRC was able to contextualise and make vivid, the discriminatory aspects of Kenya's legal framework pertaining to citizenship and the acquisition of citizenship documents. The Nubian cases and their affirming jurisprudence both enhanced the profile of the Nubian community within the TJRC process and strengthened the probative value of their submissions during the public hearings and through memoranda. As already highlighted, the petitioners in the Nubian cases did point to challenges in implementation of the decisions due to the non-responsiveness and non-compliance of the state with the directions issued by the African Commission and the African Committee. In explicitly referencing the implementation of these case decisions within the implementation matrix of the TJRC report, the TJRC provided renewed impetus and visibility for the cases which could aid the effort by the petitioners to compel the state to comply with the decisions. At this juncture, it is important to also assess the relevant constitutional, legislative and institutional reforms that took place contemporaneously with the TJRC process.

3.1.2 Constitutional, legislative and institutional reforms

Prior to 2008, there had been a sustained clamour for constitutional reform in Kenya going as far back as 1991.[45] This was part of a wider call from civil society and the political opposition, for the return to multiparty democracy in the country which had been under a *de jure* one-party state system since 1982.[46] While multiparty democracy would be restored by 1992, a contentious constitutional review process would eventually commence in 1998 under the steerage of the Constitution of Kenya Review Commission (CKRC).[47] This culminated in a 2005 referendum which saw the proposed constitution emerging from the process rejected by the electorate on a margin of 58.12 per cent voting no and 41.88 per cent voting yes.[48] The fallout from this

44 Truth, Justice and Reconciliation Commission (n 42) 47.

45 Kenya Human Rights Commission (n 35) 11.

46 N Gichuki 'Kenya's Constitutional journey: taking stock of achievements and challenges' (2016) 18 *RiA Recht in Afrika | Law in Africa | Droit En Afrique* 132.

47 Gichuki (n 46) 132.

48 'EISA Kenya: 2005 Constitutional referendum results' https://www.eisa.org/wep/ken2005results.htm (accessed 23 July 2021).

referendum triggered political realignments that then led to the highly contested 2007 elections and their fractious aftermath.[49]

In the context of the KNDR, the resumption of constitutional reform was identified as one of the key prescriptions to address 'the underlying causes of the prevailing social tensions, instability and cycle of violence' that became devastatingly manifest in the aftermath of the country's 2007 elections.[50] These underlying causes were cited to include poverty, inequitable distribution of resources and segments of Kenyan society feeling that they were the subject of historical injustices and exclusion. Therefore, constitutional reform in this context became an instrument of redressing past violations and ushering in socio-economic transformation as envisioned in the AUTJP.

Through the KNDR, the constitutional review process was revived by way of a legal framework which established a Committee of Experts (CoE) with a mandate to: harmonise prior draft proposals; identify contentious issues from the previous cycle of review and seek public input on these issues; conduct thematic consultations with various stakeholders; and submit a harmonised draft constitution to the National Assembly for approval after which the draft would be subjected to a referendum.[51] The CoE discharged its mandate and the proposed constitution was ratified in a referendum on 4 August 2010 with 68.55 per cent of the votes cast being in favour of the proposal.[52] On 27 August 2010 the Constitution (2010 Constitution) was promulgated.

In addition to being hailed for the consultative process that informed its promulgation, the 2010 Constitution is characterised as a transformative constitution with its provisions being informed by an appreciation of the historical injustices that the society sought to remedy and envision a just future.[53] The Supreme Court of Kenya acknowledged as much when it stated that 'the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*.'[54] It is through this prism that we should appreciate the impact of the 2010 Constitution in addressing historical injustices in as far as statelessness is concerned.

49 A Songa 'Locating civil society in Kenya's transitional justice agenda: a reflection on the experience of the Kenya transitional justice network with the truth, justice and reconciliation commission' in Brankovic & van der Merwe (eds) *Advocating transitional justice in Africa: the role of civil society* (2018) 19.

50 Truth, Justice, and Reconciliation Commission, 'KNDR Documents - Statement of Principles on Long-term Issues and Solutions Updated with Implementation Matrix' (2008) II Pre TJRC-Documents 5 https://digitalcommons.law.seattleu.edu/tjrc-pre/5 (accessed 2 February 2022).

51 Gichuki (n 46) 132.

52 'EISA Kenya: 2010 Constitutional referendum results' https://www.eisa.org/wep/ken2010referendum.htm (accessed 23 July 2021).

53 F Githiru, 'Transformative constitutionalism, legal culture and the judiciary under the 2010 constitution of Kenya' Doctoral dissertation, University of Pretoria 2015 at 51 (on file with the author).

54 *In the matter of the Speaker of the Senate & another* 2013 eKLR para 51.

One of the most impactful transformations brought about by the 2010 Constitution is in its bill of rights. It sets the purpose of the bill of rights as being 'to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'.[55] This heralded a significant departure from the previous constitutional order which accorded protections only to individual rights and catered only to civil and political rights.[56] The 2010 Constitution contains provisions on equality and freedom from discrimination and most notably for the Nubian cases, it requires the state to institute 'legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination'.[57] Article 28 recognises every person's inherent right to dignity while article 43 finally enshrines the economic and social rights which include the right to health, housing and reasonable standards of sanitation, adequate food of acceptable quality, clean and safe water in adequate quantities, social security and education.

Of note to the issues canvassed in the Nubian children's case, article 53(1)(a) of the 2010 Constitution establishes that every child has the right to a name and nationality from birth. Article 56 proceeds to require the state to institute affirmative action programmes to the benefit of minorities and marginalised within the arenas of political participation, education and economic fields, employment, the furtherance of their cultural values, languages and practices and reasonable access to basic amenities. Recalling the hurdles that the Nubian community faced in filing their case at the high court, article 22(b) of the 2010 Constitution now expands *locus standi* in the enforcement of the Bill of Rights to include 'a person acting as a member of, or in the interest of, a group or class of persons'. Furthermore, article 48 requires the state to ensure access to justice for all persons and that any related fees should not be prohibitive to this access.

Beyond the Bill of Rights, the 2010 Constitution at article 12(b) entitles every citizen to obtain a Kenyan passport as well as other documents of registration or identification that are issued by the state to citizens. This provides an opportunity to redress the historical discrimination and marginalisation faced by the Nubians and other marginalised communities as raised in the TJRC report. The 2010 Constitution also contains a provision on foundlings as article 14(4) states that '[a] child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.'

Legislatively, the Kenya Citizenship and Immigration Act, Cap 172 (KCA) provides a pathway for stateless persons to acquire citizenship by registration. Essentially, section 15 of the KCA allows stateless persons residing in Kenya to register as Kenyan citizens if: they have

55 Constitution (revised edition 2010) of Kenya art 19(2).
56 Constitution (repealed) of Kenya at chapter V.
57 Constitution (revised edition 2010) of Kenya art 27(6).

adequate knowledge of Kiswahili or a local dialect; have not been convicted of an offence and sentenced to an imprisonment term of 3 years or longer; they intend upon registration, to continue to be permanent residents of Kenya or to maintain a close and continuing association with the country; and they understand the rights and duties of a citizen. These provisions were then institutionally operationalised on 21 August 2019 by way of a National Taskforce for the Identification and Registration of Eligible Stateless Persons in Kenya as Kenyan Citizens (National Taskforce).

The National Taskforce was mandated to carry out six tasks: to identify all those claiming stateless persons status in Kenya; to develop vetting, verification and eligibility criteria to be utilised in conjunction with a comprehensive stateless persons database; to develop the modalities, timelines and establish the cost ramifications that come with the identification and registration of stateless persons in the country; to develop a sensitisation programme for Kenya host communities so as to enable the seamless integration of stateless persons; to examine and recommend an appropriate legal and policy framework for undertaking the process; and to identify contemporary international best practices with regard to the management of stateless persons in the context of national security.[58] The National Taskforce continues to undertake its mandate against the backdrop of an international commitment by the Kenyan government to 'complete legal reforms to address and remedy statelessness in Kenya permanently' by 2023.[59]

These developments demonstrate how strategic litigation coupled with legal and institutional reforms as induced by a transitional justice agenda converged to provide normative progress in the protection of stateless persons and providing them with a pathway to citizenship. One more essential ingredient is embedded in this arc of progress and is an essential factor to realising the promise of this progress. This is the agency and activism of the affected communities. Therefore, it is important to reflect on the experiences of the Makonde and Shona communities as a barometer for the efficacy of the constitutional and legislative safeguards that now exist for stateless persons in Kenya.

58 'National taskforce for the identification and registration of eligible stateless persons in Kenya as Kenyan citizens?: Citizenship rights in Africa initiative' https://citizenshiprightsafrica.org/national-taskforce-for-the-identification-and-registration-of-eligible-stateless-persons-in-kenya-as-kenyan-citizens/ (accessed 28 July 2021).

59 'Results of the high-level segment on statelessness', IBELONG (blog) https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/ (accessed 28 July 2021).

4 LEVERAGING REFORM TO OBTAIN REDRESS THROUGH COMMUNITY ACTIVISM: THE CASE OF THE MAKONDE AND SHONA COMMUNITIES

At the heart of the initiatives to advance the cause of stateless persons through litigation, the TJRC process and constitutional review, is community activism. Community activism denotes those initiatives that are aimed at structural transformation or the elimination of barriers with a view to improving lives at the individual and group level by eliminating prevailing conditions of discrimination or conditions of social, economic, political, cultural or environmental oppression.[60] Indeed, the impetus for the Nubian cases within the African human rights system was derived from the community itself which was already leading the charge to assert their "right to existence" as they decried discrimination at the hands of the Kenyan government.[61]

As already highlighted, the Nubian community alongside other minority communities represented themselves during the public hearings of the TJRC and vividly brought to light how citizenship-related discrimination opened the door to further violations of their civil and political rights. On constitutional review, the role of minority communities is aptly captured as follows:[62]

> Minorities engaged quite robustly with the constitutional review process from 2000 on. Their engagement focused on educating their communities on the review process, collecting community views and submitting memoranda to various institutions created to lead in Constitution making. There were common aspirations across many minority groups: juridical recognition of their identity, access to ancestral land and to participation in public life.

In addition to the direct agency exercised by communities, collaboration with non-governmental organisations (NGOs) has also been a key feature in accentuating the cause of stateless persons on various platforms. The Nubian cases were the result of collaboration between the community and NGOs who filed the cases on their behalf. It such collaboration that has emerged as essential in realising the promise of the post-2010 constitutional order. This section will now reflect on the collaboration between the Kenya Human Rights Commission (KHRC) and the Makonde and Shona communities in their quest to acquire Kenyan citizenship.

KHRC is considered as one of Kenya's premier NGOs with its founders being among the 'foremost leaders and activists in struggles for human rights and democratic reforms in Kenya'.[63] KHRC's vision is

60 'An introduction to community activism' https://nursekey.com/an-introduction-to-community-activism/ (accessed on 28 July 2021).

61 'Nubians in Kenya appeal for their "right to existence"' https://www.opensocietyfoundations.org/newsroom/nubians-kenya-appeal-their-right-existence (accessed 28 July 2021).

62 Minority rights group international 'Kenya at 50: unrealized rights of minorities and indigenous peoples' (2012) 16.

63 'KHRC – About' https://www.khrc.or.ke/about-us.html (accessed 28 July 2021).

to realise a human rights state and society and a key aspect of this is to work at the community level, especially with Human Rights Networks (HURINETs) which they work with communities to establish and incubate into stand-alone organisations that can independently advance the protection of human rights. This approach is explained in their theory of change as follows:[64]

> It is by working with the people and communities at their own level, on what is of value to them; and enabling them to understand, articulate and defend their rights, that they can effectively hold violators and duty bearers accountable.
>
> We remain persuaded that this people and justice-centred framework of engagement will go a long way in limiting the unequal power relations that deepen impunity

It is in this context that KHRC has worked on the issue of statelessness and partnered in particular with the Makonde and Shona communities in their quest to obtain Kenyan citizenship.

4.1 The Makonde and the great trek to end statelessness

The Makonde are a Bantu speaking community whose origins are in the Mwende district of Cabo Delgado province of the Republic of Mozambique. As early as 1948, a section of the community migrated to Kenya first as labourers recruited during the British colonial era to work in sisal plantations in the Kwale, Kilifi and Taita Taveta regions of Kenya's coast.[65] They would eventually be joined by exiled freedom fighters from Mozambique's struggle for independence and refugees fleeing subsequent civil war in the country.[66] The Makonde community in Kenya is estimated to stand at 4 000 people.[67] In the aftermath of Kenya's independence, the Makonde working in the sisal plantations were neither repatriated, granted work permits nor granted Kenyan citizenship. In a similar fashion to the Nubian community, the Makonde then endured discrimination as well violations in the realm of public participation and with regard to their economic, social and cultural rights. However, the post-2010 legal framework on addressing statelessness provided an opportunity to finally redress the historical violations endured by the Makonde and other similar communities.

In August 2016, the Makonde approached KHRC for assistance in being duly registered as Kenyan citizens. In partnership with Haki Centre which began as one of its HURINETs, KHRC convened a civil society initiative to assist the Makonde and this commenced with a fact-finding mission to fully ascertain the conditions of the community. The fact-finding mission confirmed the community's reality of discrimination and exclusion that emanated from being stateless and

64 'KHRC – Theory of change' https://www.khrc.or.ke/about-us/theory-of-change.html (accessed 28 July 2021).

65 United Nations High Commissioner for Refugees (UNHCR) 'The Makonde of Kenya: the struggle to belong' (2015) 3.

66 UNHCR (n 65).

67 UNHCR (n 65).

KHRC embarked on engagements with county-based and national officials to see if the Makonde's plight could be immediately addressed. With these engagements having limited traction, the Makonde alongside KHRC and its partners resolved to mount a public campaign in the form of 'Trekking against statelessness', which would see the Makonde trek from their homes in Kwale County to State House in Nairobi where the President resides. In doing so, the Makonde were 'boldly and publicly stating their claim to Kenyan citizenship and asserting their right to state recognition as a moral as well as legal right'.[68]

With their civil society partners in tow, the Makonde flagged off their trek to State House Nairobi on 10 October 2016. Almost immediately, the community encountered their first hurdle as the government's Coast Regional Coordinator halted the human convoy as he and the Kwale County Commissioner sought to dissuade the Makonde from proceeding with the trek.[69] However, the Makonde remained resolute with their chairperson, Thomas Nguli insisting: 'We have decided to go State House, Nairobi because all relevant government officials say all our issues can only be resolved in Nairobi'.[70] On 13 October 2016, the convoy made it to Nairobi where another convoy of friends and supporters seeking to stand in solidarity with the community joined them. A final standoff would ensue with the Nairobi police seeking to stop the convoy but this time, the Cabinet Secretary for Interior would intervene and announce to an elated group that President Uhuru Kenyatta had agreed to accord them audience.[71]

After years of seeking state recognition, the Makonde were escorted to State House under the protection of the police who had sought to disperse them only moments earlier. On arrival at State House, President Kenyatta acknowledged their plight and undertook to have them registered as Kenyan citizens by the close of 2016. He stated:[72]

> I apologize on behalf of my government and that of previous governments for having lived in this condition for so long. You are not visitors in this country, and I order that by the time I come to Mombasa in December the people should be registered.

On 1 February 2017, President Kenyatta visited Kwale County and presided over the issuance of 1 496 citizenship certificates, 1 176 identity cards and 1 731 birth certificates to the Makonde community.[73] In addition to declaring the Makonde the 43rd tribe of Kenya, President Kenyatta also directed that the community benefits from affirmative

68 Kenya Human Rights Commission 'Annual report 2016-2017' (2017) 33.

69 'KHRC - The Makonde community finally recognized as Kenyan citizens' https://www.khrc.or.ke/2015-03-04-10-37-01/blog/561-the-makonde-community-finally-recognized-as-kenyan-citizens.html (accessed 9 July 2021).

70 KHRC (n 69).

71 KHRC *The Journey of the Makonde to citizenship 14 mins English* https://www.youtube.com/watch?v=-PG8chfAX_U (accessed 29 July 2021).

72 KHRC (n 69).

73 'President Kenyatta issues key citizenship documents to Makonde community | The presidency' https://www.president.go.ke/2017/02/01/president-kenyatta-issues-key-citizenship-documents-to-makonde-community/ (accessed 29 July 2021).

measures including being prioritised in the recruitment of the police and military as well as in other government jobs and that the elderly, orphans and persons with disability in the community be registered and benefit from the government's cash transfer programme.[74] The Makonde were also registered as voters. The Makonde experience stands out as an illustration of how a community's tenacity and resilience coupled with civil society support, harnessed the legacy of strategic litigation as well as reforms under a transitional justice agenda to obtain a positive outcome in the eradication of statelessness.

4.2 The Shona's pilgrimage to citizenship

On the back of a successful campaign with the Makonde, KHRC would in 2018 embark on a partnership with the Shona community in Kenya to aid in their quest for Kenyan citizenship. In fact, the community approached KHRC on the basis of a referral by a government official who had observed the successful efforts of the Makonde.[75] The work commenced with an assessment which had the primary aim of establishing the citizenship status of the community. The assessment also aimed to: generate a cohesive narrative on the life of the Shona in Kenya; to illuminate the economic status and cultural practices of the community; to ascertain the impact of statelessness on the community's enjoyment of human rights; to assess the interventions that had been undertaken thus far to address the community's statelessness; and to document individual stories of interest that would help shed a light on the overall plight of the community.[76]

The Shona whose origins lie in Zimbabwe and parts of Zambia and Mozambique, came to Kenya as Christian missionaries with the initial group arriving between 1959 and 1961.[77] While they initially settled within the modern day Nairobi and Kiambu counties, they have since spread out to other areas of the country. Despite their presence pre-dating Kenya's independence, the stringent legal provisions on citizenship prior to 2010 meant the Shona did not acquire Kenyan citizenship. KHRC's assessment placed the Shona population in Kenya at approximately 2,300 and that it was only as recently as July 2019 that 597 Shona children were issued with birth certificates.[78]

After concluding the initial assessment, KHRC published a report and proceeded to enhance the profile of the Shona and their plight by availing opportunities for conventional and social media coverage.[79] This was also accompanied with facilitating direct access to policy

74 The presidency (n 73).

75 'KHRC – End of statelessness for the Shona in Kenya: The journey towards citizenship' https://www.khrc.or.ke/2015-03-04-10-37-01/blog/733-end-of-statelessness-for-the-shona-in-kenya-the-journey-towards-citizenship.html (accessed 31 July 2021).

76 KHRC 'African missionaries in identity limbo: the Shona of Kenya' (2020) 1.

77 KHRC (n 76) 1.

78 KHRC (n 76) 3.

79 KHRC (n 75).

makers for the community to make their case. This yielded the positive result of the Kiambu County Assembly passing a motion calling on the national government to recognise the Shona and grant them Kenyan citizenship. The motion expressed as follows:[80]

> Guided by the principles of the intergovernmental relations structure and in particular, the requirement for consultations and cooperation as provided under Article 6(2) of the Constitution as well as institutionalized protection of marginalized groups; this Assembly therefore urges both levels of government through the relevant Organs to:
>
> (i) Recognize the existence of the Shona community and their contribution to the County of Kiambu and the Republic of Kenya; and,
>
> (ii) Take urgent legal and/or administrative measures to address the plight of this community including granting them Kenyan citizenship so as to ensure that their children born in Kiambu County are registered in order to access education, health care in case of admission to hospital and other public services.

This pivotal development was down to the direct agency and tenacity of the Shona community who collected signatures to aid the petition which moved the Kiambu County Assembly to pass the motion. They also made sure that a representation of the community attended the session in which the motion was discussed. With the help of KHRC and UNHCR, April 2019 would see two members of the Shona community accorded an opportunity to address the Ministerial Conference on the Eradication of Statelessness in the Great Lakes Region. The community representatives who spoke to the realities of lost education opportunities and non-recognition, extracted a commitment from Kenya's Ministry for Interior and Coordination and National Government to 'By 2020, recognise and register as Kenyan citizens members of the Shona community, who qualify for citizenship under the law'.[81] This was a pivotal turning point for the Shona and the government began actualising this pledge by issuing over 600 young Shona community members with birth certificates in August 2019.[82]

To maintain the momentum, the KHRC partnered with the Shona community to help them undertake a 3-day pilgrimage and prayer for citizenship from 14-16 October 2020 that targeted the Kiambu County government and assembly as well as the National Assembly. This culminated in an inter-faith prayer session at the iconic Uhuru Park in Nairobi.[83] Soon after, the National Taskforce requested KHRC and UNHCR to support the Shona in their citizenship applications. The result was 1 730 applications from the community to the immigration

80 Kiambu county assembly- second assembly (No 18) third session afternoon sitting (045), 20 March 2019 'Motion-recognition of Shona people a stateless community living in the county'.

81 'Outcome document – Ministerial conference on the eradication of statelessness in the Great Lakes Region (16-18 April 2019, Nairobi) – World' https://reliefweb.int/report/world/outcome-document-ministerial-conference-eradication-stateless ness-great-lakes-region-16 (accessed 2 August 2021).

82 'End of Statelessness in sight for Shona as Kenya issues birth certificates', *Reuters*, 8 October 2019, https://www.reuters.com/article/us-global-rights-stateless-kenya-feature-idUSKBN1WN15Q.

83 KHRC (n 75).

department.[84] On 12 December 2020 during Kenya's 57th *Jamhuri* day (the day Kenya was declared a republic) celebrations, President Kenyatta announced that 1 670 members of the Shona community would be granted Kenyan citizenship alongside 1 300 stateless persons of Rwandan descent.[85] On 28 July 2021, 1 649 Shona community members finally received their Kenyan national identity cards at a ceremony in Nairobi.[86]

5 CONCLUSION

In the post-2010 era, Kenya has made huge strides towards the eradication of statelessness. This is evident in the provisions of the 2010 Constitution as well as in the legal and institutional frameworks that govern citizenship and migration issues. It is also evident that this journey is greatly informed by the efforts of the affected communities, their partners in civil society and the convergence of strategic litigation with transitional justice measures. The Nubian cases within the African human rights system served to amplify not only the plight of this community but that of other communities also affected by Kenya's discriminatory laws and administrative measures where citizenship was concerned. Beyond prescribing specific remedies for the Nubian community, the decisions in these cases also prescribed legal and institutional reforms which would benefit all stateless persons in Kenya. Importantly, these cases underscored that stateless persons in Kenya are protected by the African Charter even when such protections were not availed within the country's prevailing constitution.

When Kenya arrived at a transitional moment in 2008, the jurisprudence from the Nubian cases became valuable blueprints for the reforms to redress the historical injustices of statelessness that had been previously acknowledged but remained unaddressed. The TJRC utilised the Nubian cases to illustrate the problem of statelessness and echoed the recommendations for reform that were issued by the African Commission and the African Committee. In explicitly calling for these decisions to be implemented, the TJRC acknowledged that the Nubian community and other minority communities had utilised litigation as a tool for transformation and remedying the past.

While causation cannot be ascertained, it is evident that amplification of the Nubian cause through litigation and through the partnerships they enlisted along the way, saw the issue of discriminatory practices in the arena of citizenship raised during the constitutional review process. The result is the 2010 Constitution with

84 KHRC (n 75).

85 'UNHCR Applauds Kenya's decision to resolve the statelessness of the Shona and other communities – Kenya' https://reliefweb.int/report/kenya/unhcr-applauds-kenya-s-decision-resolve-statelessness-shona-and-other-communities (accessed 2 August 2021).

86 'Stateless Shona community gets Kenyan citizenship' https://www.aa.com.tr/en/africa/stateless-shona-community-gets-kenyan-citizenship/2317077 (accessed 2 August 2021).

clauses that prohibit discrimination, advance access to justice and equality under the law and offers protection for marginalised groups within the bill of rights. Additionally, the chapter on citizenship reiterates every citizen's right to access identity documents, it eradicates gender-based discrimination in as far as conferring citizenship is concerned and provides a pathway to citizenship for foundlings.

Yet, the promise of the 2010 Constitution lies in whether the affected communities can effectively assert these rights and obtain remedies where these rights are violated. The experiences of the Makonde and Shona communities have demonstrated the importance of community-led activism in conjunction with strategic support from NGOs. The campaigns by these communities actualised these constitutional safeguards as many of them received identity documents for the first time. This has in turn unlocked access to essential services such as education and health while also making them eligible for affirmative measures to remedy decades of marginalisation. Through a blend of civic action and strategic engagement with state actors, the Kenyan government moved from an ambivalent implementer of its obligations on addressing statelessness to a proactive one as seen in the establishment of a National Taskforce and closely collaborating with NGOs to see that all stateless persons in the country are duly registered and obtain Kenyan citizenship.

The journey is far from complete. The Nubian community and other marginalised groups continue to experience discriminatory practices in the acquisition of identity documents at the administrative level. The government has also sought to integrate government services by issuing every individual with a *huduma* number, which they define as 'a unique and permanent personal identification number randomly assigned to every resident individual at birth or upon registration/ enrolment and only expires or is retired upon the death of the individual'.[87] This is particularly worrying for those communities that have faced difficulties in accessing birth certificates and other identity documents since they would not be able to migrate to the *huduma* platform. At the time of writing, this issue was the subject of ongoing litigation at Kenya's Court of Appeal with one of the appellants being the Nubian Rights Forum, which is seeking to have the court address among other things, the risk of exclusion brought about by this system.[88]

Ultimately, the issues of statelessness and citizenship related discrimination remain an ongoing concern in Kenya. However, unlike in the pre-2010 dispensation, the constitutional and legislative frameworks lean towards protection of the affected communities. Furthermore, the experiences of the Nubian, Makonde and Shona communities have revealed that the next phase of ensuring

87 'FAQs' *Huduma Namba* (blog) https://www.hudumanamba.go.ke/faqs/ (accessed 2 August 2021).

88 *Nubian Rights Forum et al v the Honourable Attorney General of Kenya et al* https://www.justiceinitiative.org/litigation/nubian-rights-forum-et-al-v-the-honourable-attorney-general-of-kenya-et-al-niims-case (accessed 2 August 2021).

enforcement of these safeguards will be embarked on with a set of valuable assets to eradicate statelessness in Kenya: affected communities that are well sensitised on their rights and are emboldened by the successes seen so far; a growing constituency of NGOs and partners that are actively working to bridge the gap between affected communities and the state; and allies within the state in the form of legislators at the national and county levels as well as within the bureaucracy of citizenship and migration departments. The arc is long, but it continues to bend towards the eradication of statelessness.

II

SPECIAL FOCUS ON THE AFRICAN UNION'S THEME FOR 2021: ARTS, CULTURE AND HERITAGE: LEVERS FOR BUILDING THE AFRICA WE WANT

FOCUS SPÉCIAL SUR LE THEME DE L'UNION AFRICAINE POUR L'ANNEE 2021: ARTS, CULTURE ET PATRIMOINE: LEVIERS POUR L'EDIFICATION DE L'AFRIQUE QUE NOUS VOULONS

Effectivité des droits culturels et retour des biens culturels africains pillés sous l'empire colonial: pallier les écarts entre textes et contexte

*Olivier Baraka Bahoze**
https://orcid.org/0000-0002-2980-1296

RÉSUMÉ: Le présent article s'inspire du thème de l'Union africaine pour l'année 2021 – «Arts, culture et patrimoine: leviers pour l'édification de l'Afrique que nous voulons» – pour aborder la question du retour ou de la restitution des biens culturels africains acquis de façon irrégulière durant les périodes de la colonisation et de l'esclavage. Il part du constat selon lequel le système africain dispose d'un corpus normatif et jurisprudentiel substantiel en matière des droits culturels. Cependant, ses principaux instruments ignorent cependant la question du retour des biens culturels. Cette question trouve un relai favorable dans une mosaïque des textes disparates – qui réglementent le secteur de la culture en général – dont l'émanation institutionnelle est aussi multiple que diversifiée (Union africaine, UNESCO et Assemblée générale des Nations Unies). L'analyse de ces textes permet d'établir un lien de causalité entre retour des biens culturels africains et effectivité des droits culturels. Cet article avance l'hypothèse selon laquelle le retour de ces biens serait non seulement un mode de réparation du crime colonial mais surtout une contribution à l'effectivité des droits culturels. Parlant des blocages qui minent la concrétisation du rapatriement de ces biens, cet article critique le développement d'un certain *nationalisme artistique et culturel* – consécutif au caractère fragmentaire des politiques étatiques en la matière – générateur d'innombrables impasses. Il préconise en palliatif l'harmonisation des politiques culturelles à l'échelle régionale.

TITLE AND ABSTRACT IN ENGLISH:

Effectiveness of cultural rights and the return of African cultural property acquired during the colonial era: bridging the gaps between texts and context

Abstract: This article draws on the annual theme of the African Union – 'Arts, Culture and Heritage: Levers for Building the Africa We Want' – to address the question related to the return or restitution of African cultural property irregularly acquired during the colonial and slavery regimes. It departs from the assumption that the

* Licencié en Droit, Assistant à la faculté de Droit et Coordonnateur du Club-DIH (Université de Goma 2016), Diplômé du Programme de formation en droit international des Nations unies (Addis-Abeba 2019), Candidat au DES en Droit international public et relations internationales et Chercheur au Centre d'études pour le règlement des différends en Afrique (CERDIA) (Université de Kinshasa 2020). Assistant parlementaire à l'Assemblée nationale de la RDC (2020-2023). Domaines de spécialisation: Droit international (humanitaire, pénal, des droits de l'homme et de l'environnement). L'auteur tient à remercier sincèrement le Dr Trésor Makunya pour son opiniâtreté et ses conseils, sans lesquels la présente serait abandonnée en cours de rédaction. En définitif, je dédie la présente, à titre posthume, à mon grand-père Ntabwiko Misago Barthelémy (1936-2020), témoin des injustices coloniales et parti sans bénéficier d'une quelconque réparation des préjudices subis; olivierbahoze@gmail.com

African human rights system has a consistent normative and jurisprudential fabric on cultural rights. However, its main instruments ignore the issue of the return of cultural property. This question finds a favourable response in a mixture of disparate texts – which regulate the cultural sector in general – whose institutional emanation is as multiple as it is diversified (African Union, UNESCO and United Nations General Assembly). The analysis of these texts allows us to establish a causal link between the return of African cultural goods and the effectiveness of cultural rights. This article puts forward the hypothesis according to which the return of these properties would not only be a mode of reparation for colonial crimes but above all a contribution to the effectiveness of cultural rights. Speaking of the obstacles that undermine the concretisation of the repatriation of the illegally acquired property, this article criticises the development of a certain artistic and cultural nationalism – consecutive to the fragmentary character of the state policies in the matter – generating innumerable impasses. As a palliative, the article advocates for the harmonisation of cultural policies at the regional level.

MOTS CLÉS: retour des biens culturels, effectivité des droits, système africain, reconstitution du patrimoine culturel africain, décolonisation et justice culturelle

SOMMAIRE:

1 INTRODUCTION

Contracté récemment, en marge de la mode, le mariage entre droit et culture serait juridiquement contrenature, voire incestueux, s'il n'avait pas donné naissance aux droits culturels. Ce mariage a brisé, dans son articulation, le rituel du *péché originel*[1] qui a tendance à entacher le cadre normatif issu des précédents mariages – conclus entre droit et politique[2] d'une part et droit et économie,[3] d'autre part. Ces derniers

1 M Blay *Dictionnaire des concepts philosophiques* (2006) 601. Chez le chrétien, le concept péché originel est celui commis par Adam et Eve et fondateur des souffrances de l'humanité. Par extension, il fait allusion au 'vice, défaut d'une doctrine, d'une société, d'une organisation qui remonte à sa fondation'.

2 Pour ce qui est du droit et de la politique, voir B Leoni 'Droit et politique' in C Lottieri (dir) *Law, liberty and the competitive market* (2009) extrait disponible sur http://www.libinst.ch/publications/IL-Leoni-Droit-Politique.pdf (consulté le 23 novembre 2021); G Dubé 'Le rapport entre la politique et le droit dans l'ordre international (1963) 5(2) *Les cahiers de droit* 47-56; P Noreau 'Le droit comme vecteur politique de la citoyenneté. Cadre d'analyse pour l'étude des rapports collectifs entre majorité et minorités' in M Coutu et al (dirs) *Droits fondamentaux et citoyenneté: une citoyenneté fragmentée, illimitée, illisoire?* (2000) 325-339.

3 I Mingashang & JPS Bigira (dirs) *Du droit à l'économie et de l'économie au droit* (2019) 1-695; B Frydman 'Les nouveaux rapports entres droit et économie: trois hypothèses concurrentes' in T Kirat & E Servirin (dirs) *Le droit dans l'action économique* (2000) 25-41.

restent marqués par l'empreinte de la rationalité européenne et dont la transposition en Afrique relève du mimétisme normatif.[4] En vacillant, dans leur encrage, entre tradition et modernité, les droits culturels ont l'avantage d'éviter cet écueil. En effet, le contenu normatif de l'article 17 de la Charte africaine des droits de l'homme et des peuples[5] démontre au prix de quel effort les concepteurs de la Charte ont éviter de légiférer au rebours des valeurs traditionnelles et coutumières.

Intrinsèques à *l'africanité* ces valeurs constituent un trait d'union entre le passé, le présent et le futur. Elles trouvent leur matérialité dans l'art entant que forme expressive du patrimoine culturel et historique. Conscients de cette assertion, les États membres de l'Union africaine ont consacré 2021 année des arts, culture et patrimoine. Ceci ressort du thème annuel censé guider les activités des organes politiques de l'UA.[6] Le choix de ce thème, même s'il peut paraître banal, est chargé de significations. Les peuples africains – aussi bien continentaux que diasporiques[7] – s'engagent de plus en plus dans le processus de recouvrement de leur patrimoine culturel aliéné durant le passé colonial et esclavagiste. Terrain de prédilection de la nouvelle génération, l'on y voit une volonté assumée de rendre effective la décolonisation des esprits qui semble se perpétuer sur le plan culturel et identitaire.

Comme l'on devrait s'y attendre, le processus du recouvrement des biens culturels africains, mal acquis sous la colonisation, oppose deux visions inconciliables.[8] L'une *conservatrice*, œuvrant pour un *statu quo ante,* s'articule d'abord à travers la fin de non-recevoir opposée par certains 'héritiers légaux' des anciens colonisateurs aux requêtes émises par les 'héritiers légitimes' des victimes de la colonisation allant dans le sens de la restitution. Ensuite, cette vision se dessine maintenant à travers l'adoption des formules nuancées tendant à modifier le statut juridique de ces biens, pour les convertir – en dépit

4 OS Bemuna 'Portée criminogène des conditions de production et de réception des lois en droits positifs congolais' in JPS Bigira & I Mingashang *Le droit pénal entre douleur et enchantement dans le contexte contemporain* (2021) 1113-1140.

5 L'article 17 de la Charte (1981/1986) dispose: '1.[t]oute personne a droit à l'éducation. 2. Toute personne peut prendre part librement à la vie culturelle de la Communauté. 3. La promotion et la protection de la morale et des valeurs traditionnelles reconnues par la Communauté constituent un devoir de l'Etat dans le cadre de la sauvegarde des droits de l'homme'.

6 Chaque année, lors de la Conférence de l'UA, les chefs d'État et de gouvernement proposent et approuvent un thème de réflexion pour l'année suivante […]. C'est ainsi que lors de la 33e session de la Conférence, qui s'est tenue en février 2020, les chefs d'État et de gouvernement ont approuvé la proposition de M Ibrahim Boubacar Keita, alors Président de la République du Mali, de déclarer 2021 'Année des arts, de la culture et du patrimoine de l'UA'. Voir note conceptuelle sur l'année 2021 comme année de la culture et du patrimoine en Afrique, Déc. EX.CL/1231(XXXVII)Rev.1. Disponible sur https://au.int/sites/default/files/documents/40121-doc-f-_draft_concept_note_on_2021_as_the_year_of_arts_culture_and_heritage_in_africa_.pdf (consulté le 6 décembre 2021).

7 Sur l'Afrique et sa diaspora voir E Akyeampong 'Africans in the diaspora: the diaspora and Africa' (2000) 99(395) *Africa affairs* 183-215.

8 Pour comprendre cette dialectique, voir M Murphy & B Tiller 'Ethique et politique de la restitution des biens culturels à l'Afrique: les enjeux d'une polémique' (2019) 48(2) *Sociétés & Répresentations* 257-270.

de leur histoire macabre – en «patrimoine commun de l'humanité» au nom de l'universalité et de l'interculturalité. Au fond, cette vision préconise une sorte de libéralisme à sens unique[9] et risque de générer un blanchiment des biens culturels mal acquis.

Progressiste, l'autre vision lutte pour l'émergence d'un nouveau paradigme de justice culturelle et raisonne d'une lutte cherchant à faire rapatrier ces biens en faveur des «héritiers légitimes». Même si cette lutte peine à aboutir, son dénouement participera à la connaissance de l'histoire, à l'affermissement des arts et à l'épanouissement de la culture africaine, bref, à l'édification de «l'Afrique que nous voulons».

Au milieu de cette confrontation, le reflexe du juriste serait logiquement de s'interroger sur la place du droit dans le processus de recouvrement des biens culturels africains. Cette question est sujette à quelques ruptures et enjeux – en termes du droit et du règlement des contentieux historiques par les outils légaux et institutionnels en pleine construction – qu'il faut cerner au préalable.

Partant des ruptures, rappelons d'emblée que dans le domaine culturel et artistique, l'apport de l'Afrique au reste du monde est significatif. De nos jours, cette assertion n'est plus facilement remise en cause.[10] Les tragédies successives, consécutives au colonialisme,[11] eurent malheureusement des répercussions nocives sur l'héritage de l'Afrique dont la performance artistique et culturelle fut pendant longtemps dissipée dans un déni terrifiant. Méconnue par ses propres héritiers, une part non négligeable de cet héritage – déportée durant la période du rapt colonial – demeure enchaîné en dépit des indépendances amorcées depuis les années 50-60.[12] D'ordre historique, c'est à ce niveau que se décline la première rupture

9 Un libéralisme allant de la libre circulation des biens culturels et – 'l'unité du territoire culturel universel' pour des raisons économiques et culturelles à la 'porte ouverte' qui permettrait le rayonnement du génie, du prestige national, l'éducation des peuples lointains; c'est 'l'appréciation mutuelle des valeurs culturelles par des échanges à tous les niveaux et dans tous les domaines', et l'universalisation du langage et des valeurs culturels. Elle cherche ainsi à se muer dans les idéaux de L'UNESCO. Voir R Goy 'Le régime international de l'importation, de l'exportation et du transfert de propriété des biens culturels' (1970) 16 *Annuaire français de droit international* 605-606.

10 VY Mudimbe *The invention of Africa: gnosis, philosophy and the order on knowledge* (1988) 1-255; CA Diop *Nations nègres et cultures: de l'antiquité nègre égyptienne aux problèmes culturels de l'Afrique noire d'aujourd'hui* (1954) 1-564; CA Diop *Antériorité des civilisations nègres: mythe ou vérité historique?* (1967); E Mveng *Les sources grecques de l'histoire négro-africaine, depuis Homère jusqu'à Strabon* (1972) et T Obenga *L'Afrique dans l'antiquité: Egypte pharaonique, Afrique noire* (1973).

11 Le Manifeste culturel panafricain dans son préambule considère le colonialisme comme un tout comprenant la traite négrière et la domination politique. Pour le Manifeste, le colonialisme est '[...] un mal que tous nos peuples ont subi et vécu, d'abord sous sa forme la plus destructrice, la 'traite négrière', qui a dévasté la quasi-totalité du continent africain, et sous sa forme la plus tangible et la plus insolente, la domination politique dont nous nous efforçons de triompher'. Voir Manifeste culturel panafricain (1969), para 6.

12 C'est à travers la Résolution A/Rés. 1514 (XV) du 14 décembre 1960 que la Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux était adoptée à l'initiative de Nikita Khrouchtchev.

susceptible de servir de paravent à la compréhension des éléments juridiques qui entourent la question du retour en Afrique des biens culturels susmentionnés.

La deuxième rupture est à chercher dans une approche évolutive de la question. Fuyante, elle est de l'ordre de la contestation d'une domination[13] d'un peuple par un autre perpétuée par l'utilisation des outils culturels à des fins hégémoniques.[14] Cette rupture se traduit par la lutte pour la libération de l'héritage culturel africain, dont les biens artistiques et œuvres d'art, servant parfois d'objets de culte, transformés depuis en bien marchant dans les musées occidentaux. Poussés par la quête d'une identité culturelle, les peuples africains, postérités des aïeux anciennement colonisés, cherchent à tout prix les voies de sortie pour se défaire du goulot d'étranglement culturel qui sert d'avatar à l'assimilation culturelle incompatible avec tout développement propre, authentique et dépourvu des agrégats du mimétisme. Cette rupture s'inscrit dans une logique de confrontation tenant compte d'un nouveau paradigme en termes de rapport des forces entre anciens colonisateurs et colonisés. Sur papier, ces rapports ne sont plus verticaux mais sont devenus horizontaux mettant sur un même diapason des peuples égaux émanant des entités jouissant d'une égale souveraineté. La compréhension de cette deuxième rupture reste déterminante pour apprivoiser les blocages inhérents au rapatriement des biens culturels africains recelés en occident. Ce retour passe par la coopération internationale et soulève des questions sur les capacités du cadre conventionnel et institutionnel actuel à permettre, en toute égalité, le règlement d'un différend antérieur à son avènement.

Exposées tel qu'elles, les deux ruptures démontrent en elles-seules toute la complexité qu'il y a à aborder juridiquement la question du retour des biens culturels africains volés sous l'empire colonial. Plus complexe davantage quand cette question doit être analysée à l'aune de l'effectivité d'une catégorie des droits, reconnue objectivement aux peuples africains et dont la justiciabilité, possible ou supposée, imposerait aux Etats des obligations positives en termes de protection, de promotion et de réalisation.

Pour ce qui est des enjeux, le retour des biens culturels africains paraît, toutes proportions gardées, comme un pas décisif vers la fin de la colonisation sous ses formes culturelles.[15] Relevant désormais des

13 Parlant de la domination, la Charte culturelle de l'Afrique précise qu'elle a '[…] entraîné la dépersonnalisation d'une partie des peuples africains, falsifié leur histoire, systématiquement dénigré et combattu les valeurs africaines, tenté de remplacer progressivement et officiellement leurs langues par celle du colonisateur'. Préamble de la Charte culturelle de l'Afrique (1976/1990) para 7.

14 Pour ce qui est de l'hégémonie en droit international, voir M-N Laperrière & R Bachand L'hégémonie dans la société internationale: un regard néo-gramscien (2014) Hors-série *Revue québécoise de droit international* 1-13. Disponible sur https://doi.org/10.7202/1068070ar (consulté le 6 décembre 2021).

15 MC Ribeiro & AP Ribeiro 'La restitution des œuvres d'art: un pas décisif dans le processus de décolonisation' (2020) *Mémoires en jeu* 1-8. Disponible sur https://estudogeral.sib.uc.pt/bitstream/10316/90472/1/La%20restitution%20des%20œuvres%20d_art.pdf (consulté le 20 février 2021).

crimes contre l'humanité,[16] l'esclavage et le colonialisme ont voulu faire des africains un peuple culturellement déshérité. En effet, la condition servile du peuple nègre en particulier, comme le rappelle Achille Mbembe, «n'aurait pas seulement plongé le sujet nègre dans l'humiliation, l'abaissement et une souffrance sans nom. Ce dernier aurait, quant au fond, subi une expérience de mort civile caractérisée par le déni de dignité, la dispersion et la tourmente de l'exil».[17] Cette mort sociale,[18] s'il en est une, se manifeste largement à l'échelle de l'identité culturelle dans la mesure où le phénomène colonial a produit, à travers la translocation du patrimoine africain, un effet de coagulation ou d'étouffement de l'expression culturelle des peuples colonisés.[19]

Le deuxième enjeu, et c'est le corolaire du premier, s'appuierait sur le fait que le recouvrement de l'intégralité des biens culturels faisant partie du patrimoine africain est une forme de réparation des crimes coloniaux tout en étant une condition *sine qua non* pour garantir l'effectivité des droits culturels, y compris les droits qui leur sont connexes. En effet, le caractère réparateur du retour des biens culturels s'est érigé en doctrine majoritaire au sein de l'Assemblée générale des Nations Unies. Depuis sa troisième résolution, relative à la question du retour des biens culturels, adoptée le 18 décembre 1978.[20] De nos jours, cette position vieille de 48 ans, se conforte davantage par la pratique des Etats.[21]

Plus de 60 ans après les indépendances et quatre décennies après l'éclosion du système africain des droits de l'homme, la question relative au retour dans leur pays d'origine des biens culturels volés durant l'esclavage et la colonisation se pose avec acuité. Au carrefour entre le droit, la politique et la morale,[22] cette question n'exaspère pas

16 Le Sénégal est parmi les rares Etats à se dôter d'une législation déclarant l'esclavage et la traite négrière crime contre l'humanité. Il s'agit de la Loi 2010-10 du 5 mai 2010 *JO no 6560* du 11 décembre 2010.

17 A Mbembe *Critique de la raison nègre* (2013) 120.

18 O Patterson *Slavery and social death: a comparative study* (1982) 1-560.

19 Certains doctrinaires, comme Eteka Yemet, auraient souhaité que la définition du génocide soit élargie aux considérations linguistique, politique, sanitaire, sexuelle et culturelle. Il forge le concept de génocide culturel ou *ethnocide*, définit comme 'destruction de la culture d'un peuple par un autre'. Voir VE Yemet *La Charte africaine des droits de l'homme* (1996) 203.

20 Cfr A/Rés 3187 (XXVIII) (1973) sur la restitution des œuvres d'art aux pays victimes d'expropriation. Dans cette résolution, l'organe délibérant de l'ONU 'affirme que la restitution prompte et gratuite à un pays de ses objets d'art, monuments, pièces de musée, manuscrits et documents par un autre pays, autant qu'elle constitue une juste réparation du préjudice commis, est de nature à renforcer la coopération internationale'.

21 Cette pratique se cristallise à travers le nombre de plus en plus croissant des accords bilatéraux conclus entre les Etats africains et européens portant sur la restitution des biens culturels.

22 A Gay 'La restitution des œuvres d'art à leur pays d'origine: un débat au carrefour entre le droit, la politique et la morale' (2013) 2 *Université Lumières Lyon* 1-67.

uniquement les Etats africains.[23] Elle concerne tous les peuples du monde qui, d'une manière ou d'une autre, furent déshérités d'une partie de leur patrimoine culturel matériel suite au contact avec l'occident.[24]

Néanmoins, il faut marteler ici que les allures globales de ce phénomène semblent pour les moins trompeuses. Il est établi en effet que l'Afrique reste de loin le continent le plus touché. Les expertises majoritaires en la matière convergent à considérer que plus de 90 à 95% des pièces majeures du patrimoine culturel d'Afrique subsaharienne se trouvent hors du continent dans les grands musées occidentaux.[25] Certains commentateurs parlent d'une «déperdition massive par rapport aux autres situations».[26] D'autres fustigent un véritable «Mémocide»,[27] qui, à en croire van Nijen, «entraîne des répercussions sur le plan culturel, éducatif, identitaire, affectif, politique, matériel,

23 Dans sa Résolution A/67/L.34 du 5 décembre 2012 consacrée au retour ou restitution des biens culturels dans leur pays d'origine, l'Assemblée générale des Nations unies donne une liste des pays dépossédés de leurs biens culturels concernés par leur retour ou leur restitution. Soixante-douze pays de quatre continents différents sont concernés. Il s'agit de: Afghanistan, Algérie, Argentine, Arménie, Bélarus, Belize, Bolivie , Bosnie-Herzégovine, Bulgarie, Burkina Faso, Cambodge, Cameroun, Canada, Chine, Chypre, Colombie, Congo, Côte d'Ivoire, Croatie, Égypte, Équateur, Érythrée, Espagne, Estonie, États-Unis d'Amérique, Éthiopie, Finlande, Gabon, Gambie, Géorgie, Grèce, Grenade, Guatemala, Haïti, Hongrie, Inde, Iran, Iraq, Italie, Koweït, Liban, Lituanie, Luxembourg, Libye, Madagascar, Mali, Malte, Mexique, Micronésie, Mongolie, Monténégro, Myanmar, Nigéria, Pakistan, Panama, Pologne, Portugal, République arabe syrienne, République de Corée, République démocratique du Congo, République de Moldova, République tchèque, Roumanie, Samoa, Serbie, Seychelles, Slovaquie, Slovénie, Tadjikistan, Tunisie, Turquie et Viet Nam. Disponible sur https://www.un.org/ga/search/view_doc.asp?symbol=A/67/L.34&Lang=F (consulté le 6 décembre 2021).

24 F Sarr & B Savoy *Rapport sur la restitution du patrimoine culturel africain: vers une nouvelle éthique relationnelle* (2018) 8. Les auteurs renseignent que la captation du patrimoine culturel des Etats vaincus faisait partie intégrante de la stratégie militaire des Etats européens: En Chine en effet (1860), en Corée (1866), en Éthiopie (1868), dans le royaume Ashanti (ou Asante, 1874), au Cameroun (1884), dans la région du lac Tanganyika, futur Congo belge (1884), dans la région de l'actuel Mali (1890), au Dahomey (1892), au Royaume du Bénin (1897), dans l'actuelle Guinée (1898), en Indonésie (1906), en Tanzanie (1907), les raids militaires et les expéditions dites punitives de l'Angleterre, de la Belgique, de l'Allemagne, des Pays-Bas et de la France sont au XIXe siècle l'occasion de prises patrimoniales sans précédent. Le type et la quantité d'objets convoités, la présence d'experts auprès de certaines armées, l'attention aiguë que plusieurs musées et bibliothèques d'Europe prêtent à l'avancée lointaine des troupes, la destination muséale souvent précise assignée à certains objets dès leur prise prouvent combien ces captations patrimoniales s'apparentent davantage, au XIXe siècle, à des soustractions ciblées qu'à de pillages militaires *stricto sensu* (visant traditionnellement le numéraire, les armes et drapeaux ennemis).

25 S Martin 'L'Afrique ne peut pas être privée des témoignages de son passé' *Le Figaro* (6 décembre 2017) entretien avec Éric Biétry-Rivierre.

26 Voir l'allocution d'Alain Godonou au 'Forum de l'Unesco sur la mémoire et l'universalité' (5 février 2007) in VL Prott *Témoins de l'histoire: recueil de textes et documents relatifs au retour des objets culturels* (2011) 63.

27 Terme forgé par Grmek Mirko et emprunté par VK Dissake *Le 'Mémoricide'* Thèse Doctorat de droit privé et sciences criminelles Université de Paris 8 Vincennes Saint-Denis (2017) 1-432.

sociologique, religieux, économique, locale et globale».[28] Vu sous cet angle, vouloir en finir avec la négation d'un droit à la culture, corollaire à cet état de choses, s'avère la conséquence de cet enjeu.

Au regard du système africain des droits de l'homme quel lien de causalité peut-on établir entre restitution des biens culturels africains et effectivité du droit à une vie culturelle? Autrement dit, en quoi ou à quelles conditions le retour des biens culturels africains contribue-t-il à l'effectivité des droits culturels? Telle est la question principale autour de laquelle tournera la présente réflexion.

Un problème d'ordre méthodologique est à mentionner dès le départ. La question du retour des biens culturels africains – en dépit du fait qu'elle soit juridiquement soutenue par un éventail des normes aussi bien sur le plan international que régional – paraît pour le moins complexe. Au-delà de ses dimensions historiques, politiques, sociologiques et philosophiques, l'aspect juridique qui la caractérise admet à son tour d'innombrables passions en termes d'identité, de mémoire, de souveraineté et de nationalisme culturels. Pour un chercheur africain, le principal défi sera de parvenir à se hisser en commentateur impartial. L'objet du présent article n'est pas donc de revenir de manière exhaustive sur les aspects politiques, diplomatiques et historiques de la question. Non seulement les études abondent dans ce sens,[29] cela nous paraît surtout pécher par prétention dans un cadre aussi réduit. Nous nous contenterons uniquement d'analyser – dans une approche à la fois dogmatique, critique et empirique – le cadre normatif dédié à la question du retour des biens culturels dans le système africain (partie 2) avant de savoir en quoi et sous quelles conditions le retour de ces biens contribuera à l'effectivité des droits culturels en Afrique (partie 3). On proposera enfin des pistes de solution à l'échelle régionale en guise de conclusion (partie 4).

2 DROITS CULTURELS ET RETOUR DES BIENS CULTURELS VOLES A L'AFRIQUE: CONCEPTUALISATION ET FONDEMENT JURIDIQUE

Parler de l'effectivité des droits culturels passe préalablement par la clarification de certains concepts. Nous allons d'abord préciser ce que nous entendons par culture, patrimoine culturel, bien culturel et droits culturels (partie 2.1). Cette approche conceptuelle permettra de cerner ensuite l'interprétation et l'applicabilité à cette question des sources conventionnelles du système africain relatives aux droits culturels (partie 2.2).

28 JV Nijen *La restitution du patrimoine culturel africain. L'Afrique au musée, les musées en Afrique: solutions et impasses* (2020) Mémoire rédigé pour l'obtention du Certificat Cours de base en muséologie ICOM 3.

29 Voir Akyeampong (n 7) 183-215; Murphy & Tiller (n 8) 257-270; Goy (n 9) 605-606; Ribeiro & Ribeiro (n 15) 1-8; Patterson (n 18) 1-560; Gay (n 22) 1-67; Sarr & Savoy (n 24); Martin (n 25); Nijen (n 28).

2.1 Clarification conceptuelle

D'entrée de jeu, il faut avouer que le triptyque conceptuel culture, patrimoine culturel et bien culturels est notoirement polysémique. On peut croire à une facilité définitionnelle à première vue, mais qui s'éclipse rapidement, quand on tente de proposer une définition de quelque nature que ce soit. En plus, l'éclipse d'une définition conventionnelle, unanimement admise, paraît consécutive à la pluralité des sources consacrées au domaine culturel.

Sur le plan universel, les deux premières conventions adoptées dans le cadre de l'Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO) – portant successivement sur les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels [30] et la protection du patrimoine mondial, culturel et naturel[31] – ne portent aucune définition du concept culture.

C'est de la Conférence intergouvernementale sur les politiques culturelles pour le développement[32] connue sous le nom de *Mondiacult*, tenue en 1982 à Mexico, que nous devons l'une des premières définitions selon laquelle:

> La culture peut aujourd'hui être considérée comme l'ensemble des traits distinctifs spirituels et matériels, intellectuels et affectifs qui caractérisent une société ou un groupe social. Elle englobe outre les arts et les lettres, les modes de vie, les droits fondamentaux de l'être humain, les systèmes de valeurs, les traditions et les croyances.[33]

Sur le plan africain, parlant des réalités de la culture africaine, le Manifeste culturel panafricain renseigne que «la culture, c'est la totalité de l'outillage matériel et immatériel, œuvres d'art, savoir et savoir-faire, langues, modes de pensée, comportements et expériences accumulées par le peuple dans son effort de libération pour dominer la nature et édifier une société toujours meilleure».[34]

Aux côtés de ces définitions disparates, il existe une définition jurisprudentielle, très englobante émanant de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Commission Africaine des Droit de l'Homme et des Peuples c. Kenya*. Pour la Cour:[35]

> [...] la culture doit être appréhendée dans son sens le plus large qui recouvre le mode de vie d'un groupe particulier dans son ensemble, notamment ses langues, ses symboles comme les modes vestimentaires et de construction d'abris, les activités économiques qu'il mène, la production des moyens de subsistance, les rituels tels que la manière particulière dont le groupe règle les problèmes et

30 Nations Unies *Recueil des Traités* vol 823, 231 N0 11806 (1970/1972).

31 Nations Unies *Recueil des Traités* Vol 1037 N0 15511 151 (1972/1975).

32 Pour plus de precisions, voir MZ Abdouddhab 'Protection du patrimoine culturel et droits de l'homme' in JAR Nafzinger & T Scovazzi (eds) *The cultural heritage of mankind* (2005) 252-253.

33 Voir le Préambule de la *Déclaration de Mexico sur les politiques culturelles*, (26 juillet-6 août 1982) para 6. Disponible sur www.unesco.org/culture/laws/mexico/html-fr/page1.shtml (consulté le 6 décembre 2021).

34 Manifeste culturel panafricain (n 11) para 13.

35 (fond) (2017) 2 RJCA 9 para 179.

> pratique les cérémonies spirituelles, son identification à ses propres héros ou modèles et les valeurs communes à ses membres qui reflètent la singularité et la personnalité du groupe.

Pour ce qui est du patrimoine culturel, le Manifeste culturel panafricain de 1969 reprend ce concept à trois reprises sans pour autant le définir. A son tour la Charte culturelle africaine de 1976 reste muette au sujet de ce qu'il faut entendre par patrimoine culturel. Par ailleurs, dans son Chapitre VIII consacré à la protection du patrimoine culturel africain, la Charte se contente de dire que «[l]e patrimoine culturel africain doit être protégé sur le plan juridique et le plan pratique dans les conditions énoncées par les instruments internationaux en vigueur et selon les meilleures normes applicables dans ce domaine».[36] Ce même écueil est perceptible dans la Charte de la renaissance culturelle de l'Afrique de 2006. Cet instrument, non encore en vigueur, reprend à 10 reprises le concept «patrimoine culturel» – auquel il accole soit le préfixe 'matériel et immatériel', soit l'adjectif 'africain' voire le qualificatif 'naturel' – tout en entretenant cependant l'ambiguïté autour de sa définition.

Il en découle à cet effet que la définition serait à rechercher dans des sources subsidiaires voire internationales. En effet, en droit international le concept «patrimoine culturel» cache une notion plurielle.[37] Matériel ou immatériel, africain ou naturel, cette notion est un terrain de prédilection de l'UNESCO. La Convention pour la protection du patrimoine mondial, culturel et naturel adoptée le 16 novembre 1972, ne définit pas concrètement le concept «patrimoine culturel». Son article 1er n'en donne que les éléments constitutifs. Entre autres

> *les monuments*: œuvres architecturales, de sculpture ou de peinture monumentales, éléments ou structures de caractère archéologique, inscriptions, grottes et groupes d'éléments, qui ont une valeur universelle exceptionnelle du point de vue de l'histoire, de l'art ou de la science, – *les ensembles*: groupes de constructions isolées ou réunies, qui, en raison de leur architecture, de leur unité, ou de leur intégration dans le paysage, ont une valeur universelle exceptionnelle du point de vue de l'histoire, de l'art ou de la science, – *les sites*: œuvres de l'homme ou œuvres conjuguées de l'homme et de la nature, ainsi que les zones y compris les sites archéologiques qui ont une valeur universelle exceptionnelle du point de vue historique, esthétique, ethnologique ou anthropologique.

Le même problème de définition se remarque pour le concept bien culturel. L'article 28 de la Charte culturelle africaine ne se contente que de citer en vrac quelques éléments susceptibles de constituer ce qu'il faut entendre par bien culturel. Cette disposition parle des archives, des objets d'art et d'archéologie.[38]

L'article premier de la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels de 1970 ne définit pas non plus le concept bien culturel. Il ne se limite d'en préciser les éléments constitutifs.[39] C'est la Convention de l'Institut international pour l'unification du droit privé (Unidroit) – adoptée le 24 juin 1995 à

36 Charte culturelle de l'Afrique (n 13) art 26.

37 C Bories *Le patrimoine culturel en droit international: les compétences des Etats à l'égard des élements du patrimoine culturel* (2011) 35.

38 Charte culturelle de l'Afrique (n 13) art 28.

Rome sous les auspices de l'UNESCO qui en donne la teneur. A son article 2, elle entend par biens culturels, «[...] les biens qui, à titre religieux ou profane, revêtent une importance pour l'archéologie, la préhistoire, l'histoire, la littérature, l'art ou la science et qui appartiennent à l'une des catégories énumérées dans l'annexe à la présente Convention». Avant cette convention, la protection des biens culturels a fait l'objet d'une convention dès le 14 mai 1954.[40] C'est la convention de La Haye sur la protection des biens culturels en cas de conflits armés qui définira pour la première fois la notion de «biens culturels» à son article 1er.[41]

Pour ce qui est des «droits culturels», une observation mérite d'être faite d'entrée de jeu. En dépit du développement des instruments relatifs aux droits de l'homme, les instruments particuliers portant sur les droits culturels sont rares, la tendance en vogue étant de mélanger ces droits avec les droits économiques et sociaux. Les textes qui portent directement sur les droits culturels sont encore à l'étape déclarative.

39 Aux fins de la présente Convention sont considérés comme biens culturels les biens qui, à titre religieux ou profane, sont désignés par chaque Etat comme étant d'importance pour l'archéologie, la préhistoire, l'histoire, la littérature, l'art ou la science, et qui appartiennent aux catégories ci-après: a) collections et spécimens rares de zoologie, de botanique, de minéralogie et d'anatomie; objets présentant un intérêt paléontologique; b) les biens concernant l'histoire, y compris l'histoire des sciences et des techniques, l'histoire militaire et sociale ainsi que la vie des dirigeants, penseurs, savants et artistes nationaux, et les événements d'importance nationale; c) le produit des fouilles archéologiques (régulières et clandestines) et des découvertes archéologiques; d) les éléments provenant du démembrement de monuments artistiques ou historiques et des sites archéologiques; e) objets d'antiquité ayant plus de cent ans d'âge, tels que inscriptions, monnaies et sceaux gravés; f) le matériel ethnologique; g) les biens d'intérêt artistique tels que: i) tableaux, peintures et dessins faits entièrement à la main sur tout support et en toutes matières (à l'exclusion des dessins industriels et des articles manufacturés décorés à la main; ii) productions originales de l'art statuaire et de la sculpture, en toutes matières; iii) gravures, estampes et lithographies originales; iv) assemblages et montages artistiques originaux, en toutes matières; h) manuscrits rares et incunables, livres, documents et publications anciens d'intérêt spécial (historique, artistique, scientifique, littéraire, etc.) isolés ou en collections; i) timbres-poste, timbres fiscaux et analogues, isolés ou en collections; j) archives, y compris les archives phonographiques, photographiques et cinématographiques; k) objets d'ameublement ayant plus de cent ans d'âge et instruments de musique anciens.

40 Voir E David, F Tulkens & D Vandermeersch *Code de droit international humanitaire* (2012) 110-118.

41 Aux termes de cette disposition '[...]sont considérés comme biens culturels, quelle que soit leur origine ou leur propriétaire: a) les biens, meubles ou immeubles, qui présentent une grande importance pour le patrimoine culturel des peuples, tels que les monuments d'architecture, d'art ou d'histoire, religieux ou laïques, les sites archéologiques, les ensembles de constructions qui, en tant que tels, présentent un intérêt historique ou artistique, les œuvres d'art, les manuscrits, livres et autres objets d'intérêt artistique, historique ou archéologique, ainsi que les collections scientifiques et les collections importantes de livres, d'archives ou de reproductions des biens définis ci-dessus; b) les édifices dont la destination principale et effective est de conserver ou d'exposer les biens culturels meubles définis à l'alinéa a, tels que les musées, les grandes bibliothèques, les dépôts d'archives, ainsi que les refuges destinés à abriter, en cas de conflit armé, les biens culturels meubles définis à l'alinéa a; c) les centres comprenant un nombre considérable de biens culturels qui sont définis aux alinéas a et b, dits "centres monumentaux"'.

Ces textes ne définissent pas ce qu'il faut entendre par droits culturels. En effet, il s'agit de la Déclaration universelle de l'UNESCO sur la diversité culturelle du 2 novembre 2001 ainsi que la Déclaration de Fribourg sur les droits culturels du 7 mai 2005. L'article 5 de la première Déclaration intitulée 'Les droits culturels, cadre propice à la diversité culturelle' ne fait que situer la place des droits culturels dans les droits de l'homme[42] pendant que la deuxième Déclaration ne donne que les matières sur lesquelles portent ces droits.[43]

Vu sous l'angle du retour des biens culturels africains, par droits culturels nous entendons principalement le droit à une vie culturelle et les droits qui lui sont connexes. Il s'agira entre autres du droit à l'identité culturelle, droit de jouir de son héritage culturel, droit à la formation et l'information sur son passé historique et culturel, droit à l'éducation qui respecte son identité culturelle, droit de pratiquer librement la religion de sa culture (culte ancestral), droit à la justice culturelle, droit des peuples à disposer de leurs biens culturels et le droit à l'autodétermination culturelle. A notre entendement, toutes ces composantes font un tout constitué des agrégats indissociables que nous qualifierons génériquement de «droits culturels». Penchons-nous maintenant sur leur conception juridique en Afrique, pour cerner le degré de conventionalité de la question relative au retour des biens culturels volés sous la colonisation.

2.2 La maturation juridique et jurisprudentielle des droits culturels dans le système africain des droits de l'homme

La conception juridique des droits culturels en Afrique n'est pas récente. Elle émane des textes variés sur le plan international[44] et régional[45] (2.2.1), et est confortée au fur et à mesure par la jurisprudence des organes africains chargés de surveiller la mise en œuvre les droits de l'homme (2.2.2). L'analyse des textes ainsi que de la

42 Selon cette disposition, 'Les droits culturels sont partie intégrante des droits de l'homme, qui sont universels, indissociables et interdépendants. L'épanouissement d'une diversité créatrice exige la pleine réalisation des droits culturels, tels qu'ils sont définis à l'article 27 de la Déclaration universelle des droits de l'homme et aux articles 13 et 15 du Pacte international relatif aux droits économiques, sociaux et culturels. Toute personne doit ainsi pouvoir s'exprimer, créer et diffuser ses œuvres dans la langue de son choix et en particulier dans sa langue maternelle; toute personne a le droit à une éducation et une formation de qualité qui respectent pleinement son identité culturelle; toute personne doit pouvoir participer à la vie culturelle de son choix et exercer ses propres pratiques culturelles, dans les limites qu'impose le respect des droits de l'homme et des libertés fondamentales'.

43 Emanant d'une équipe d'universitaires dirigée par Patrice Meyer-Bitsch désignée par 'Groupe de Fribourg', cette déclaration a pour le moment valeur de doctrine. A sa lecture, elle ne définit pas les droits culturels *in concreto* mais on comprend que ces derniers portent sur l'identité culturelle (article 3), se réfèrent à des communautés culturelles (article 4), portent sur l'accès et a participation à la vie culturelle (article 5), ont trait à l'éducation, la formation, l'information et la communication (articles 6 et 7), enfin, ils font référence à la coopération culturelle.

jurisprudence en la matière permettra de savoir en quoi et sous quelles conditions le retour des biens culturels africains contribuera à l'effectivité des droits culturels en Afrique (3).

2.2.1 Les droits culturels dans le système africain des droits de l'homme et des peuples

Dans l'itinéraire du système africain des droits de l'homme la culture et l'éducation constituent deux faces d'une même médaille. En effet, dès la création de l'Organisation de l'Unité africaine (OUA), les États membres s'étaient convenus – pour atteindre les objectifs de l'Organisation[46] – de coordonner et harmoniser leurs politiques générales, en particulier dans les domaines de l'éducation et de la culture.[47] Avec le passage de l'OUA à l'Union africaine (UA), la culture a pris une place de *leitmotiv* dans la promotion du développement durable ainsi que l'intégration des économies africaines entant que l'un des objectifs principaux de l'UA.[48] Cette promotion devra se cristalliser aux plans économique, social et *culturel*.

Au niveau international, le droit de participer à la vie culturelle de la communauté est prévu par l'article 27 de la Déclaration universelle des droits de l'homme[49] et à l'article 15 du Pacte international relatif aux droits économiques sociaux et culturels.[50] Outre le système européen de type individualiste – qui, dès le départ a nourri des méfiances injustifiées à l'égard des droits que la doctrine majoritaire occidentale renvoie dans la 'deuxième catégorie' – le système

44 A titre indicatif citons la Déclaration universelle des principes de la Coopération culturelle internationale adoptée par la quatorzième session de la Conférence générale de l'UNESCO (1966); La Convention Internationale sur la protection des biens culturels en cas de conflit armé (1954) et ses protocoles additionnels; La Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970); La Convention pour la protection du patrimoine mondial culture et naturel (1972); La Déclaration universelle de l'UNESCO sur la diversité culturelle (2001); La Convention pour la sauvegarde du patrimoine culturel immatériel (2003); La Convention sur la protection et la promotion de la diversité des contenus et des expressions culturels (2005).

45 A titre d'exemple notons le Manifeste culturel panafricain d'Alger (1969); La Charte Culturelle de l'Afrique (1976); La Charte africaine des droits de l'Homme et des Peuples (1981); la Charte de la renaissance culturelle africaine (2006).

46 Article (II)(1) de la Charte de l'OUA (1963/1963).

47 Article (II)(2)(c) de la Charte de l'OUA (1963/1963).

48 Article (3)(j) de l'Acte constitutif de l'UA (2000/2001).

49 L'article 27 de la DUDH du 10 décembre 1948 dispose: '1. Toute personne a le droit de prendre part librement à la vie culturelle de la communauté, de jouir des arts et de participer au progrès scientifique et aux bienfaits qui en résultent. 2. Chacun a droit à la protection des intérêts moraux et matériels découlant de toute production scientifique, littéraire ou artistique dont il est l'auteur'.

50 L'article 15 du PIDESC (1966/1976) dispose: '1. Les Etats parties au présent Pacte reconnaissent à chacun le droit: a) De participer à la vie culturelle; b) De bénéficier du progrès scientifique et de ses applications; c) De bénéficier de la protection des intérêts moraux et matériels découlant de toute production scientifique, littéraire ou artistique dont il est l'auteur. 2. Les mesures que les Etats parties au présent Pacte prendront en vue d'assurer le plein exercice de ce

américain, à travers l'article 14 du Protocole de San Salvador[51] et le système africain par le biais de l'article 17 de la Charte africaine des droits de l'homme et des peuples consacrent le droit de participer à la vie culturelle.[52]

Ce cadre juridique, pour le moins général, est renforcé par une panoplie des conventions sectorielles. L'avènement de ces dernières a été dicté, dès le début de l'OUA, par le besoin d'utiliser le domaine de la culture et de l'éducation comme instrument pour atteindre les objectifs de l'Organisation.

C'est dans cette perspective qu'en 1969, le Symposium du premier Festival culturel panafricain, organisé à Alger sous l'égide de l'OUA, adopta le Manifeste culturel panafricain. Dépourvu de la force contraignante, ce manifeste a une portée politique et idéologique indéniable qui tient non seulement à sa philosophie revendicative mais surtout à son engagement en faveur de la totale décolonisation culturelle des peuples africains. A cet effet, le paragraphe 5 du Préambule de ce Manifeste rappelle sans atermoiements qu'

> il y a nécessité d'un retour aux sources de nos valeurs, non pour nous y enfermer, mais plutôt pour opérer un inventaire critique, afin d'éliminer les éléments devenus caducs et inhibiteurs, les éléments étrangers aberrants et aliénateurs introduits par le colonialisme, et retenir de cet inventaire les éléments encore valables les actualiser et les faire déboucher sur le moderne et l'universel.

Par ailleurs, le Manifeste rappelle le rôle de la culture africaine dans la lutte de la libération et de l'unité africaine ainsi que son rôle dans le développement économique et social de l'Afrique. Pour ainsi dire, de l'avis du Manifeste, la culture africaine a joué un rôle capital dans l'effectivité du droit des peuples africains à disposer d'eux-mêmes tout comme l'affermissement de leur droit au développement.

droit devront comprendre celles qui sont nécessaires pour assurer le maintien, le développement et la diffusion de la science et de la culture. 3. Les Etats parties au présent Pacte s'engagent à respecter la liberté indispensable à la recherche scientifique et aux activités créatrices. 4. Les Etats parties au présent Pacte reconnaissent les bienfaits qui doivent résulter de l'encouragement et du développement de la coopération et des contacts internationaux dans le domaine de la science et de la culture'.

51 L'article 14 du Protocole additionnel à la convention américaine relative aux droits de l'homme traitant des droits économiques, sociaux et culturels (1988) prévoit le *Droit aux bienfaits de la culture* en ces termes: '1. Les Etats parties au présent Protocole reconnaissent à chacun le droit: a. de participer à la vie culturelle et artistique de la collectivité; b. de bénéficier du progrès scientifique et de ses applications; c. de bénéficier de la protection des intérêts moraux et matériels découlant de toute production scientifique, littéraire ou artistique dont il est l'auteur. 2. Les mesures que les Etats parties au présent Protocole prendront en vue d'assurer le plein exercice de ce droit devront comprendre celles qui sont nécessaires pour assurer la préservation, le développement et la diffusion de la science, de la culture et de l'art. 3. Les Etats parties au présent Protocole s'engagent à respecter la liberté indispensable à la recherche scientifique et aux activités créatrices. 4. Les Etats parties au présent Protocole reconnaissent les bienfaits qui doivent résulter de la stimulation et du développement de la coopération et des relations internationales dans le domaine de la science, de l'art et de la culture. Ils s'engagent par conséquent à encourager une plus large coopération internationale en la matière.'

52 Voir l'article 17(1) & (2) de la Charte de Banjul (1981/1986).

Pour ce qui est de la restitution des biens faisant partie du patrimoine culturel africains pillés sous l'empire colonial, le Manifeste suggère d'«[e]ngager toutes les démarches nécessaires, y inclus par l'intermédiaire des institutions internationales, pour récupérer les objets d'art et les archives pillés par les puissances coloniales, prendre les mesures nécessaires pour arrêter l'hémorragie des biens culturels qui quittent le continent africain».[53]

En 1976, convaincus du fait que tout peuple a le droit imprescriptible à organiser sa vie culturelle en fonction de ses idéaux politiques, économiques, sociaux, philosophiques et spirituels,[54] les chefs d'État et de gouvernement de l'OUA ont tenu leur Assemblée ordinaire à Port-Louis, capitale de Maurice. De ces assises fut adoptée la Charte culturelle pour l'Afrique. Traité à part entière, cet instrument compte déjà 35 ratifications à ces jours.[55] Cette Charte vise, à en croire ses objectifs, à «a) libérer les peuples africains des conditions socio-culturelles qui entravent leur développement pour recréer et entretenir le sens et la volonté de développement; b) réhabiliter, restaurer, sauvegarder, promouvoir le patrimoine culturel africain; c) affirmer la dignité de l'homme africain et les fondements populaires de sa culture; d) combattre et éliminer toutes les formes d'aliénation, d'oppression et de domination culturelle partout en Afrique, notamment dans les pays encore sous domination coloniale et raciste dont l'apartheid; e) favoriser la coopération culturelle entre les Etats africains en vue du renforcement de l'unité africaine».[56]

Pour ce qui est du sort des biens culturels pillés en Afrique, la Charte de Port-Louis s'inscrit dans une logique protectionniste pour le moins rétroactive. Par son article 28, la Charte oblige les Etats à prendre les dispositions pour mettre fin au pillage des biens culturels africains et obtenir que ces biens culturels, notamment les archives, les objets d'art et d'archéologie, dont l'Afrique a été spoliée, lui soient restitués. Cette disposition encourage les Etats à coopérer pour ce faire en ce sens qu'ils devront appuyer les efforts déployés par l'UNESCO et prendre toutes autres initiatives pour assurer l'application des résolutions de l'Assemblée générale des Nations Unies sur le retour ou la restitution des œuvres d'art enlevées à leurs pays d'origine.[57]

53 Point 9 (n 11) sur les suggestions et propositions.

54 Charte culturelle de l'Afrique (n 13) Préambule para 5.

55 https://au.int/sites/default/files/treaties/7769-sl-CULTURAL%20CHARTER%20FOR%20AFRICA%20%20%28%2A%29.pdf (consulté le 6 décembre 2021).

56 Charte culturelle de l'Afrique (n 13) article 1.

57 Depuis 1972, l'Assemblée générale des Nations Unies a adopté des nombreuses résolutions portant sur la protection et le retour des biens culturels, dans le cadre de la préservation et du développement des valeurs culturelles. Il s'agit des Résolutions 3026 A (XXVII) du 18 décembre 1972; 3148 (XXVIII) du 14 décembre 1973; 3187 (XXVIII) du 18 décembre 1973; 3391 (XXX) du 19 novembre 1975; 31/40 du 30 novembre 1976; 32/18 du 11 novembre 1977; 33/50 du 14 décembre 1978; 34/64 du 29 novembre 1979; 35/127 et 35/128 du 11 décembre 1980; 36/64 du 27 novembre 1981; 38/34 du 25 novembre 1983; 40/19 du 21 novembre 1985; 42/7 du 22 octobre 1987; 44/18 du 6 novembre 1989; 46/10 du 22 octobre 1991; 48/15 du 2 novembre 1993; 50/56 du 11 décembre 1995; 52/24 du

Adoptée en 2006 à Khartoum, la Charte de la renaissance culturelle africaine est venue – à en croire les dispositions de son article 1er – remplacer la Charte culturelle de l'Afrique de 1976. Cette Charte n'est pas encore entrée en vigueur faute des ratifications exigées.[58]

Dans son Chapitre 5 relatif à la protection du patrimoine culturel africain, cet instrument pose aux articles 26, 27 et 28 les principes autour de la restitution des biens faisant partie du patrimoine africain pillé sous la colonisation. Les articles 26 et 27 font de la restitution des biens culturels africains pillés une obligation positive – à la fois des moyens et de résultats – à la charge des Etats-parties. En effet, dans ces articles le législateur régional utilise le verbe 'devoir' qui sous-entend une obligation de résultat et non 'pouvoir' qui sous-entendrait une action à mener dans les limites du possible.[59]

L'article 28 quant à lui, oblige les Etats concernés par le retour des biens culturels volés à mettre en place les conditions physiques et environnementales appropriées à la sauvegarde et à la protection des documents et archives historiques restitués. Cette disposition semble endosser un peu le discours réfractaire du type paternaliste[60] devenu un argument derrière lequel se cachent des héritiers occidentaux – à travers une sorte de moralité tardive et centrée sur le matériel – afin d'opiner que toutes les conditions ne sont pas réunies pour que les Etats africains soient capables d'accueillir les biens à restituer.[61] Encore une fois, cet argument n'a pas à être érigé en condition *sine qua non,* ou du moins en préalable en amont de toute restitution. Le caractère comique d'une telle position est tellement saisissant quand on sait que ces biens

25 novembre 1997; 54/190 du 17 décembre 1999; 56/97 du 14 décembre 2001; 1483 du 22 mai 2003 du Conseil de sécurité de l'ONU sur l'Iraq; 58/17 du 3 décembre 2003; 61/52 du 4 décembre 2006; 64/78 du 7 décembre 2009; A.67/L.34 du 5 décembre 2012, 2199 du 12 février 2015; A/RES/70/76 du 9 décembre 2015; 2253 du 17 décembre 2015; 2341 du 24 mars 2017 et 70/130 du 13 décembre 2018. Voir http://www.unesco.org/new/fr/culture/themes/restitution-of-cultural-property/united-nations/ (consulté le 6 décembre 2021).

58 En vertu de l'article 35 de la Charte, son entrée en vigueur est conditionnée par la réception des instruments de ratification et d'adhésion de deux tiers des Etats membres de l'UA par la Commission de l'UA.

59 L'article 26 prévoit que: 'Les Etats africains devront prendre les dispositions nécessaires pour mettre fin au pillage et au trafic illicite des biens culturels africains et obtenir que ces biens culturels soient restitués à leurs pays d'origine'. Et l'article 27 d'ajouter: 'Les Etats africains devront prendre les mesures nécessaires pour garantir que les archives et autres documents historiques qui ont été illicitement déplacés d'Afrique leur soient restitués afin qu'ils puissent disposer d'archives complètes concernant l'histoire de leurs pays'.

60 Sarr & Savoy (n 24).

61 Certains chercheurs africains basés en Europe soutiennent aussi cet argument. Pour ce qui est de la République démocratique du Congo (RDC), nous pouvons citer à titre indicatif GL Kasongo 'La restitution du patrimoine culturel africain, et après? L'Etat congolais et l'urgence d'une politique de réappropriation du patrimoine culturel et de la promotion des droits culturels' in JB Akilimali & TM Makunya (dirs) *L'Etat africain et la crise postcoloniale: repenser 60 ans d'alternance institutionnelle et idéologique sans alternative socioéconomique* (2021) 331-355.

ont été volés de quelque part[62] et qu'on sait *a fortiori* que le problème de leur conservation ne s'est jamais posé avant la colonisation.

L'analyse du cadre normatif relatif au retour des biens culturels africains démontre que les principaux instruments des droits de l'homme du système africain demeurent muets sur la question. Seuls les instruments sectoriels, internationaux et résolutoires consacrés à la culture – relevant généralement du *soft law* – prévoient des fragments dans ce sens. D'où, la difficulté de situer la réglementation du retour des biens culturels dans le droit positif issu du système africain des droits de l'homme. Ce retour ne serait ainsi qu'un de plusieurs facteurs – proches ou lointains – susceptibles de contribuer à l'effectivité des droits culturels. En conséquence, tout porte à croire qu'un droit au patrimoine culturel africain, en tant que droit subjectif, demeure juridiquement d'une positivité éclipsée. Analysons dans la partie qui suit les décisions ayant trait aux droits culturels rendues par les organes de mise en œuvre du système africain des droits de l'homme.

2.2.2 Quelques repères jurisprudentiels

Dans la jurisprudence des organes de mise en œuvre du système africain des droits de l'homme, la question relative aux droits culturels a été examinée devant la Commission et la Cour africaines dans deux affaires de référence.

La première, l'affaire *Centre for Minority Rights Development (Kenya) et Minority Rights Group International (au nom de Endorois Welfare Council) c. Kenya* (affaire *Endorois*), porte sur la violation présumée de l'article 17(2) & 17(3) de la Charte africaine.[63] Il a été fait état de violations résultant du déplacement des membres de la Communauté Endorois, un peuple autochtone, de leur terre ancestrale, le défaut de leur dédommagement adéquat pour la perte de leurs biens, la perturbation de leurs activités pastorales communautaires et les violations du droit de pratiquer leur religion et leur culture, ainsi que la perturbation du processus de développement global de la Communauté Endorois.[64] Les plaignants allèguent que «les droits culturels des Endorois ont été violés doublement: Premièrement, la communauté a subi des restrictions systématiques à l'accès aux sites culturels et deuxièmement, les droits culturels de la communauté ont été violés par les dommages graves causés par les autorités kenyanes à leur vie

62 A celui qui lui posait la question de savoir si l'indépendance était précocement accordée à l'Afrique, Julius Nyerere répondait avec ironie que 'si vous volez mon jacket de ma maison, ne me demandez pas par la suite si je suis disposé ou capable à le conserver avant de me le rendre. Il était mien en premier lieu et vous n'aviez aucun droit de me le prendre'. Voir 'Prospects of Mankind; Africa: Julius Nyerere Interview' (1959) disponible sur https://www.youtube.com/watch?v=MSmYo NmN40s (consulté le 6 décembre 2021).

63 La Commission africaine dans l'affaire *Endorois*, Communication 276/03 *Centre for Minority Rights Development (Kenya) et Minority Rights Group International (au nom de Endorois Welfare Council) c. Kenya* (25 novembre 2009) para 239-251.

64 *Endorois* (n 63) para 1.

pastorale».[65] La Commission a donné gain de cause aux plaignants en concluant qu' «[e]n forçant la communauté à vivre sur des terres semi arides sans accès aux plantes médicinales et autres ressources vitales pour la santé de leurs bétails, l'Etat défendeur a créé une menace grave à la vie pastorale des Endorois. Elle convient que toute essence du droit des Endorois à la culture a été refusée, rendant illusoire le droit à toutes intentions ou buts».[66]

En 2017, la Cour africaine a rendu au fond un arrêt dans l'affaire opposant la Commission africaine au Kenya récidiviste. Pendante devant la Commission depuis 2009, dans cette affaire il s'est agi encore une fois de l'expulsion d'une communauté autochtone, les Ogiek, d'une zone forestière du Kenya, la forêt de Mau, laquelle expulsion a affecté le mode de vie traditionnel des Ogiek. Après avoir été saisie de la requête par la Commission, la Cour a rendu une ordonnance de mesures provisoires portant sur les transactions foncières dans ladite zone forestière,[67] et quatre ans après, une décision au fond a été rendue.[68] En l'occurrence, «[l]a requérante affirme que les droits culturels des Ogiek ont été violés par l'État défendeur du fait qu'il a limité leur accès à la forêt de Mau qui héberge leurs sites culturels. Selon la requérante, les démarches qu'ils ont entreprises pour accéder à leurs terres historiques à des fins culturelles se sont heurtées à des mesures d'intimidation et à des détentions. En outre, les autorités kényanes ont imposé de sérieuses restrictions à leur mode de vie de chasseurs-cueilleurs, après les avoir expulsés de force de la forêt de Mau».[69] La Cour a conclu «[…] que le défendeur a violé les droits culturels de la population Ogiek en l'expulsant de la forêt de Mau, l'empêchant ainsi de pratiquer ses activités culturelles, contrairement à l'article 17(2) et (3) de la Charte».[70]

La position de la Cour dans cette affaire nous paraît édifiante à deux niveaux. D'abord, la Cour n'a pas validé l'argument relatif au caractère évolutif de la culture qui impacterait l'effectivité des droits culturels, tout en rejetant, ensuite, l'argument du requérant fondé sur les restrictions d'un droit des minorités au nom de l'intérêt commun. En effet, l'argument du Kenya selon lequel «les Ogiek ont évolué et que leur mode de vie a tellement changé au fil du temps qu'ils ont perdu leur identité culturelle distinctive»[71] n'a pas remporté la conviction des juges. De l'avis de la Cour: «[…] le défendeur n'a pas démontré à suffisance que cette évolution et cette transformation alléguées du mode de vie des Ogiek ont totalement effacé leur spécificité culturelle. La Cour souligne à cet égard que l'immobilisme ou la pérennité d'un mode de vie statique ne peut être considéré comme un élément

65 *Endorois* (n 63) para 239.
66 *Endorois* (n 63) para 251.
67 *CADHP c. Kenya* (2013) 1 RJCA 200 (mesures provisoires) para 1-25.
68 *CADHP c. Kenya* (2017) (n 35) para 1-227.
69 *CADHP c. Kenya* (2017) (n 35) para 170.
70 *CADHP c. Kenya* (2017) (n 35) para 190.
71 *CADHP c. Kenya* (2017) (n 35) para 175.

essentiel de la culture ou de la spécificité culturelle.[72] Par ailleurs, la Cour n'a pas été convaincue par l'argument du Kenya selon lequel «les mesures d'expulsion avaient été prises dans l'intérêt commun afin de préserver l'environnement naturel du complexe forestier de Mau».[73] Elle releva à *contrario* que l'article 17 de la Charte ne prévoit pas d'exceptions aux droits culturels. Toute restriction à ces droits doit donc tenir compte de l'article 27 de la Charte.[74]

Sans verser dans des analogies dangereuses en rupture d'avec la question sous examen, il est possible de remarquer que l'argument selon lequel, par la force de la mondialisation qui aurait entrainé une certaine uniformisation culturelle faisant perdre aux africains leur culture – cette dernière s'étant fondue dans un moule de l'universalité – ne tient plus débout. Un colonisateur de mauvaise foi peut se cacher derrière pareil argument pour faire valoir le fait que la culture des peuples africains a évolué et donc son patrimoine culturel fait jadis partie du patrimoine commun de l'humanité pour ainsi dire que sa restitution a déjà perdu à la fois son intérêt, son importance ainsi que son actualité. Une fois de plus, pareil argument manque d'assise logique en fait comme en droit. Il validerait par ailleurs un discours d'assimilation culturelle déconnecté du vrai enjeu relatif au retour des biens culturels spoliés: la décolonisation des esprits.

Dans une approche prospective, penchons-nous maintenant sur les retombées du retour des biens culturels africains en termes de participation à l'effectivité des droits culturels en Afrique.

3 LE RETOUR DES BIENS CULTURELS COMME LEVIER DE L'EFFECTIVITE DES DROITS CULTURELS EN AFRIQUE

En quoi ou à quelles conditions le retour des biens culturels africains peut contribuer à l'effectivité des droits culturels? La réponse à cette question nous semble déterminante pour établir le lien de cause à effet entre retour des biens et effectivité des droits. Cependant, elle paraît de l'ordre des spéculations car en ce moment il n'est pas aisé de présager avec certitude l'impact redouté que le retour de ces biens aura sur l'affermissement et l'effectivité des droits culturels en Afrique. On tentera d'y répondre à deux temps. D'abord envisager l'articulation de la restitution en droits subjectifs (partie 3.1), ensuite l'entrevoir sous le prisme du devoir des Etats (partie 3.2).

72 *CADHP c. Kenya* (2017) (n 35) para 187. La Cour poursuit en opinant qu' 'Il est naturel que certains aspects de la culture d'un peuple, comme la façon de se vêtir, ou les symboles du groupe, changent avec le temps. Cependant, les valeurs et surtout les valeurs traditionnelles invisibles ancrées dans le sentiment d'identification de soi et la mentalité commune restent généralement les mêmes'.

73 *CADHP c. Kenya* (2017) (n 35) para 174.

74 *CADHP c. Kenya* (2017) (n 35) para 187.

3.1 L'articulation de la restitution en droits: défis, moyens et finalité

L'une des innovations de la Charte africaine des droits de l'homme et des peuples[75] réside dans l'élargissement du cercle des destinataires des droits qu'elle opère. Partant des individus à la collectivité, en passant par les peuples africains, le système africain privilégie une approche multiple pour ce qui est de destinataires primaires des droits qu'il consacre. Ce qui implique que l'effectivité des droits culturels s'apparente à l'aptitude de ces 'créanciers des droits' susmentionnés d'en exercer la faculté de jouissance. Ici, il sera donc question de cerner d'abord les défis, avant de savoir ensuite par quels moyens la restitution de biens culturels africains peut s'articuler en droits pour satisfaire une finalité bien déterminée, à savoir, participer à l'effectivité des droits culturels en Afrique.

Dans le cas d'espèce, pour ce qui est de défis, on notera d'abord la difficulté induite par la situation juridique actuelle des biens culturels africains pillés sous la colonisation. En effet, avec le temps, ces biens, meubles par leur nature, sont passés d'une main à une autre, quittant des collections privées vers les collections publiques – brouillant partiellement toute traçabilité – faisant des personnes qui détiennent légalement la propriété de ces biens 'acquéreurs de bonne foi', complexifiant d'avantage la perspective de leur retour. Ensuite, s'ajoute une panoplie des techniques juridiques auxquelles s'accrochent les anciennes métropoles. «L'indisponibilité, l'inaliénabilité et l'imprescriptibilité […] visant à protéger, mais également à contrôler la circulation de certains biens qui se distinguent par leur valeur artistique ou historique»,[76] sont autant des blocages, postérieurs au rapt, qui impactent négativement le processus de rapatriement de ces biens. A ceci s'ajoute le changement radical des circonstances géographiques. A qui restitue-t-on? Les chefferies d'hier, auxquelles ces biens ont été arrachés, sont-elles les Etats d'aujourd'hui? Il en découle ainsi un vaste chantier dont la matérialisation exacerbe et interpelle sur les réelles capacités des parties prenantes à être à la hauteur du défi.[77] Ce chantier passe par l'identification, le déclassement et le rapatriement des biens culturels susmentionnés. Ces opérations sont malheureusement à la traine. Victime de la lourdeur diplomatique à l'échelon bilatéral, elles demandent – pour produire d'effets escomptés – des moyens supplémentaires en termes de flexibilité et d'innovation. En fait, l'un des échecs de la coopération internationale en matière de restitution des biens culturels volés réside non seulement dans la non-rétroactivité du cadre conventionnel, mais aussi, dans l'existence

75 Pour ce qui est des originalités normatives de la Charte africaine voir Yemet (n 19) 199-249; F Ouguergouz *La Charte africaine des droits de l'homme et des peoples. Une approche des droits de l'homme entre tradition et modernité* (1993) 75-81.

76 C Hershkovitch 'La restitution des biens culturels. Fondements juridiques, enjeux politiques et tendances actuelles' in *Etnologie-Géopolitique* (2017) 39 1 *conflit et patrimoine* 103-121.

77 A Sylla 'Les musées en Afique: entre pillage et irrésponsabilité' (2007) 70(1) *Afrocultures* 90-101.

d'obligations pécuniaires que les Etats requérants doivent assumer pour compenser les éventuelles pertes découlant du vide matériel consécutif au rapatriement d'un bien. Cela ressort de certaines clauses que regorge l'article 7 de la convention de l'UNESCO de 1970.[78] Appliquées en l'espèce, ces clauses semblent immorales dans le sens où elles mettraient à la charge des victimes d'une injustice passée des obligations pécuniaires pour leur propre réparation. Les Etats africains, dont un plus grand nombre fait partie de la catégorie d'Etat en développement, n'ont pas souvent des moyens, et ont d'autres problèmes urgents plus pressants que le retour des biens culturels.

Pour ce qui est de moyens, on cherchera aussi à savoir les procédés à mettre en place pour articuler la restitution en droits subjectifs, l'objectif étant de préconiser une approche avant-gardiste faisant de la restitution un droit à part entière susceptible de justiciabilité. Des moyens à la fois légaux et institutionnels supplémentaires peuvent être mobilisés en faveur de cette question. Pour ce qui est des moyens légaux, l'article 5(a) de la Convention de l'UNESCO de 1970 demande aux Etats de contribuer à l'élaboration des projets de textes législatifs et réglementaires en vue de lutter contre le trafic illicite des biens culturels. La lecture parallèle des articles 2(1)[79] et 5 de cette convention fait de la coopération internationale un outil indispensable pour la lutte contre le trafic illicite des biens culturels sans relever clairement les implications de telles dispositions sur la restitution des biens pillés antérieurement à son entrée en vigueur. Avec ces 141 ratifications,[80] ouvertes aux Etats africains et européens, cette Convention peut être utilisée pour donner effet utile à la quête de restitution des biens culturels africains. Sauf que peu d'Etats-parties se sont acquittés de l'obligation de légiférer à l'interne. Et puis, étant postérieure à l'époque coloniale, elle n'est pas d'application rétroactive. D'où, l'impossibilité de résoudre un problème passé avec un cadre légal présent. L'option, non encore expérimentée à notre connaissance, est le recours aux institutions régionales pour ce faire. Leur action ne peut cependant se

78 L'article 7(b)(ii) de la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970/1972) stipule que 'Les Etats parties à la présente Convention s'engagent: [...] à prendre des mesures appropriées pour saisir et restituer à la requête de l'Etat d'origine partie à la Convention tout bien culturel ainsi volé et importé après l'entrée en vigueur de la présente Convention à l'égard des deux Etats concernés, à condition que l'Etat requérant verse une indemnité équitable à la personne qui est acquéreur de bonne foi ou qui détient légalement la propriété de ce bien. Les requêtes de saisie et de restitution doivent être adressées à l'Etat requis par la voie diplomatique. L'Etat requérant est tenu de fournir, à ses frais, tout moyen de preuve nécessaire pour justifier sa requête de saisie et de restitution. Les Etats parties s'abstiennent de frapper de droits de douane ou d'autres charges les biens culturels restitués en conformité avec le présent article. Toutes les dépenses afférentes à la restitution sont à la charge de l'Etat requérant'. C'est nous qui soulignons.

79 Article 2(1) de cette convention, 'Les Etats parties à la présente Convention reconnaissent que l'importation, l'exportation et le transfert de propriété illicites des biens culturels constituent l'une des causes principales de l'appauvrissement du patrimoine culturel des pays d'origine de ces biens, et qu'une collaboration internationale constitue l'un des moyens les plus efficaces de protéger leurs biens culturels respectifs contre tous les dangers qui en sont les conséquences'.

80 Voir les details disponibles sur https://fr.unesco.org/fighttrafficking/1970.

limiter que dans un cadre purement consultatif tendant à clarifier le contenu des droits culturels et le rôle des Etats en faveur du recouvrement des biens culturels africains éparpillés dans le monde. Ce qui ne s'est jamais réalisé. Pourtant, cette option devrait être le premier acte à poser dans le processus d'articulation de la restitution en droit.

Quant à la finalité, elle s'inscrit dans une approche purement utilitariste; à savoir, la contribution des biens faisant parties du patrimoine culturel africain à l'effectivité des droits culturels. A cet effet, le droit de participer à une vie culturelle, le droit à l'éducation, la liberté des cultes – tels que consacrés par le système africain – sont restés pendant longtemps assujettis à une certaine extraversion due à l'absence des outils nécessaires à leur libre épanouissement. De ce qui précède, la restitution s'avère en soi un droit pour les africains, *ayant droit* des biens culturels pillés. La non-restitution de ces derniers pérennise une injustice mettant en cause l'œuvre des indépendances. Elle jette aussi un discrédit sur le degré de civilisation de certains Etats qui s'accrochent à garder jalousement les preuves macabres de leur passé criminel. Ces Etats demeurent par ailleurs complice de la violation des droits culturels en Afrique par le fait de non-rapatriement des biens susceptibles de contribuer à leur effectivité.

Le retour des biens culturels africains est une question d'autodétermination culturelle s'imposant aussi bien aux Etats qu'aux individus. Reste maintenant à savoir si ce retour permettra d'en finir avec le décalage entre droit consacré et réalités vécues.

3.2 La restitution des biens sous le prisme d'obligations de l'Etat: en finir avec le décalage entre droit déclaré et réalité sociale vécue?

A l'échelle des destinataires secondaires – les Etats africains débiteurs des droits culturels – chargés de leur mise en œuvre interne, l'effectivité fait écho à un concept évaluatif de la réception et de la mise en œuvre des normes juridiques.[81] L'effectivité dont il est question s'apprécie à travers «[…] des écarts entre le droit en vigueur et la réalité sociale qu'il est censé ordonner […]».[82] Ceci, dans la mesure où, toute convention des droits de l'homme, à l'instar de la Charte africaine, a pour but – pour emprunter les mots de la Cour européenne des droits de l'homme, «[…] de protéger les droits non pas théoriques ou illusoires, mais concrets et effectifs».[83] Nous avons, dans les développements précédents,[84] précisé qu'en matière de droits culturels, le système africain est suffisamment en avance en normes et jurisprudence, le principal problème serait au niveau de l'effectivité interne, et donc, à travers la mise en œuvre par les Etats.

81 AJ Arnaud (ed) *Dictionnaire encyclopédique de théorie et de sociologie du droit* (1993) 218.

82 Arnaud (n 81) 218.

83 *Airey c. République d'Irlande* (arrêt CEDH 9 octobre 1979) para 24.

84 Ci-haut partie 2.2

Ainsi, la question qui se posera à ce niveau sera de savoir à quel seuil les Etats mettent en œuvre les droits culturels en général[85] et, particulièrement, en quoi le retour des biens culturels africains leur aiderait à s'acquitter de leur obligation de respecter et de faire respecter les droits culturels des peuples africains conformément aux prescrits de la charte africaine des droits de l'homme et des peuples,[86] ainsi que les dispositions de la charte de la renaissance culturelle.[87] Encore une fois, il faut l'avouer, on ne peut pas prédire avec exactitude l'apport des biens culturels aux capacités étatiques de garantir un plein effet aux droits culturels. Ceci, non seulement parce qu'on est en face des biens dont l'antériorité au système contemporain de protection des droits de l'homme est manifeste, mais surtout, du fait même que la question de ces biens, on l'a déjà dit, n'a aucune référence légale dans les principaux instruments dédiés aux droits de l'homme en Afrique.

Cependant, la non restitution des biens culturels à l'Afrique est de nature à affecter les Etats dans leur capacité de donner plein effet aux droits culturels en raison de leur caractère intergénérationnel. Ces droits s'opèrent par la transmission d'un héritage, à la fois matériel et immatériel, d'une génération à une autre. Dans ses dimensions économiques, ils supposent aussi la restauration du patrimoine culturel et le développement de l'industrie artistique et touristique. L'absence prolongée des biens volés à l'Afrique est un enrichissement sans cause pour leurs détenteurs, une sorte d'évasion des capitaux indispensables pour les héritiers légitimes.

L'article 17(3) de la Charte africaine ne met-il pas à la charge de l'Etat le devoir de promotion et de protection de la morale et des valeurs culturelles de la communauté? Les captations des biens culturels de l'Afrique par l'occident colonisateur est une injustice historique qui a causé la rupture de l'équilibre interculturel, condition préalable de l'universalisme.[88] Aussi, par leur essence, les droits culturels sont à la fois de jouissance individuelle et d'exercice collectif. S'adressant plus à la communauté qu'à l'individu, l'exercice de ces droits consacre un droit des peuples à l'autodétermination culturelle. Poussé à l'extrême, ce dernier concerne directement l'Etat qui, tout en s'identifiant aux peuples s'exprime à son nom.[89] Dans ce sens, le retour des biens culturels permettra aussi à l'Etat de canaliser sa politique culturelle en fonction de son passé culturel. Ce qui facilitera la création des conditions juridiques et matérielles susceptibles de planter un

85 Pour ce qui est de l'application de la Charte africaine par les Etats, voir JF Flauss & EL Abdelgawad (eds) *L'application nationale de la Charte africaine des droits de l'homme et des peuples* (2004) 1-266.

86 En vertu de l'article premier.

87 Principalement le Titre VI, Chapitre V (articles 26, 27, 28 & 29).

88 Pour l'universalisme dans le contexte du multiculturalisme voir D Lochak *Le droit et les paradoxes de l'universalité* (2010) 117-158. Pour le vide éthique de la diversité culturelle voir RN Nsasay *La Cosmodémocratie. Un principe de gouvernance pour la société technologique et mondialisée* (2008) 111-153.

89 S Sur 'Phénomène de mode en droit international' in *Le droit international et le temps* (2001) Actes 34 *Société Française pour le Droit International* (25, 26 & 27 mai 2000) 55.

environnement favorable à l'effectivité des droits culturels et d'en finir avec le décalage entre droits consacrés et réalité vécue.

Il faut mentionner que le traitement de la question de restitution est abandonné à chaque Etat pris individuellement. S'est imposée ainsi une sorte de *non-ingérence,* presqu'une démission, des instances régionales qui justifie partiellement pourquoi les instruments africains dédiés à la culture peinent à être ratifiés massivement. Un déficit en termes d'un *front commun pour la culture* est à décrier. Une fragmentation des politiques culturelles nationales s'en suive, chaque Etat se perdant dans des labyrinthes complexes de négociations, consécutives à la coopération bilatérale, s'inscrivant plus dans une posture de continuité de la dialectique conflictuelle *post-coloniale* qu'à des rapports sincèrement amicaux. En l'espèce, c'est la RDC contre la Belgique,[90] le Nigéria et le Bénin respectivement contre la Grande Bretagne et la France,[91] l'Ethiopie contre l'Italie,[92] la Namibie contre l'Allemagne;[93] le Mali,[94] le Sénégal, le Burkina, le Cameroun, la Cote d'Ivoire contre la France;[95] bref, chaque Etat mène son batail à vase clos et en ordre dispersé. Ce qui prolonge dans le temps l'avènement du rapatriement massif et définitif de ces biens, une question pourtant devenue d'ordre existentiel. Le défi à ce niveau serait dans la capacité des Etats africains à harmoniser leurs politiques culturelles.

4 CONCLUSION

«La culture, c'est ce qui demeure dans l'homme lorsqu'il a tout oublié» disait Eduard Hierrot. Priver à quelqu'un sa culture revient à le condamner à l'amnésie de lui-même. Le mot culture «comporte deux sens. L'un, en mouvement désigne le processus par lequel un esprit se forme, par l'éducation mais aussi par expérience, à l'autonomie du jugement. L'autre, statique, désigne un ensemble figé de contenus de savoir dont le nombre et la nature sont fixés par l'état d'une civilisation».[96] La présente réflexion revisite ce concept, d'un point de vue juridique, en tenant compte de ce double sens.

90 Kasongo (n 61) 331-335.

91 J Crampette 'Réparer le passé et protéger l'avenir: la protection du patrimoine culturel en Afrique subsaharienne à travers les exemples de la République du Bénin et du Nigéria' disponible sur https://1995unidroitcap.org/wp-content/uploads/2021/04/Rapport-Jeanne-Crampette.pdf

92 E Ficquet 'La stèle éthiopienne de Rome. Objet d'un conflit de mémoires' (2004) XLIV (1-2) *Cahiers d'études africaines* 369-385.

93 S Martens 'Allemagne-Namibie: enjeux d'une réconciliation post-coloniale' (2019) 3 *Politique étrangère* 129-140.

94 AZ Traoré & NY Traoré 'Les biens culturels du Bèlèdougou et du pays Dogon (mali) objets de "pillage" colonial: procès d'une stratégie' (2021) 003 1 *Akofena* 29-44.

95 J Paquette 'France and the restitution of cultural goods: the Sarr-Savoy report and its reception' (2020) 29 *Cultural Trends* disponible sur http://journals.openedition.org/etudesafricaines/4648; V Manuel 'Restituer le patrimoine "africain". Les dessous d'une démarche symbolique' (2019) 155 *Les nouvelles de l'archéologie* 47-51.

96 Blay (n 1) 176.

Comme cela a été démontré dès le départ, contrairement aux mariages mariages entre droit et politique et droit et économie, le mariage entre droit et culture a suivi un itinéraire à part faisant des droits culturels une entité normative rebelle à l'occidentalisation des droits de l'homme. Consacrés à l'article 17 de la Charte africaine, les droits culturels – articulés autour du droit à l'éducation, du droit de prendre part à la vie culturelle de la Communauté ainsi que la protection de la morale et des valeurs traditionnelles reconnues par la communauté – voguent entre tradition et modernité. Ces droits connectent l'héritage du passé au présent et s'érigent en gage de la communicabilité de cet héritage à l'avenir. A cet effet, la question relative à l'effectivité des droits culturels et celle touchant au retour des biens culturels africains pillés sous la période coloniale sont indissociables. Pour ainsi dire, quand ce retour paraît hypothétique, l'effectivité de certains droits culturels le devient tout autant.

La non-restitution des biens faisant partie du patrimoine culturel africain pillé sous la colonisation participe-t-elle à une violation persistante des droits culturels en Afrique? Sans approfondir la question dans ses dimensions historiques, politiques, philosophiques et diplomatiques, nous avons essayé de revisiter l'arsenal juridique dédié aux aspects culturels afin d'établir un lien de causalité entre retour de ces biens et effectivité des droits culturels. Trois observations d'ordre théorique, pratique et prospectif peuvent être faites à ce niveau.

Théoriquement, la question du retour des biens culturels n'est pas directement traitée par les principaux instruments du système africain de protection des droits de l'homme, rendant le lien entre droit et culture complexe à apprivoiser. C'est sous l'angle de la protection du patrimoine culturel qu'apparaisse une panoplie des normes sectorielles dédiées à la culture dans son ensemble émanant des diverses institutions. L'analyse de l'effet utile de ces textes permet d'établir un lien de causalité entre restitution des biens africains pillés sous le colonialisme et effectivité des droits culturels. La principale problématique à ce niveau reste de savoir par quel mécanisme le système africain peut contribuer à normaliser cet état de cause, en régissant entre autres des situations passées intégrant un élément d'extranéité et qui, au-delà des frontières africaines, ne relèvent pas de la nature relationnelle débiteur-créancier à l'image des rapports verticaux *Etat-individus* – comme cela est le cas en matière des droits de l'homme – mais plutôt, relèverait des rapports horizontaux notoirement diplomatiques entre souverainetés (Etat à Etat).

Pratiquement cependant, il y a un certain décalage entre les prévisions légales et la réalité sociale du fait des incohérences qui affecteraient la mise en œuvre de ces textes. Non seulement quand ils émanent d'une initiative régionale ils souffrent, à l'instar de la Charte de la renaissance culturelle africaine, du défaut de ratification par les Etats, mais aussi, quand ils relèvent de l'international ils ne se limitent qu'à l'étape déclarative. Véritable champs d'expérimentation du *soft law,* le domaine culturel dans son paradigme juridique actuel ne permet pas aux Etats de s'armer des textes à portée contraignante pour soutenir leurs efforts diplomatiques et rendre le retour des biens culturels africains une réalité. Aussi, la mobilisation des toutes les

ressources disponibles par les Etats – afin de rapatrier ces biens dans l'optique de reconstituer le patrimoine culturel africain saccagé suite au colonialisme – souffre d'un déficit en terme de volonté.

Prospectivement, il serait souhaitable d'envisager la mesure dans laquelle régionaliser cette quête. Car de plusieurs politiques culturelles des Etats africains découlent une certaine fragmentation. Il sied de remarquer qu'en dépit des avancées qu'on peut se féliciter sur le plan normatif, le cadre institutionnel spécial est quasi-inexistant. C'est depuis 2008 qu'il a été créé, sous les auspices de l'UNESCO, un comité international pour la promotion du retour des biens culturels à leur pays d'origine ou leur restitution en cas d'appropriation illégale. A notre connaissance, une structure de cette nature n'existe pas au niveau régional alors que l'Afrique reste de loin le continent le plus touché par ce phénomène. Nous voyons en sa création un pas décisif vers la canalisation ou l'harmonisation des politiques culturelles au niveau régional ainsi qu'un bon début pour une diplomatie culturelle à l'échelle africaine, indispensable pour un panafricanisme culturel actualisé.

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

*Kevin Bakulumpagi**
https://orcid.org/0000-0001-5051-6142

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

TITRE ET RÉSUMÉ EN FRANCAIS:

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

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

* LLB (Makerere), Dip LP (LDC), LLM (Dar es Salaam), Research Fellow, Advocates for Natural Resources and Development (ANARDE); kbakulu@gmail.com. I am grateful to ANARDE, Gaia Foundation and AFRICE for their input and resources in generating this paper. I equally thank the reviewers for their constructive comments.

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

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

CONTENT:

1 INTRODUCTION

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

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

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

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

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

4 Wild & McLeod (n 2) 5.

5 Verschuuren et al (n 3) 267.

groves of Ghana,[6] sacred forests of Burkina Faso,[7] sacred natural forests in the Bandjoun Kingdom of Western Cameroon[8] and the sacred sites of Bagungu clans in Uganda.

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

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

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

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

6 Verschuuren et al (n 3) 267.

7 Verschuuren et al (n 3) 131.

8 Verschuuren et al (n 3) 121.

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

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

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

2.1 Understanding the Resolution

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

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

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

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

12 Charter for African Cultural Renaissance art 14.

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

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

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

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

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

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

2.2 Understanding the conceptual and theoretical basis of the Resolution

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

2.2.1 Earth jurisprudence

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

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

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

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

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

18 Berry (n 17) 81.

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

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

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

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

2.2.2 Rights of nature

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

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

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

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

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

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

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

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

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

2.2.3 Customary governance

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

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

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

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

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

28 Koons (n 20) 7.

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

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

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

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

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

3 A HUMAN RIGHTS PERSPECTIVE

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

3.1 International instruments

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

3.1.1 International Bill of Rights

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

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

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

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

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

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

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

3.1.2 United Nations Convention on Biological Diversity (1992)

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

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

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

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

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

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

38 Art 15 of the ICESCR.

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

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

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

3.1.4 Sustainable Development Goals

The Resolution is a step towards achieving sustainable development goals by Africa in particular; SDG 9 which attributes great biodiversity loss to industry, innovation and infrastructure activities; SDG 15 on preservation of life on land; as well as SDG 14 on life under water which requires taking a more ecocentric approach that looks at nature as having rights and allows for laws to protect sacred natural sites and territories. Of particular importance, SNST in preserving biodiversity build climate change resilience upon which African nations promote climate action as per SDG 13.[41]

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

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

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

42 Rühs & Jones (n 30) 5.

43 Rühs & Jones (n 30) 1.

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

3.2 Regional instruments

3.2.1 African Charter on Human and Peoples' Rights 1981

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

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

The African Charter sets up the African Commission[46] which is charged with a duty to ensure the protection of human and peoples' rights under conditions laid down by the Charter.[47] The African Commission in exercising its mandate may consider African practices consistent with international norms on human and peoples' rights plus customs generally accepted as law.[48] It is on this basis that in passing the Resolution, the Commission drew upon customary governance systems and the need to promote African culture as a basis for such a method of culture-based conservation.

3.2.2 Charter for African Cultural Renaissance (2006)

This Charter is of particular importance to the preservation of SNST. It affirms that any human community is governed by rules and principles based on culture; and that culture encompasses, lifestyles, ways of living together, value systems, traditions and beliefs.[49] It encourages state parties to integrate cultural objectives in development strategies[50] and also to assert the dignity of African men and women as well as the popular foundations of their culture.[51] The Charter is a regional instrument that acknowledges the importance of culture including spiritual value systems and traditions in promoting African identity

45 Art 29 of the African Charter on Human and Peoples' Rights.
46 African Charter art 30.
47 African Charter art 45.
48 African Charter art 61.
49 Preamble to the Charter for African Cultural Renaissance (2006).
50 Charter for African Cultural Renaissance art 3(g).
51 Charter for African Cultural Renaissance art 3(a).

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

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

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

3.3 National instruments

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

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

3.3.1 Constitutions

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

The Constitution of Kenya 2010, however, comes out strong on rights of culture and indigenous communities. The Constitution expressly states that culture is the foundation of the nation[55] and

52 Chennells & The Gaia Foundation (n 9) 33.
53 Charter for African Cultural Renaissance art 9.
54 JR May & E Daly *Global environmental constitutionalism* (2015).
55 Art 11 of the Kenya Constitution 2010.

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

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

3.3.2 National legislation

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

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

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

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

56 Kenya Constitution art 44.
57 Kenya Constitution art 56.
58 Kenyan Constitution art part II.
59 See page 3 above.
60 The laws that provide for environment and social impact assessment such as the Tanzania National Environment Management Act 2004.

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

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

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

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

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

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

62 Inter-ministerial Order article 21.

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

64 Bryne (n 63) 1.

65 Bryne (n 63) 1.

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

4.1 Substantive issues

4.1.1 Legal pluralism

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

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

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

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

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

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

68 Preamble to the African Charter.

69 Preamble to the African Charter para 7.

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

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

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

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

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

4.1.2 Conflict of laws

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

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

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

4.1.3 Gender considerations

The African Charter is clear on equality of all persons and the need for respect of rights of women[77] yet in many cultural settings and

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

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

75 Sacred Forest Stewardship Council of India.

76 Kauffman & Sheehan (n 19) 3.

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

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

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

4.1.4 Dispute resolution

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

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

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

79 Sunde (n 27) 186.

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

4.1.5 The land question

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

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

4.1.6 Enforceability of earth jurisprudence and rights of nature

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

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

82 Art 61 of the 2010 Kenya Constitution.

83 Kenya Constitution art 63.

84 Jack et al (n 17) 512.

4.2 Practical issues

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

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

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

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

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

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

87 ACHPR (n 10) 56.

88 Kamga-Kamdem (n 78) 125.

89 Kamga-Kamdem (n 78) 125.

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

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

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

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

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

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

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

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

95 Barrow (n 93).

5 CONCLUSION AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

97 Sunde (n 27) 153.

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

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

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

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

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

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

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

100 Preamble to the Charter for African Cultural Renaissance.

The repatriation of African heritage: shutting the door on the imperialist narrative

*Fiona Batt**
https://orcid.org/0000-0002-8365-1217

ABSTRACT: This article is written in recognition of the repatriation movement, which is going through a renaissance in relation to the cultural heritage of African peoples. The collecting of African cultural heritage without free, prior and informed consent was a feature of colonialism. This article highlights the vulnerability of past and present African heritage in the light of the 'imperialist narrative'. The imperialistic narrative accompanied the act of colonialism in Africa and enabled the taking of African heritage to public and private collections in Europe and America where many remain. Much of the heritage was displayed as an African 'curiosity box' which helped to support the now discredited idea of a hierarchy of peoples. This article argues that until there is a steady stream of African heritage returning home to Africa the narrative will continue to impact *in situ* African heritage including natural resources. Until museums repatriate African heritage unreservedly, the 'imperialist narrative' will exclude the corollary narrative of African Renaissance. The article examines potential restitution/ repatriation mechanisms for African peoples and states for the return of their cultural heritage, drawing on the UNESCO conventions, the African Union Charter for African Cultural Renaissance, the Sarr and Savoy Report, 'Restitution of African Cultural Heritage. Toward a New Relational Ethics', the Report of the Expert Mechanism on the Rights of Indigenous Peoples Repatriation of ceremonial objects, human remains, and intangible resources under the United Nations Declaration on the Rights of Indigenous Peoples' and the ECOWAS 2019/2023 Action Plan on the return of cultural properties to their countries of origin.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le rapatriement du patrimoine africain: en finir avec le récit impérialiste

RÉSUMÉ: Cet article est écrit en reconnaissance du mouvement de rapatriement des biens culturels africains qui connaît une renaissance fulgurante. Le pillage du patrimoine culturel africain sans consentement préalable, libre et éclairé a été un trait caractéristique majeur du système colonial. Cet article analyse la vulnérabilité du patrimoine africain passé et présent sous le prisme du 'récit impérialiste'. Le récit impérialiste a accompagné l'acte de colonisation en Afrique et a permis de déplacer le patrimoine africain dans des collections publiques et privées en Europe et en Amérique, où il est toujours présent. Une grande partie de ce patrimoine a été présentée comme une boîte à curiosités africaine qui a contribué à soutenir l'idée, aujourd'hui discréditée, d'une hiérarchie entre peuples. Cet article soutient que tant qu'il n'y aura pas un flux régulier de patrimoine africain retournant en Afrique, le récit impérialiste continuera à avoir un impact sur le patrimoine africain *in situ*, y compris sur les ressources naturelles. Tant que les musées ne rapatrieront pas le patrimoine africain sans réserve, le 'récit impérialiste' exclura le récit corollaire de la Renaissance

* LLB (Plymouth), LLM, PhD (Bristol), Independent human rights lawyer consultant; f.battwalh@gmail.com

F Batt 'The repatriation of African heritage: shutting the door on the imperialist narrative' (2021) 5 *African Human Rights Yearbook* 328-350
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africaine. L'article examine les mécanismes de restitution/rapatriement potentiels pour les peuples et les États africains en vue du retour de leur patrimoine culturel, en s'appuyant sur les conventions de l'UNESCO, la Charte de l'Union africaine pour la renaissance culturelle africaine, le rapport Sarr et Savoy, '*Restitution of African Cultural Heritage. Toward a New Relational Ethics*', le Rapport du Mécanisme d'experts sur les droits des peuples autochtones sur le rapatriement des objets cérémoniels, des restes humains et des ressources immatérielles en vertu de la Déclaration des Nations Unies sur les droits des peuples autochtones' et le Plan d'action 2019/2023 de la CEDEAO sur le retour des biens culturels dans leur pays d'origine.

KEY WORDS: repatriation, cultural heritage, African renaissance, natural resources, restitution

CONTENT:

1 INTRODUCTION

This article is written in recognition of the repatriation movement, which is going through a renaissance, not only in relation to the repatriation of the cultural heritage of African peoples but equally the cultural heritage of indigenous peoples.[1] The article's focus is the continued retention and non-return by museums and scientists of the cultural heritage of African peoples taken under colonialism.[2] The collecting of African cultural heritage without free, prior and informed consent was a feature of colonialism.[3] One observer has noted that there is more African cultural property outside of the continent than within.[4] Museums historically have been at the forefront as collectors of African cultural heritage and as such have strongly influenced

1 F Sarr & B Savoy 'The restitution of African cultural heritage toward a new relational ethics, restitution report' (2018) (Sarr & Savoy Report) http://restitutionreport2018.com/sarr_savoy_en.pdf (accessed 12 September 2021); Report of the expert mechanism on the rights of indigenous peoples 'repatriation of ceremonial objects, human remains, and intangible resources under the United Nations Declaration on the rights of indigenous Peoples' UN Doc A/HRC/45/35 (21 July 2020) (Repatriation Report) www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Reportrepatriation.pdf (accessed September 2021).

2 The term 'heritage' is used here rather than the term cultural property as it is a broader term and includes the tangible and intangible the movable and the immovable and includes human remains.

3 E Posner 'The international protection of cultural property: some sceptical observations' (2006) 141 *University of Chicago Public Law & Legal Theory Paper* 1-22 http://www.law.uchicago.edu/academics/publiclaw/index.html (accessed 12 June 2021); V Rigg 'Curators of the colonial idea: the museum and the exhibition as agents of bourgeois ideology in nineteenth century NSW' (1994) 4 *Public History Review* 188.

4 F Shyllon 'The recovery of cultural objects by African states through the UNESCO and UNIDROIT conventions and the role of arbitration' (2000-2) *Uniform Law. Review* 219-241; Sarr & Savoy Report (n 1).

repatriation policies. [5] In truth museums remain 'the moat around the colonial castle'.[6] Additionally the call for the decolonisation of museums has highlighted some resistance to repatriation.[7]

The call for the restitution of African cultural heritage is not new. The Abuja Proclamation 1993, a declaration of the first Abuja Pan-African Conference on Reparations For African Enslavement, Colonization, and Neo-Colonization, called for financial and psychological reparations as well as restoration of artefacts. The Proclamation included: 'Convinced that numerous lootings, theft and larceny have been committed on the African People call upon those in possession of their stolen goods artifacts and other traditional treasures to restore them to their traditional owners the African People.'[8] More recently in 2019, ECOWAS initiated the ECOWAS 2019/2023 Action Plan in relation to cultural heritage.[9] The Plan called for the return of African cultural heritage, back to the countries of origin. The Plan is a West African specific initiative. Furthermore, the Plan recognises the cultural genocide context of the theft of African cultural property.[10] Significantly, the African Union 2006 Charter for African Cultural Renaissance in article 26 articulates a similar philosophy that 'African States should take steps to put an end to the pillage and illicit traffic of African cultural property and ensure that such cultural property is returned to their countries of origin'.[11] Additionally, a European 2018 initiative supports the restitution of African cultural heritage.[12] Objects designated as cultural heritage have received protection under domestic and international law as they have been linked to the identity of peoples and the identity of the state.[13]

5 C Fforde, C McKeown, & H Keeler *The Routledge companion to indigenous repatriation: return reconcile renew* (2020) 375: 'Scoping survey of historic human remains in English museums undertaken on behalf of the ministerial working group on human remains (2003) http://www.honour.org.uk/wp-content/uploads/2014/05/ScopingSurveyWGHR-2.pdf (accessed 12 September 2021).

6 F Batt *Ancient indigenous human remains and the law* (2021).

7 H Fischer 'Should museums return their colonial artefacts?' (20 June 2019) *The Guardian* www.theguardian.com/culture/2019/jun/29/should-museums-return their-colonial-artefacts (accessed 12 June 2021); N Rea 'A French Museum director pushes back against a radical report calling on Macron to return looted African art' *Artnet* (November 2018) https://news.artnet.com/artworld/quai-branly-president-macron-africa-restitutionreport-1404364 (accessed 12 September 2021).

8 See tabled motion on 10 May 1993 welcoming the Abuja Proclamation UK Parliament Early Day motion https://edm.parliament.uk/ (accessed 12 September 2021).

9 ECOWAS Community of West African States https://www.ecowas.int/ecowas-committee-on-the-return-of-cultural-properties-to-their-countries-of-origin-to-meet-in-cotonou/ (accessed 12 September 2021).

10 J Sarkin *Germany's genocide of the Herero: Kaiser Wilhelm II, his General, his settlers, his soldiers* (2011)

11 24 January 2006.

12 Sarr & Savoy Report (n 1).

13 A Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 'The right to self-determination:

The restitution/repatriation of the cultural heritage of African peoples is a pressing cultural and legal issue which needs to be addressed in relation to restitution/repatriation mechanisms. When one nation holds another nation's heritage, it not only has physical possession of that heritage but importantly it has possession of another's voice. However, until museums repatriate African heritage unreservedly, the 'imperialist narrative' will exclude the corollary narrative of African Renaissance. The African Renaissance Institute defines African Renaissance as, 'a shift in the consciousness of the individual to re-establish our diverse traditional African values, to embrace the individual's responsibility to the community and the fact that he, in community with others, together are in charge of their own destiny'.[14] The imperialist narrative is to be understood here to mean a narrative which accompanied and legitimised colonialism. Furthermore, the narrative exists today enabled by the retention of African cultural heritage in museums and universities, in former colonising states such as the UK, Germany and France.[15]

2 IMPERIALIST NARRATIVE: AFRICA AS A 'CURIOSITY BOX'

A people's cultural heritage tells a unique story about that people. Objects designated as cultural heritage 'tell us who we are and where we are from'.[16] They encapsulate the history of a nation state or of a particular people.[17] When cultural heritage is displaced and exhibited in the museums of the former colonial powers the narrative can never be culturally neutral. Asante highlights: 'We must tell our own narratives and take charge of our own historical language; there is no other way for us to realise an African renaissance'.[18] In fact only when African cultural heritage is *in situ* will the narrative tell the story of past, present and future renaissance and complete the full right to self-determination imagined by the International Bill of Rights.[19]

Felwine Sarr and Bénédicte Savoy highlight the hurdle of exclusive control in the following: 'Not to mention that the very duration,

historical and current development on the basis of United Nations instruments' UN Doc E/CN.4(2)(404) (1981) 641-77; S Stetie 'The Intergovernmental Committee: mechanisms for a new dialogue' (1981) 33 *Museum International* 116-118.

14 J Cossa 'African renaissance and globalization: a conceptual analysis and a way forward' (2015) 38(3) *Ufahamu Journal of African Studies* 165.

15 There are several themes running through the imperialist narrative – the retention of African cultural property being just one. Non-governmental organisations and aid can also be included.

16 A Elsen 'Why do we care about art' (1976) 27 *Hastings Law Journal* 951 at 952.

17 F Fechner 'The fundamental aims of cultural property law' (1998) 7 *International Journal of Cultural Property* 376-394.

18 M Asante 'Meeting Cheikh Anta Diop on the road to African resurgence' (2018) 13:1 *International Journal of African Renaissance Studies – Multi, Inter and Transdisciplinarity*.

19 Cristescu (n 13).

temporality, and meaning of these objects has been under an exclusive control and authority of Western institutional museum structures that decide how long one can have access to these objects.'[20] Prosecutor Bensouda in the International Criminal Court case of *Prosecutor v Ahmad Al Faqi Al Mahdi* stated in relation to the destruction of Malian cultural heritage the following: 'Let us be clear: what is at stake is not just walls and stones. The destroyed mausoleums were important, from a religious point of view,[21] from an historical point of view, and from an identity point of view'.[22] All three of these elements raised by Prosecutor Bensouda are relevant to the cultural value of all African cultural heritage.

A number of themes in relation to the imperialist narrative are represented in the following:

First, the removal of African cultural heritage without consent was undoubtedly part of the colonising experience. The collecting of cultural heritage including human remains of African indigenous peoples and the heroes who fought against the colonisers was a realised tool of the colonialists, enabling the theft of land and the subjugation of a people through the removal and erosion of culture. Colonialism was legitimised by the now discredited legal principles of the 'doctrine of discovery' and *terra nullius*.[23] These discredited legal doctrines were thought to be quashed by the legal principle of the right to self-determination avowed to colonial African states included in the United Nations Charter and the International Bill of Rights.[24] Regrettably, these doctrines continue to permeate the debate around the retention by museums of African cultural heritage today.[25]

Second, the remnants of the colonial project remain in the guise of paternalism in the arguments for non-return of cultural heritage put forward by museums. Museums argue that the objects are better

20 Sarr & Savoy Report (n 1).

21 *Centre for minority rights development (Kenya) and minority rights group international on behalf of Endorois welfare council v Kenya*, 276/2003, African Commission on Human and Peoples' Rights 4 February 2010, paras 283 & 173: 'cultural practices constituted a religion under international law'; 403 Resolution on the Need for a Study on the Situation of Africa's Sacred Natural Sites and Territories - ACHPR/Res 403 (LXIII) 2018.

22 Statement of the prosecutor of the International Criminal Court Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi, *Prosecutor v Ahmad Al Faqi* Al Mahdi Case ICC-01/12-01/15.

23 *Mabo v Queensland* (No 2) (1992) 175 CLR & Western Sahara case advisory opinion 1975.

24 Charter of the United Nations; UN General Assembly, International Covenant on Civil and Political Rights; UN General Assembly, International Covenant on Economic, Social and Cultural Rights.

25 S Bond 'What the "Nefertiti Hack" tells us about digital colonialism' *Hyperallergic* (24 May 2021) https://hyperallergic.com/647998/what-the-nefertiti-hack-tells-us-about-digital-colonialism/ (accessed 12 September 2021).

protected where they are in Western museums rather than in the source countries.[26] Museums offer skill sharing and lending as an alternative to restitution.[27] Paternalistic, defined as 'the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced',[28] has been linked with colonialism.[29]

Third, linked to the paternalistic argument is a theory of cultural property law, in the form of the internationalist theory. Internationalist theory does not protect all the cultural objects which have cultural significance for the cultural heritage of the state, but cultural objects which have a cultural significance to the whole world or mankind.[30] Merryman suggests the theory is 'shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated or from whatever cultural or geographical source it derives.'[31] States have drawn on this theory to retain cultural objects. Discussing the cultural heritage of Native American indigenous peoples, Hutt has described as paternalistic this theory of cultural property.[32]

Fourth, according to Smith, 'a situation is discriminatory or unequal if like situations are treated differently or different situations are treated similarly'.[33] Hutt argues that Holocaust cultural property looted and stolen in World War II has been given a different status than stolen Native American cultural property.[34] Hutt highlights the difference in the response by museums to the claims of Holocaust victims and Native Americans.[35] She suggests that most of the property taken during World War II has been returned due to voluntary efforts on the part of the museums.[36] Hutt's observation in relation to Native American cultural heritage is an observation which can be noted in the retention and non-return of African cultural heritage.

26 C Roehrenbeck 'Repatriation of cultural property – who owns the past? An introduction to approaches and to selected statutory instruments' (2010) 38 *International Journal of Legal Information*.

27 Rea (n 7).

28 M Barnett 'International paternalism and humanitarian governance' (2012) *Constitutionalism* 485

29 J Murphy 'Legitimation and paternalism: the colonial state in Kenya' (1986) 29 *African Studies Review* 55-65.

30 J Merryman 'Two ways of thinking about cultural property' (1986) 80 *American Journal of International Law* 833.

31 J Merryman 'Cultural property international trade and human rights' (2001) 19 *Cardozo Arts & Entertainment Law Journal*.

32 S Hutt 'Legal perspectives on cultural resources' in J Richman, M Forsyth & W Creek (eds) *Cultural property law theory: a comparative assessment of contemporary thought legal perspectives on cultural resources* (2004) 17.

33 R Smith 'Traditional land and cultural rights' (2001) 5 *International Journal of Human Rights* 1-18

34 S Hutt 'If Geronimo was Jewish: equal protection and the cultural property rights of Native Americans' (2004) 24 *Northern Illinois University Law Review* 527.

35 Hutt (n 34).

36 Hutt (n 34).

Fifth, states do not accept including the term 'cultural genocide' within the legal genocide framework. A particular international debate over the destruction of a people's culture arose in discussions over the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The relationship of colonialism and the active destruction of culture was highlighted by Lemkin in his research about a form of genocide he viewed as cultural genocide articulated in the following: 'Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone, after removal of the population and the colonisation of the area by the oppressor's own nationals.'[37]

Initially in the drafting stages of the Convention, cultural genocide was to be included as a crime under the Convention.[38] However, in the final Convention, cultural genocide was excluded and has since been viewed as a controversial term in law.[39] The final Convention requires a physical destruction of the group. The term resurfaced in discussions on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. However, states with large indigenous populations such as the United States of America (USA), Australia and Canada objected to the inclusion of the term, and it was removed from the final text of the document.[40]

3 MUSEUMS AND COLLECTING

In this section, the focus is on cultural heritage removed from the African continent illegally. The holders draw on the language of property and legal contracts made at the time of acquisition to justify their retention. [41]

37 R Lemkin 'Genocide – a modern crime' (1945) 4 *Free World* 39-43, www.preventgenocide.org/lemkin/freeworld1945.htm (accessed 12 June 2021).

38 Convention on the prevention and punishment of the crime of genocide – the secretariat and ad hoc committee drafts secretariat draft first draft of the Genocide Convention, prepared by the UN Secretariat UN Doc. E/447 (May 1947).

39 United Nations Economic and Social Council, Commission on Human Rights, third Session UN Doc E/CN.4/SR.76 (1948); T Musgrave Self-*determination and national minorities* (2000); See debate on Genocide Convention UN Doc E/CN.4/Sub.2/416 para 447; United Nations International Criminal Tribunal for the former Yugoslavia Judgement, *Prosecutor v Radislav Krstic* Case IT-98-33-T, 2001 the Hague: United Nations, para 480.

40 United Nations High Commissioner for human rights, indigenous issues: Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32 UN Doc E/CN.4/2003/92 (2003).

41 Rea (n 7).

The bust of Nefertiti, a queen of the 18th dynasty of Ancient Egypt, was discovered in 1912 by a German team led by archaeologist Ludwig Borchardt in Minya governorate and illegally smuggled out of Egypt in 1913.[42] The bust of Nefertiti now resides in the Neues Museum in Berlin. Egypt has been making requests to Germany since the 1920s; the most recent was in 2020 by the Tourism and Antiquities Minister Khaled al-Anani.[43] The German Museum housing Nefertiti claims the bust was acquired legally.[44] However, if you draw on the non-return of the Greek Parthenon sculptures alongside the non-return of Nefertiti, Egypt and Greece were under the occupation of the Ottoman Empire, therefore, it can be argued that permission was given by the occupying force. Under international law, today, this brings into question the legitimacy of acquisition.[45]

The British Museum has a collection of 80 objects from Ethiopia particularly Maqdala.[46] The collection includes ceremonial crosses, chalices, weapons, and other examples from the Ethiopian Orthodox tradition. In 1867, an expedition of 13 000 British soldiers entered Maqdala and stole many cultural objects. According to the British Museum, 'accompanying the soldiers was an archaeologist Richard Rivington Holmes from the British Museum who bought some of the objects from an auction specifically organised to sell the looted objects. The archaeologist returned with them to the British Museum'.[47] Presently, the British Museum has entered into agreements on skill sharing and state that they have a cordial relationship with Ethiopian representatives but are yet to return the stolen cultural heritage.[48] However, in 2018 Ethiopia's ambassador, Hailemichael Aberra Afework, requested their return.[49] Additionally AFROMET – the Association for the Return of the Maqdala Ethiopian Treasures – is an international organisation dedicated to retrieving Ethiopian cultural heritage looted during the British invasion of the country in 1867-8.[50]

42 'Egypt revives effort to retrieve Nefertiti bust "stolen" by Germany' *The New Arab* (3 October 2020) alaraby.co.uk (accessed 12 September 2021).

43 J Cohen 'Egypt's most wanted: an antiquities wish list' *history.com* (2011) https://www.history.com/news/egypts-most-wanted-an-antiquities-wish-list (accessed 12 September 2021).

44 'Germany refuses to return Nefertiti bust to Egypt' (2009) *BBC News* http://news.bbc.co.uk/1/hi/world/europe/8427269.stm#:~:text=German%20officials%20have%20ruled%20out,state%20nearly%20a%20century%20ago (accessed (12 September 2021).

45 E Cunliffe, N Muhesen & M Lostal 'The destruction of cultural property in the Syrian conflict: legal implications and obligations' (2016) 23 *International Journal of Cultural Property*.

46 British Museum Maqdala Collection https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/maqdala-collection (accessed 12 September 2021).

47 British Museum Maqdala Collection (n 46).

48 British Museum Maqdala Collection (n 46).

49 M Bailey Ethiopia calls on London Museum to repatriate objects looted 150 years ago *The Art Newspaper* (6 April 2018).

50 The Association for the return of the Maqdala Ethiopian treasures http://www.afromet.info/about_us.html (accessed 12 September 2021).

Diaspora organisations are very active in raising awareness of the theft of African cultural heritage.[51]

In relation to the human remains of African peoples, European and South African scientists stole the bodies of the San people for the purposes of racial research.[52] Furthermore, European colonialists removed skulls and human remains of 'African Heroes' who fought against the colonialists. In Tanzania there has been a call for the return of the skull of Mangi Meli a chief from Moshi in Tanzania. He was a symbol of resistance against the German occupation. He was captured and executed in 1900 and his skull was taken to Germany as a trophy. However, his skull cannot be located. There are over 200 Tanzanian remains in German collections which were collected to act as a monument to the colonial troops.[53] The Tanzanian government has requested that these human remains should be returned and buried in order to restore dignity.[54]

4 RESTITUTION/REPATRIATION

Enshrined in international human rights law is the right to an effective remedy.[55] There is a hierarchy of terms in relation to remedies. In relation to the return of cultural heritage the terms of restitution and repatriation are generally used. Restitution is associated with cultural objects and repatriation human remains.[56]

In relation to the term restitution, it is the restoration to its rightful owner of something that was unjustly taken.[57] As concluded by the Report of the International Law Commission (ILC) 'because restitution most closely conforms to the general principle that the responsible state is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not

51 See the work of the International Association for the Reunification of the Parthenon Sculptures http://www.parthenoninternational.org/ (accessed 12 September 2021).

52 C Rassool 'Human remains, the disciplines of the dead and the South African memorial complex' in D Peterson (ed) *The politics of heritage in Africa economies, histories, and infrastructures* (2015).

53 'The search in Germany for the lost skull of Tanzania's Mangi Meli' *BBC* (3 November 2018) www.bbc.com/news/world-africa-45916150accessed (12 September 2021); note the oral tradition of Letti a missing female chief from the Nyaturu tribe in Tanzania who led a rebellion against the German colonisers and whose bones cannot be traced. Webinar Ancient Indigenous Human Remains University of Bristol Human Rights Implementation Centre (8 September 2021).

54 A Cooper 'Reparations for the Herero genocide: defining the limits of international litigation' (2006) 106 *Oxford Journal of African Affairs* 113-126.

55 *Yakye Axa Indigenous Community v Paraguay* Judgment of 17 June 2005.

56 *Native American Graves Protection and Repatriation Act* (25 USC 3001 et seq, 43 CFR part 10) as a model for the repatriation of human remains; The 2001 UNESCO convention on the protection of the underwater cultural heritage article 1(a) and article 1(a)(i) includes the protection of human remains over 100 years old.

57 J Thompson 'Cultural property, restitution and value' (2003) 20 *Journal of Applied Philosophy* 251-262.

been committed, it comes first among the forms of reparation'.[58] In the discussions on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in relation to cultural heritage and sacred sites, some states argued that the term 'restitution' should be replaced with return as there was a concern that rights of third parties or the state may be infringed.[59] This reluctance can partially be explained by one commentator's observation that this implies acceptance of claims for the recognition of indigenous rights to the land and resources that they still occupy and use.[60] Australia, Canada, the United States and New Zealand initially voted against the adoption of UNDRIP. In particular Sweden had a problem with, 'restitution' in relation to cultural, spiritual and intellectual property.[61] Similar objections were raised to a restitutionary provision in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[62] In relation to ancient human remains which were removed from Africa, article 12 UNDRIP is the only international provision which considers repatriation of human remains. The term 'repatriation' is a less contentious term than 'restitution' and has its ordinary meaning and is linked to the repatriation of a body.

In situations of armed conflict, article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) contains a definition of cultural property.[63] However, as noted above, the collecting of African cultural heritage was taken under colonialism which although now considered a crime against humanity by some political commentators is not viewed as falling under the laws of war.[64] The Hague Convention includes the movable and the immovable. The cultural property of peoples and states has been targeted in war time, and if not targeted has been vulnerable to collateral damage.[65] Furthermore, occupying powers have a special responsibility to safeguard and preserve the cultural

58 Report of the International Law Commission, 53rd sess. (23 April, 1 June and 2 July-10 August 2001) in UNGAOR, 56th sess, Supp No 10 (A/56/10), (Commentary on article 35) 238-239, para (3) 240-241.

59 Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32 indigenous issues 1995/32 UN Doc E/CN.4/2001/85 (2001) para 147.

60 A Eide 'The indigenous peoples, the working group on indigenous populations and the adoption of the UN Declaration on the Rights of Indigenous Peoples' in C Charters & Stavenhagen (eds) Making *the declaration work the United Nations Declaration on the Rights of Indigenous Peoples* (2009).

61 UN Doc E/CN.4/1997/102.

62 A Vrdoljak *International law, museums and the return of cultural objects* (2006).

63 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 14 May 1954, 249 UNTS 249 UNTS p. 240, reproduced in A Roberts & R Guelff (eds) *Documents on the laws of war* (1989).

64 'France to return remains of 24 Algerian resistance fighters following prolonged campaign' (2020) Daily *Sabah* 20 August 2020; President Macron called colonialism 'a crime against humanity' France 24.com 16 February 2017.

65 C Wegener & M Otter 'Cultural property at war: Protecting heritage during armed conflict.' (2008) 23 *The Getty Conservation Institute*; US customs, Immigration and Enforcement (ICE) have intervened and returned stolen artefacts stolen after

property of the occupied state in times of war.[66] This Convention recognises the importance of cultural property to the state and to the heritage of mankind. The restitutionary provision is included in the Hague Convention first Protocol article 3, as follows:[67]

> Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

The 1970 United Nations Educational Scientific and Cultural Organisation (UNESCO) Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property provides the main regulatory framework for the protection of cultural property and a comprehensive definition in peacetime.[68] Problematically in relation to removed African cultural heritage the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property does not apply to cultural property removed before the Convention came into force in 1972. Almost all African cultural heritage was removed under colonial rule in the 19th and 20th centuries. So the failure of the Convention to address pre-1972 illicitly removed cultural property significantly reduces the effectiveness of the convention in the protection, control and return of African cultural property. Additionally, requests must be made by states.[69] This was highlighted as a gap in the UN Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations.[70] The state centric nature of the UNESCO instruments is problematic for indigenous peoples and communities of the African continent.[71]

The 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) includes the terms 'indigenous or other communities' in its Recital. The UNIDROIT Convention optimistically recognises that indigenous cultural property was taken in

the US invasion in Iraq *ICE News* (5 February 2018) https://www.ice.gov/news/releases/ice-returns-thousands-ancient-artifacts-seized-hobby-lobby-iraq (accessed 12 September 2021); 'Recent examples of successful operations of cultural property restitutions in the world.' The United Nations Educational, Scientific and Cultural Organization (12 June 2007) www.unesco.org/culture (accessed 12 June 2021); Posner (n 4).

66 Art 5 Hague Convention.

67 249 UNTS 358, entered into force 7 August 1956.

68 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, arts 4, 13(b)-(c), 14 November 1970, 823 UNTS 231.

69 Canada – Jordan, November 2018 and USA – Nepal, April 2018, http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention/ (accessed 12 September 2021).

70 UN Doc E/CN.4/Sub.2/1993/28 para 124.

71 Batt (n 6).

the colonial era and therefore could include the cultural heritage of African indigenous peoples. The Convention embraces property which may have been removed over 100 years ago. It does provide for a time limit of three years in article 5(5) for a state to bring a claim against a possessor they know holds a cultural object. Problematically there is a non-retroactivity clause contained in article 10 that 'the Convention will apply solely to cultural objects stolen after the Convention entered into force'.[72]

However, it introduces a caveat for 'a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use' in article 3(8). The caveat is contained in article 3(4) stipulates that a claim 'shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor'. UNIDROIT article 16 sets out the following to facilitate requests for return of cultural objects: (a) directly to the courts or other competent authorities of the declaring state; (b) through an authority or authorities designated by that state to receive such claims or requests and to forward them to the courts or other competent authorities of that state; (c) through diplomatic or consular channels. This provision is particularly valuable in the return of African cultural heritage debate.

In relation to intangible African cultural heritage the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage includes the terms communities and groups. Its recital recognises that communities, in particular indigenous communities, groups and individuals 'play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage'.[73] Additionally, the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established to develop a new international instrument protecting the traditional knowledge and genetic resources of indigenous peoples and communities.[74] However, after many years of work on a draft legal instrument by WIPO, the process has not come to an end.[75] Furthermore, a new instrument could face challenges concerning ratification. Additionally, the 2020 Repatriation of ceremonial objects, human remains and intangible cultural heritage under the UNDRIP

72 Article 28 United Nations Vienna Convention on the Law of Treaties (1969) United Nations, Treaty Series, vol 1155, p 331; The principle of non-retroactivity provides that the provisions of a treaty 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty.

73 2003 UNESCO Convention for the safeguarding of the intangible cultural heritage.

74 World Intellectual Property Organization (WIPO) intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore www.wipo.int/tk/en/igc/ (accessed 12 September 2021).

75 WIPO Doc WIPO/GRTKF/IC/13/5(b); For general information see also Protection of Traditional Cultural Expressions: Draft Gap Analysis WIPO Doc WIPO/GRTKF/IC/13/4(b) Rev. (2008).

suggests that the 'the Intergovernmental Committee on intellectual property and genetic resources, traditional knowledge and folklore should consider, explicitly addressing repatriation'.[76]

On the African continent positive steps have been taken by the African Regional Intellectual Property Organisation (ARIPO) and states to protect and stop the biopiracy of Traditional Knowledge (TK). ARIPO one of two African regional intellectual property legal fora have been very active in advocating the protection of TK in Africa and recognises that communities are vulnerable to the misappropriation of their TK.[77] In 2010 ARIPO adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.[78]

Encouragingly many African states have legislated *sui generis* systems for the protection of various forms of communal intellectual property and TK.[79] In South Africa, the San and Khoi peoples, classed as indigenous peoples, have lost their TK to biopiracy in the past. However, South African legislation has sought to prevent this. Furthermore in 2019 the National Khoi Council and South African San Council, facilitated by Natural Justice an NGO, signed an Access and Benefit Sharing Agreement in respect of the 'rooibos' plant.[80] Additionally, the 'Endorois Peoples' Biocultural Protocol: Sustainable Biodiversity Resource Management For Access and Benefit Sharing and Protection from Threats to Culture' is a comprehensive document which outlines protection of resources and details procedures, principles and access in relation to engagement with their resources.[81]

Complementing the UNESCO Conventions is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation. It is an advisory body set up in 1978.[82] The Committee in cases of Illicit appropriation has seen mediation and conciliation added to its mandate in 2005, in order to facilitate the return and restitution of

76 UN Doc A/HRC/45/35 para 91 at 18.

77 WIPO Symposium University of the Gambia (14 September 2012), record of meeting with author.

78 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) 2010 and administrative instructions under the regulations for implementing the Swakopmund protocol on the protection of traditional knowledge & expressions of folklore 2019.

79 Nigerian Copyright Act and the Namibian Copyright Act which protect expressions of folklore.

80 D Schroeder, R Chennells, C Louw, L Snyders & T Hodges 'The Rooibos benefit sharing agreement – breaking new ground with respect, honesty, fairness and care' (2019) 29 *Cambridge Quarterly of Healthcare Ethics* 1-26.

81 Endorois welfare council: Endorois biocultural protocol sustainable biodiversity resource management for access and benefit sharing and protection from threats to culture (2019) http://archive.abs-biotrade.info/fileadmin/media/Knowledge_Center/Pulications/BCPs/Endorois-Peoples-Biocultural-Protocol.pdf (accessed 12 September 2021).

82 http://portal.unesco.org/culture/en/ev.phpURL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 12 September 2021).

cultural property.[83] One of its fundamental tasks is to encourage and facilitate the return of cultural objects by colonial powers back to developing countries. [84] Examples of return include the marble mask of Gorgon, which was stolen from Hippo Regius in Algeria in 1996. The mask was returned to Algeria in April 2014 under an agreement with Tunisia. Furthermore, in the same month three Egyptian cultural objects were returned by Germany to Egypt.[85]

A human rights based approach should be adopted in the call for the return of African cultural heritage, particularly the cultural rights framework. Xanthaki argues that cultural claims should be argued within a cultural rights framework.[86] Linking cultural rights with the protection of heritage is seen as contentious by some states. However, on 22 March 2018, the United Nations Human Rights Council unanimously adopted resolution A/HRC/RES/37/17 on cultural rights and the protection of cultural heritage.[87]

Internationally UNDRIP is a significant legal instrument in the repatriation and restitution of the cultural heritage of indigenous peoples, although it is only a declaration. Furthermore the language of cultural rights permeates UNDRIP.[88] Article 11 UNDRIP in relation to cultural, intellectual, religious and spiritual property includes restitution and effective mechanisms and article 12 in relation to indigenous human remains present and past includes repatriation. Article 12 UNDRIP uniquely in an international instrument directly addresses the repatriation of indigenous people' human remains by including the right to repatriation in article 12(1) and a guiding but not explicit explanation on how repatriation may be achieved in article 12(2). Significantly, in 2020, the Report of the Expert Mechanism on the Rights of Indigenous Peoples Repatriation of ceremonial objects, human remains and intangible cultural heritage under the UNDRIP outlined a number of recommendations for the return of indigenous peoples' cultural heritage and human remains.[89] However, since it is an indigenous peoples' Declaration, the stolen human remains of the San and Khoe peoples would fall under the Declaration, the skull of Mangi Meli, a hero removed from Tanzania to Germany, would not.

83 General assembly resolution 'Return or restitution of cultural property to the countries of origin (11 November 1993) A/RES/50/56.

84 Vrdoljak (n 62).

85 See recent restitution cases of cultural objects using the 1970 Convention. http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-Convention/ (accessed 12 September 2021).

86 A Xanthaki *Indigenous rights and United Nations standards: Self-determination, culture and land* (2009).

87 UN Human Rights Council. Resolution 37/17: Cultural rights and the protection of cultural heritage UN Doc A/HRC/RES/37/17 (22 March 2018).

88 J Anaya 'The right of indigenous peoples to self-determination in the post declaration era' in C Charters & R Stavenhagen (eds) *Making the Declaration work* (2009).

89 UN Doc A/HRC/45/35 https://digitallibrary.un.org/record/3876274?ln=en (accessed 12 September 2021).

Additionally, the United Nations Human Rights Committee could potentially play a role in the repatriation and restitution of African cultural heritage. In the past it has played a significant role in the interpretation of culture in relation to indigenous peoples right to culture, under article 27 International Convention on Civil and Political Rights.[90]

Equally, the language of cultural rights is evident in the African Charter on Human and Peoples' Rights. Article 17 states that 'every individual may freely take part in the cultural life of his community'. Article 22 highlights the right for people to freely participate in their economic, social and cultural development, and article 29 states that 'the individual shall also have the duty; to preserve and strengthen positive African cultural values in his relations with other members of the society'. The African Commission on Human and Peoples' Rights a body which interprets the African Charter, has been particularly vigilant in protecting the cultural rights of indigenous peoples in Africa.[91] It has established its own working group on indigenous peoples and has produced an extensive study on the indigenous peoples of the African continent.[92]

International law is increasingly recognising the importance of cultural identity and the link with heritage.[93] The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (2003) recognises the importance of cultural heritage to the cultural identity of a group and highlights heritage as a component of cultural identity in its Preamble.[94] Furthermore the Committee on Economic, Social and Cultural Rights in its General Comment 21 emphasised free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices.[95] In relation to the return of cultural heritage, the cultural heritage which should be returned is: 'that which is particularly representative of the cultural identity of a specific people. The extent that the absence or withdrawal of a particular item would constitute an irreparable deprivation, and an irreplaceable loss in the chain of actions and interactions which go to make up a living culture'.[96] The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016, states as follows: 'We declare: African heritage is central to preserving and promoting our cultures thereby uplifting identity and

90 *Länsman et al v Finland* Communication No 511/1992 UN Doc CCPR/C/52D/511/1992; see General Comment 23 UN Doc CCPR/C/21/Rev.1/Add.5 para 6-7.

91 *Endorois* case (n 21).

92 Report of the African Commission's working group of experts on indigenous populations/communities (2005).

93 Y Athanasios 'Cultural property and identity issues in international law: the inadequate protection of the cultural heritage of indigenous peoples' in C Akrivopoulou & N Garipidis (eds) *Human rights and risks in the digital era: globalization and the effects of information technologies* (2012) 256-277.

94 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage Paris, 17 October 2003.

95 General Comment 21 (2009).

96 UNESCO CLT-85/WS/41 Paris 20 September 1985.

dignity'. Furthermore, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* the African Commission stated that 'the African Charter places a burden on African states to preserve the 'cultural heritage essential to indigenous group identity'.[97] Additionally the 2013 Briefing Notes on the Charter for African Cultural Renaissance recognises the role of culture in relation to political emancipation, economic and social development, cultural renewal and identity however linked to the state.[98]

The African Union Charter for African Cultural Renaissance can play a significant role in furthering the repatriation objective articulated in the 2019 ECOWAS action plan to facilitate the return of African heritage and furthermore encourage protection of *in situ* cultural heritage. It is a document which reflects the philosophy of and behind repatriation, contextualised in the encouragement of African cultural values. Its Preamble highlights the urgent need to carry out a systematic inventory with a view to preserving and promoting tangible and intangible cultural heritage, in particular in the spheres of history, traditions, history arts and handicrafts, knowledge and know how. Article 31 calls on African states to promote and protect culture and commit to African cultural values and promote a sense of identity among Africans.[99]

In relation to particularly repatriation and protection of *in situ* cultural heritage articles 26, 27, 28, and 29 are important. Article 26 provides that states should take steps to put an end to the pillage and illicit traffic of African cultural property and ensure that such cultural property is returned to their countries of origin. Article 27 stipulates that states should take the necessary measures to ensure that archives and other historical records which have been illicitly removed from Africa are returned to African governments in order that they may have complete archives concerning the history of their country. This was encouraged in the Repatriation Report 2020.[100] Article 28 states that the concerned African states shall commit themselves to provide appropriate physical and environmental conditions to safeguard and protect returned archives and historical records. This would deflect the paternalistic argument articulated by museums. Article 29 provides that African states should ratify the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Convention for the Safeguarding of the Intangible Cultural Heritage.[101]

Finally, in relation to the legal protection of African cultural heritage, strategic human rights litigation should not be ruled out. The telling of the story, the framing of the narrative in the voice of African communities in relation to the theft of their cultural heritage, can be

97 *Endorois* case (n 21) para 283.

98 *Endorois* case (n 21) para 2.3 and 2.4.

99 Charter for African Cultural Renaissance articles 3, 4, & 10.

100 Sarr & Savoy (n 1) 18.

101 F Shyllon 'Implementation of the 1970 UNESCO: failure to grasp the nettle' UNESCO headquarters 20-21 June 2012.

very powerful in judicial and extra judicial settings. The main strategy behind strategic litigation is to use test cases to achieve change not only for the individual or group seeking justice in a particular case but for similar individuals or groups facing similar challenges, thus affecting broader change.[102]

Furthermore, two cultural heritage theories support the return of African cultural heritage. The moralist theory of cultural property underpins the return of cultural heritage and requires the holders of African cultural heritage to behave honourably.[103] The moralist theory would explain a museum giving back African cultural heritage without prolonged delays because it would be the 'right thing to do'.[104] The theory recognises the existence of power disparities in disputes. It recognises that there may be an unequal bargaining relationship in cultural heritage disputes.[105] On the other hand, the nationalist theory is not based on 'the right thing to do' but strongly linked with the cultural identity of peoples. It has the potential to protect and return African cultural heritage. Merryman suggests that cultural nationalism 'implies the attribution of national character to objects, independently of their location or ownership, and legitimises national export controls and demands for the repatriation of cultural property'.[106] Cristescu, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that the legal principle of the return of cultural property recognises that cultural objects were removed to 'mother countries' during the colonial period and should be returned.[107]

Restitution and repatriation contribute to restorative justice.[108] Restorative justice 'is a way of healing wounds and moving onto the path of reconstruction and reconciliation' particularly for individuals and communities'.[109] In the Mangi Mali example his relatives are still grieving and in the wider Tanzanian community he was a hero who

102 B Schokman, DCP Mohen & D Piper 'Short guide – strategic litigation and its role in promoting and protecting human rights' (2012) *Lawyers eradicating poverty*; H Duffy *Strategic human rights litigation* (2018).

103 S Hutt 'Legal perspectives on cultural resources' in J Richman, M Forsyth, & W Creek (eds) *Cultural property law theory: a comparative assessment of contemporary thought legal perspectives on cultural resources* (2004) 17-36.

104 Manchester museum has a particularly equitable record in relation to responding to claims and returning indigenous remains. Manchester Museum gave back four tattooed skulls and two limb bones to Australian Aborigines in 2004 http://www.elginism.com/similar-cases/manchester-museum-to-return-maori-remains-to-new-zealand/20081117/1555/ (accessed 12 September 2021).

105 S Harding 'Justifying repatriation of native American cultural property' (1997) 72 *Indian Law Review* 723

106 J Merryman *Thinking about the Elgin Marbles* (1985) 83.

107 Cristescu (n 13); United Nations Educational, Scientific and Cultural Organization return and restitution of cultural property: a brief resume (Paris 20 September 1985) CLT-85/WS/41.

108 C Garbett 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2017) 5(2) *Restorative Justice* 198-220.

109 L Lixinski 'Cultural heritage law and transitional justice: lessons from South Africa' (2015) 9 *International Journal of Transitional Justice* 278-296.

fought against colonialism.[110] It is worth noting the increasing discussions on symbolic reparations, generally contextualised in the building of a memorial, memorialising an event remembering the event.[111] Symbolic measures 'are aimed at recognizing the dignity of the victims, expressing a criticism or moral sanction towards the perpetrators, and pointing out the importance of prevention'.[112] In the context of the return of African cultural property the event being the removal of cultural heritage by the colonialists and the symbolic reparation being the process of return and actual return. Further many museums are state funded and public bodies, for example the British Museum in London, which houses the Ethiopian stolen cultural heritage mentioned in this article, and the Neues Museum in Berlin housing the Bust of Queen Nefertiti which were removed under disputed circumstances. Return would raise the moral sanction and the language of the perpetrator and the victim for the states concerned. Farida Shaheed's UN study on the right of access to and enjoyment of cultural heritage, highlighted the importance of knowing one's culture and the trauma and disconnect caused if access is denied.[113] Recently in Namibia, human remains from the Nama and Herero indigenous peoples collected during colonial rule and studied by scientists have been returned from Germany by the Museum of Medical History.[114] Here the repatriation retold the story of the genocide that took place under German colonial rule.[115]

5 AFRICAN RENAISSANCE

The African Renaissance narrative ebbs and flows.[116] Cheikh Anta Diop is considered to be the father of the African Renaissance movement.[117] Asante stressed the African peoples' relentless struggle to tell their own stories and take charge of their own historical languages is a

110 'Executed Tanzanian hero's grandson takes DNA test to find lost skull' (20 November 2018) *BBC News* https://www.bbc.co.uk/news/world-africa-46277158 (accessed 12 September 2012).

111 Renaissance Monument Dakar Senegal.

112 R Greeley, M Orwicz, J Falconi, A Reyes & F Rosenberg 'Repairing symbolic reparations: assessing the effectiveness of memorialization in the Inter-American system of human rights' (2020) 14 *International Journal of Transitional Justice* 165-192.

113 F Shaheed 'The right to access to and enjoyment of cultural heritage as a human right' UN Doc A/HRC/17/38 (2011).

114 D Carvajal 'Museums confront the skeletons in their closets' (20 May 2014) *New York Times* https://www.nytimes.com/2013/05/25/arts/design/museums-move-to-return-human-remains-to-indigenous-peoples.html (accessed 12 September 2021).

115 Sarkin (n 10)

116 B Ayeleru 'African cultural rebirth: a literary approach' (2011) 23(2) *Journal of African Cultural Studies* 165-175.

117 D Turello *Africa past and future: A conversation with Toyin Falola* (14 December 2016) https://blogs.loc.gov/kluge/2016/12/ (accessed 12 September 2021).

prerequisite for achieving an African Renaissance.[118] A reaction against European imperialism has been noted as a catalyst that triggered the call for an African Renaissance in the 20th century.[119] Very recently, the African Union (AU) declared the year 2021 as 'The African Union year of arts, culture and heritage: levers for building the Africa we want'.'[120] Lo argues that African culture should be the central element in any renaissance movement in Africa and contends that music and poetry act as a disabler of the imperialist narrative.[121]

The Sarr and Savoy Report highlights that 60 per cent of the population in Africa is under the age of 20 years.[122] They stress the importance of access to culture for the youth of Africa.[123] This is supported by Makoko Tarawia Kihundwa, a young Tanzanian Chagga man, who stated that 'Mangi Meli's skull must be found and returned to the museum in Dar es Salaam so the young generation can know their history'.[124] A question put to an educated young Egyptian man in relation to the iconic figure of Nefertiti still residing in the Neues Museum in Berlin is also illustrative. When I asked him, 'what do you think about the bust of Nefertiti being in Germany in a German Museum,' he asked: 'Who is Nefertiti?'. The bust of the former Egyptian queen internationally is a well-known icon of Egyptian history and culture and has now moved from a national icon to an international icon, moving from the cultural heritage of the nation state to the cultural heritage of 'mankind'.

The return of African cultural heritage can contribute to African economies particularly in the area of heritage tourism. Ghana's Year of Return programme in 2019 attracted over one million diaspora visitors and generated $US 1.8 billion.[125] Egypt has built a viable tourism economy around its museums and monuments although concerns over acts of terrorism have impacted the tourism industry in recent years. The returning Benin Bronzes to Nigeria have required the building of the Emowaa Pavilion. Governor Obaseki, talking about the new pavilion to house the returning Benin Bronzes said: 'The integration of Emowaa (the new museum) into the daily life of our people, and its impact on a greatly improved urban fabric, will begin with the opening

118 Asante (n 18); G Kamwendo 'Denigrating the local glorifying the foreign: Malawian language policies in the era of African renaissance' (2010) 5(2) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 270-282.

119 M Lo 'Writing and righting the African renaissance' (2019) 3 *Research Africa Reviews*.

120 African Union concept note on 2021 as the year of arts, culture and heritage in Africa https://au.int/en/documents/20210322/concept-note-2021-year-arts-culture-and-heritage-africa (accessed 12 September 2021).

121 Lo (n 119); D Nabudere 'The African renaissance in the age of globalization' (2001) 6 *African Journal of Political Science/Revue Africaine de Science Politique*.

122 Sarr & Savoy (n 1).

123 Sarr & Savoy (n 1).

124 Batt (n 6) 146

125 'African diaspora: did Ghana's year of return attract foreign visitors?' *BBC* (30 January 2020).

of the Emowaa Pavilion'.[126] Building a museum, for example in Dar es Salaam, would bring in added revenue on top of the revenue from conservation tourism, and could be classed as sustainable development and contribute to the sustainable development goals.[127]

Furthermore, the African Renaissance has been linked to human rights and the emancipation of women from patriarchal societies.[128] The ideology of the African Renaissance clearly contributes to the development of second and third generation rights. However, Fidèle Ingiyimbere argues that the language of human rights is not helpful as it 'incarnates an imperialist ideology and is furthermore rooted in Western democracy'.[129] The inclusion of human rights in the discussion presents the danger of adding to the imperialist narrative unless, as Asamoa Acheampong suggests, human rights are interpreted from an African perspective.[130]

A suggestion to strengthen the African Renaissance narrative and counter the imperialist narrative is that mineral resources should be included under the umbrella term 'cultural heritage'. The African continent is a resource-rich continent. However, as the African Commission on Human and Peoples' Rights has highlighted in its Resolution 236 on Illicit Capital Flight from Africa: 'Africa is embroiled in a vicious circle of poverty, malnutrition, diseases and death because its revenue potential is being drained by multinational companies and individuals through exploitation of the loopholes and weaknesses of laws and of the monitoring system'. Furthermore: 'foreign aid is a short-term, unsustainable and unreliable form of revenue; this requires State Parties to take measures to create a revenue base'. [131] Along with measures such as local content laws which contribute to capital from mineral resources staying in Africa, viewing mineral resources as cultural heritage will further enhance their protection and associated revenue.[132]

126 'Museums association trustees approve return of Benin bronzes held in Berlin museums' Museum Association (2 July 2021) https://www.museumsassociation.org/museums-journal/news/2021/07/trustees-approve-return-of-benin-bronzes-held-in-berlin-museums/ (accessed 12 September 2021).

127 F Nocca 'The role of cultural heritage in sustainable development: multi-dimensional indicators as decision-making tool' (2017) 9 *Sustainability*.

128 K Acheampong 'Human rights and the African Renaissance' (June 2000) 5 *African Journal of Political Science/Revue Africaine de Science Politique*.

129 F Ingiyimbere 'Human rights as an imperialist ideology' in *Domesticating human rights* (2017).

130 Acheampong (n 128).

131 ACHPR/Res 236(LIII)2013.

132 The natural wealth and resources contracts (review and re-negotiation of unconscionable terms) regulations, 2020 (the unconscionable terms regulations) made under section 8 of the Natural Wealth and Resources Contracts (review and re-negotiation of unconscionable terms) Act, CAP 450 of 2017 (the Unconscionable Terms Act); the Natural Wealth and Resources (Permanent Sovereignty) (Code of Conduct for Investors in Natural Wealth and Resources) Regulations, 2020 (the code of conduct) made under section 13(2)(a) of the Natural Wealth and Resources (Permanent Sovereignty) Act, CAP 449 of 2017 (the Permanent Sovereignty Act).

The African Diaspora, which has traditionally contributed to the improvement of per capita income in Africa, is now playing an important role in the call for the return of African cultural heritage. In August 2021 the British Museum closed a gallery housing the Benin Bronzes in response to a protest tour urging the institution to return the colonial looted artifacts.[133] In 2020, the Congolese activist Mwazulu Diyabanza, who has been calling for reparations for colonialism, slavery and cultural appropriation, was arrested on a number of occasions for the attempted theft of African cultural heritage from European Museums.[134] Mr Diyabanza drew attention to the imperialist narrative in relation to retained African cultural heritage.

6 RECOMMENDATIONS

The most recent report in the area of repatriation is the 2020 United Nations Expert Mechanism on the Rights of Indigenous Peoples, 'Repatriation of ceremonial objects, human remains, and intangible resources under the United Nations Declaration on the Rights of Indigenous Peoples Report' (Repatriation Report).[135] The Repatriation Report has been referred to in this article, firstly, because there are many African peoples recognised as indigenous peoples on the continent.[136] Secondly, the recommendations in their entirety are worthy of consideration. In relation to all indigenous peoples the Repatriation Report envisages an International Indigenous Repatriation Review Committee comprised of indigenous peoples, museum professionals, human rights experts and others.[137] The Repatriation Report places the onus of responsibility for the establishment of a repatriation committee on UNESCO in its capacity as facilitator of repatriation and provider of advice.[138] My recommendation is that in both cases (the return of indigenous peoples' cultural heritage and the return of African cultural heritage) UNESCO should not be the lead in relation to drawing up a committee due to the politically charged nature of restitution. Reflecting on the call for return of illicitly removed cultural heritage in article 27 of the Charter for African Cultural Renaissance, an African based commission working on the restitution of African cultural heritage would be better suited to the task. It is possible for such committee to be established under the auspices of the African Union or the African Commission on Human and Peoples' Rights.

133 B Reilly 'British Museum closes gallery in response to protestors' (August 2021) https://morningstaronline.co.uk/article/b/british-museum-closes-gallery-in-response-to-protesters

134 A Marshall 'To protest colonialism, this Congolese activist takes artifacts from Paris museums' *New York Times* (nytimes.com) (accessed 12 June 2021).

135 Repatriation Report (n 1).

136 Report on indigenous peoples in Africa (n 1).

137 Repatriation Report (n 1) para 90.

138 Repatriation Report (n 1) para 90.

The Repatriation Report encourages partnerships between all stake holders, UNESCO, WIPO, states and indigenous peoples.[139] This is happening already particularly in relation to the Benin Bronzes which have received much publicity. Germany has reached an agreement with Nigeria to return a share of stolen Benin Bronzes looted by the British. Furthermore, many British museums are returning Benin Bronzes unconditionally.[140]

Furthermore, the Repatriation Report encourages bilateral agreements between states. There are several bilateral agreements between states which have facilitated the repatriation of indigenous human remains. Such agreements include those between the UK and Australia concluded in 2000 and between France and Australia agreed in 2004.[141]

The Sarr and Savoy Report an African-specific restitution Report recommends online inventories and databases as a way of protecting and contributing to the return of African cultural heritage. This approach is similar to the WIPO's initiative, set up to protect traditional knowledge. Further, the Report introduces the sharing of digital content through a plan for the systematic digitisation of documents that have yet to be digitised concerning Africa.[142] In relation to the views of indigenous peoples, databases and digitalisation have been viewed with some concern due to loss of control of custodianship.[143] Furthermore the ECOWAS 2019/2023 Action Plan on the return of cultural properties to their countries of origin envisages a Regional Committee in charge of the monitoring of the action plan.[144]

The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation is another avenue to consider. However, it appears to be underutilised by states possibly because of the political nature of a demand for restitution by one state to another and the non-retroactive nature of the conventions.[145] Optimistically, the text of the UNIDROIT convention a private law convention could accommodate

139 Repatriation Report (n 1) para 85.

140 G Adams 'Museums Association Trustees approve return of Benin bronzes held in Berlin museums' 2 July 2021Museum Association News accessed 12 July 2021 https://www.museumsassociation.org/museums-journal/news/2021/07/trustees-approve-return-of-benin-bronzes-held-in-berlin-museums/# (accessed 12 June 2021).

141 H Keeler 'Repatriation symposium: indigenous international repatriation' (2012) 44 *Arizona St Law Journal.*

142 Sarr & Savoy (n 1) 67.

143 Keynote address by the UN Special Rapporteur on the Rights of Indigenous Peoples, Professor S James 26th session of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Indigenous Panel: Intellectual property and genetic resources: What is at stake for indigenous peoples? (3 February 2014).

144 ECOWAS (n 9).

145 E Campfens 'Whose cultural objects? Introducing heritage title for cross-border cultural property claims' (2020) 67 *Netherlands International Law Review* 257.

the claims of African peoples for the restitution of African cultural heritage.

7 CONCLUSION

The AU 2021 vision of embracing culture and heritage as a lever for change in combination with the support for the return of African cultural heritage from within Africa and outside of Africa, draws an optimistic picture for the future. However, it is clear that there is a continuing struggle between the imperialist narrative and the African Renaissance narrative. Museums are removing themselves from a call for the partial or total decolonisation of museums and have been said to be 'burying their head in the sand.'[146] Furthermore, museums are stating 'not every collection is tainted with the 'impurity of a colonial crime'.[147] In relation to a repatriation mechanism for the return of African cultural heritage, the question is: Will the continent accept the probable solution foisted on it that UNESCO remains the powerhouse in relation to the repatriation and restitution of African cultural heritage? Or will it find its own solution of a restitution commission under the auspices of the African Union?

146 L Bakare 'British museum "has head in sand" over return of artefacts' 21 June 2019 *Guardian*.

147 Rea (n 7).

La protection juridique des intérêts culturels africains en droit international des investissements

*Rimdolmsom Jonathan Kabré**
https://orcid.org/0000-0001-6889-2517

RÉSUMÉ: Cette contribution s'inscrit dans le cadre des interactions entre droits culturels et droit des investissements et questionne la protection accordée aux considérations culturelles africaines en droit international des investissements. S'il est généralement admis que la culture occupe une place centrale dans la quête de développement du continent et est un élément d'identification des peuples africains, comment le droit international des investissements protège-t-il ces considérations culturelles africaines, sachant que la protection accordée aux investissements peut avoir un impact sur certains aspects culturels des pays dans lesquels ils sont réalisés ? Bien que les considérations culturelles aient progressivement émergé dans le paysage normatif du droit des investissements, l'article soutient que la prise en compte de ces considérations reste, à bien d'égards, insuffisante dans le contentieux des investissements. L'article va plus loin en discutant de certaines réformes pour mieux protéger ces considérations et ainsi permettre au levier culturel de pleinement jouer son rôle dans la construction de l'Afrique que nous voulons.

TITLE AND ABSTRACT IN ENGLISH:

The legal protection of African cultural interests in international investment law

Abstract: This contribution looks at the interactions between cultural rights and investment law and investigates the protection afforded to African cultural considerations in international investment law. If it is generally accepted that culture plays a central role in the continent's quest for development and is an identifying factor for African peoples, how does international investment law protect African cultural considerations, knowing that the protection granted to investments may have an impact on certain cultural aspects of the countries in which they are being executed? Although cultural considerations have gradually made their way into the normative landscape of investment law, this article argues that taking these considerations into account remains, in many respects, insufficient in investment litigation. The article goes further to discuss certain reforms to better protect cultural considerations and thus allow the cultural lever to fully play its role in achieving the Africa we want.

* Docteur en droit de l'Université de Lausanne (Suisse), Chercheur postdoctoral et Responsable du programme de Master in *International Trade and Investment Law in Africa* à l'Université de Pretoria (Afrique du Sud). Titulaire d'une maitrise en droit international et comparé de l'Université de Lausanne et d'une maitrise en droit judiciaire privé de l'Université Thomas Sankara du Burkina Faso; rimdolmsom.kabre@gmail.com

RJ Kabré 'La protection juridique des intérêts culturels africains en droit international des investissements' (2021) 5 *Annuaire africain des droits de l'homme* 351-374
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MOTS CLÉS: cultures africaines, contentieux d'investissements, droits des peuples indigènes, droit d'agir, tierce-participation

SOMMAIRE:

1 INTRODUCTION

La culture est un concept dont les contours ne sont pas toujours faciles à cerner. Ce constat semble être partagé aussi bien par la Cour africaine des droits de l'homme et des peuples (la Cour africaine ou la Cour) que par la Charte de la renaissance culturelle africaine (la Charte de la renaissance). Pour la Cour,

> [l]a culture peut être définie comme un ensemble complexe qui comprend une relation spirituelle et physique avec la terre ancestrale, la connaissance, la croyance, l'art, le droit, la morale, les coutumes et toutes autres capacités et habitudes acquises par l'humanité en tant que membre de la société – l'ensemble des activités matérielles et spirituelles et des produits d'un groupe social donné qui le distinguent des autres groupes semblables. La culture englobe aussi la religion, la langue et les autres caractéristiques d'un groupe.[1]

De son côté, la Charte perçoit la culture comme un

> ensemble de caractéristiques linguistiques, spirituelles, matérielles, intellectuelles et émotionnelles de la société ou d'un groupe social et qu'elle englobe, outre l'art et la littérature, les modes de vie, les manières de vivre ensemble, les systèmes de valeur, les traditions et les croyances.[2]

Cet ensemble, qui est composé d'éléments tangibles et intangibles, a une importance particulière car étant, *inter alia*, un facteur d'identification, d'affranchissement et de développement des peuples. La culture permet, en effet, d'identifier un peuple et de le distinguer des autres. Dans ce sens, la Charte de la renaissance rappelle que la culture est le socle de toute communauté humaine.[3] Ensuite, et dans le cas spécifique des peuples africains, la culture a joué un rôle déterminant dans leur affranchissement car, et en dépit de

> la domination culturelle qui, au cours de la traite des esclaves et de la colonisation, a entraîné la négation de la personnalité culturelle d'une partie des peuples africains, falsifié leur histoire, systématiquement dénigré et combattu les valeurs africaines, et tenté de remplacer leurs langues par celle du colonisateur, les peuples

1 *Commission africaine des droits de l'homme et des peuples c. Kenya* (fond) (2017) 2 RJCA 9, para 170.

2 Selon le préambule de la Charte de la renaissance culturelle africaine, du 24 janvier 2006, considérant 2.

3 Charte de la renaissance (n 2), préambule, considérant 2.

> africains ont pu trouver dans la culture africaine les forces nécessaires à la résistance et à la libération du continent.[4]

En conséquence, la culture fait l'objet d'une promotion et d'une protection tant au niveau universel qu'africain. Sur le plan universel, on pourrait citer des instruments juridiques tels la Convention internationale sur la protection des biens culturels en cas de conflit armé,[5] la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels,[6] la Convention pour la protection du patrimoine mondial culture et naturel,[7] la Déclaration universelle de l'UNESCO sur la diversité culturelle,[8] la Convention pour la sauvegarde du patrimoine culturel immatériel,[9] la Convention sur la protection et la promotion de la diversité des expressions culturelles,[10] la Déclaration universelle des principes de la Coopération culturelle internationale,[11] la Déclaration et le programme d'action de Vienne,[12] de même que les deux Pactes internationaux des Nations unies relatifs aux droits civils et politiques et aux droits économiques, sociaux et culturels. Tous ces instruments contiennent des dispositions traitant des questions culturelles.

Sur le plan régional africain, la promotion et la protection de la culture ont toujours été une préoccupation commune des États. Et cela s'est reflété dans un nombre important de textes et d'instruments juridiques adoptés au niveau continental, de la Charte de l'Organisation de l'Unité africaine[13] à l'Acte Constitutif de l'Union africaine[14] en passant par d'autres textes tels le Manifeste Culturel Panafricain,[15] la Charte culturelle de l'Afrique,[16] la Charte africaine des droits de

4 Charte de la renaissance (n 2), préambule, considérant 5.

5 Convention de La Haye pour la protection des biens culturels en cas de conflit armé, avec règlement d'exécution, 14 mai 1954.

6 Adoptée à Paris, le 14 novembre 1970.

7 Adoptée par la 17e session de la Conférence générale de l'UNESCO, Paris, 16 novembre 1972.

8 Adoptée par la 31e session de la Conférence générale de l'UNESCO, Paris, 2 novembre 2001.

9 Adoptée par la 32e session de la Conférence générale de l'UNESCO, Paris, 3 novembre 2003.

10 Adoptée par la 33e session de la Conférence générale de l'UNESCO, Paris, 20 octobre 2005.

11 Adoptée par la 14e session de la Conférence générale de l'UNESCO, Paris, 4 novembre 1966.

12 Adoptés par la Conférence mondiale sur les droits de l'homme le 25 juin 1993.

13 Voir art 2(2)(c) de la Charte de l'Organisation de l'Unité africaine, 25 mai 1963.

14 L'un des objectifs de l'Union est la promotion du développement durable aux plans économique, social et culturel, ainsi que l'intégration des économies africaines, voir art 3(j) de l'Acte Constitutif de l'Union africaine, 11 juillet 2000.

15 Adopté par le Symposium du premier Festival culturel panafricain, organisé en 1969 à Alger sous l'égide de l'Organisation de l'Unité africaine.

16 Du 5 juillet 1976.

l'homme et des peuples,[17] la Charte de la renaissance et l'Agenda 2063.[18] La culture fait aussi l'objet d'une protection juridictionnelle et quasi-juridictionnelle par des organes de l'Union africaine notamment la Cour africaine[19] ainsi que la Commission africaine des droits de l'homme et des peuples.[20] Dans la célèbre affaire *Commission africaine des droits de l'homme et des peuples c. Kenya* (affaire *Ogiek)*, par exemple, la Cour a rappelé que la protection de la culture est particulièrement importante pour les sociétés autochtones compte tenu du fait que celles-ci sont, le plus souvent, victimes des activités économiques et des programmes de développement à grande échelle.[21] L'affaire *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) c. Nigeria* (affaire *Ogoni*) est un exemple illustratif de cet état de fait dans la mesure où la minorité autochtone du sud du Nigeria, le peuple Ogoni, a vu son environnement de vie, sa santé et un certain nombre de ses droits (y compris les droits culturels) gravement affectés par les activités d'exploitation pétrolières menées par le gouvernement nigérian en partenariat avec des investisseurs étrangers.[22]

La présente contribution s'inscrit justement dans le contexte des interactions entre droits culturels et activités économiques[23] et s'interroge sur la protection accordée aux considérations culturelles africaines dans le cadre du droit international des investissements. Cultures et droit des investissements peuvent, en effet, interagir de plusieurs manières: D'une part, il peut s'agir d'une incidence du droit des investissements sur la culture notamment lorsque la volonté d'attirer les investissements débouche sur un assouplissement des normes culturelles et de la protection accordée aux populations indigènes de l'État-hôte. D'autre part, des standards très élevés en matière de protection du patrimoine culturel de l'État hôte peuvent

17 Adoptée le 27 juin 1981 et entrée en vigueur le 21 octobre 1986. La culture est mentionnée en plusieurs endroits dans la Charte africaine des droits de l'homme et des peuples notamment dans le préambule, à l'article 17(2) & (3), à l'article 20(3) et à l'article 22(1).

18 Selon l'Aspiration 5 de l'Agenda 2063, l'Afrique aspire à se doter 'd'une forte identité culturelle, d'un patrimoine commun, et de valeurs et d'éthique partagées'.

19 *Commission africaine* (n 1).

20 Commission africaine des droits de l'homme et des peuples, Communication 276/03 *Centre for Minority Rights Development (Kenya) et Minority Rights Group (pour le compte d'Endorois Welfare Council) c. Kenya*, 25 Novembre 2009.

21 *Commission africaine* (n 1), para 180.

22 Commission africaine des droits de l'homme et des peuples, Communication 155/96 *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) c. Nigeria* (2001).

23 Un aspect intéressant des interactions entre activités économiques et droits culturels, mais non couvert dans cet article, est relatif aux projets financés par les institutions financières telles la Banque mondiale, la Banque africaine de développement (BAD). Dans ce sens, voir le rapport du Mécanisme indépendant d'inspection (MII) du Groupe de la Banque africaine de développement 'Projets d'énergie de Bujagali (Ouganda): les questions spirituelles et de patrimoine culturel' mai 2020, disponible https://www.afdb.org/fr/documents/projets-denergie-de-bujagali-ouganda-les-questions-spirituelles-et-de-patrimoine-cultu rel (consulté le 4 septembre 2021).

entraîner des différends d'investissement car pouvant impacter les intérêts économiques des investisseurs et potentiellement entrer en conflit avec certaines dispositions des accords d'investissements. Pour les États africains, qui sont le plus souvent hôtes d'investissement, le défi est de pouvoir arriver à concilier leurs obligations découlant des traités d'investissements (notamment vis-à-vis des investisseurs) avec leurs obligations vis-à-vis de leurs propres populations (en matière culturelle notamment). Il s'avère ainsi nécessaire de trouver un équilibre entre ces différents intérêts en jeu pour éviter que les États africains ne se retrouvent entre le marteau du droit des investissements et l'enclume des droits culturels. Celui-ci pourrait consister en l'intégration des considérations culturelles dans le droit des investissements afin d'aboutir à une application harmonieuse de ces deux branches du droit. L'objectif de cet article est de discuter des différents aspects de cette intégration. Il propose une analyse qui se structure autour de deux axes principaux, le premier traitant du volet normatif (partie 2) et le second se focalisant sur le volet juridictionnel de cette intégration (partie 3).

2 L'ÉMERGENCE D'UNE PROTECTION NORMATIVE DE LA CULTURE AFRICAINE EN DROIT INTERNATIONAL DES INVESTISSEMENTS

L'examen des dispositions contenues dans les accords d'investissements conclus par les États africains (accords bilatéraux d'investissement et accords de libre-échange comportant des chapitres relatifs à l'investissement) permettra de déterminer l'étendue de la protection accordée aux considérations culturelles et artistiques. En rappel, les États africains ont joué un rôle prépondérant aussi bien dans la création que dans le développement du droit international des investissements.[24] Actuellement, ils ont conclu un tiers de l'ensemble des accords d'investissements[25] et leur implication dans les affaires d'investissement varie entre 15% et 27% du nombre total d'affaires.[26]

24 P-J Le Cannu 'Foundation and innovation: the participation of African states in the ICSID dispute resolution system'(2018) 33 *ICSID Review – Foreign Investment Law Journal* 456-500. Voir aussi WB Hamida, J-B Harelimana & A Ngwanza (eds) *Un demi-siècle africain au CIRDI: regards rétrospectifs et prospectifs* (2019) 402.

25 Au date du 30 juin 2021, les États africains ont signé 1021 sur l'ensemble des 3264 accords d'investissements (traités bilatéraux d'investissements et traités avec des chapitres d'investissement) conclus à ce jour, voir UNCTAD International Investment Agreements Navigator, disponible à https://investment policy.unctad.org/international-investment-agreements/advanced-search (consulté le 4 septembre 2021).

26 CIRDI, Affaires Du CIRDI — Statistiques, Numéro 2021-1, p. 12, disponible à https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20FR.pdf (consulté le 4 septembre 2021).

Sur le plan normatif, ces États étaient qualifiés, durant de nombreuses années, de *rule-takers* compte tenu de leur faible influence sur le processus d'élaboration des normes d'investissement.[27] Progressivement, le continent s'est émancipé de cette tutelle (essentiellement européenne) pour prendre en main l'élaboration des normes d'investissement au point où certains auteurs considèrent que les États africains sont désormais des *rule-makers*.[28] A cet effet, il convient de souligner qu'un certain nombre d'accords récemment conclus par les États africains comptent parmi les accords les plus innovants en la matière: on pourrait citer le Traité bilatéral d'investissement Maroc-Nigeria,[29] l'Acte additionnel de la CEDEAO sur l'investissement[30] ou le récent Code panafricain des investissements qui a été conçu pour refléter les spécificités et les réalités africaines.[31]

C'est dans ce contexte que cette section évalue la manière dont la question culturelle a été prise en considération lors de l'élaboration des normes d'investissements impliquant les États africains. Une revue des accords d'investissements, conclus depuis les indépendances jusqu'à nos jours, révèle une prise en compte progressive de ces considérations (2.1) même si elle demeure, à bien d'égards, insuffisante (2.2).

2.1 Une prise en compte progressive …

Cette prise en compte est perceptible au travers de l'inclusion expresse des considérations culturelles dans certains récents accords conclus par

27 Voir, par exemple, W Alschner & D Skougarevskiy 'Rule-takers or rule-makers? A new look at African Bilateral Investment Treaty practice' (2016) 4 *Transnational Dispute Management* 4.

28 MM Mbengue & S Schacherer 'The "Africanisation" of international investment law: the Pan-African Investment Code and the reform of the international investment regime' (2017) *Journal of World Investment & Trade* 414-448; MM Mbengue 'Africa's voice in the formation, shaping and redesign of international investment law' (2019) *ICSID Review – Foreign Investment Law Journal* 455-481.

29 Signé le 3 décembre 2016. Pour une discussion de cet accord, voir T Gazzini 'The 2016 Morocco–Nigeria BIT: An important contribution to the reform of investment treaties' (2017) *Investment Treaty News* 26 September 2017, disponible sous https://www.iisd.org/itn/en/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarc isio-gazzini/ (consulté le 4 septembre 2021). Voir aussi O Ejims 'The 2016 Morocco-Nigeria Bilateral Investment Treaty: More practical reality in providing a balanced investment Treaty?' (2019) *ICSID Review - Foreign Investment Law Journal* 62-68.

30 Acte additionnel A/SA.3/12/08 adoptant les règles communautaires sur l'investissement et les modalités de leur mise en œuvre au sein de la CEDEAO, signé le 19 décembre 2008, entré en vigueur le 19 janvier 2009.

31 Projet de Code panafricain des investissements, décembre 2016, disponible à https://au.int/sites/default/files/documents/32844-doc-projet_code_panafri cain_dinvestissements_decembre_2016.pdf (consulté le 2 décembre 2021); voir aussi MM Mbengue 'Un Code panafricain d'investissement pour promouvoir le développement durable' (29 June 2016) 17(5) *Passerelles* https://ictsd.iisd.org/ bridges-news/passerelles/news/un-code-panafricain-dinvestisse ment-pour-promouvoir-le-développement (consulté le 4 septembre 2021).

les pays africains (2.1.1) ainsi qu'au travers de la protection accordée aux communautés indigènes (2.1.2).

2.1.1 L'inclusion expresse des considérations culturelles dans certains récents accords d'investissements

Le premier accord d'investissement signé par un État africain est le traité bilatéral d'investissement entre la République fédérale d'Allemagne et la République togolaise[32] et le dernier accord (jusqu'au 30 juin 2021) est l'accord intérimaire de partenariat économique entre le Royaume-Uni et le Cameroun.[33] Alors que la culture n'est pas mentionnée dans le premier accord suscité, le second affirme, dans son préambule, que les deux États n'assoupliront ni ne rendront moins strictes leurs législations et réglementations nationales, notamment conçues pour protéger et promouvoir la diversité culturelle au nom de la promotion des investissements directs étrangers.

De façon générale, l'inclusion de ces considérations culturelles revêt plusieurs formes. Il peut s'agir ainsi d'une mention dans le préambule de l'accord, de l'affirmation du droit de réglementation en faveur de la culture, des dispositions imposant des obligations aux investisseurs en matière de protection culturelle, des dispositions visant à promouvoir la culture et les programmes culturels.

S'agissant du préambule, l'Accord intérimaire de Partenariat économique entre le Royaume-Uni et le Cameroun mentionne la culture dans son préambule.[34] Quoique non-contraignante, une telle mention peut s'avérer utile pour interpréter les dispositions substantielles des traités d'investissement.[35] Dans le même sens, certains accords affirment que leur application doit se faire conformément à l'objectif de développement durable et doit aussi tenir pleinement compte des meilleurs intérêts humains, culturels, économiques, sociaux, sanitaires et environnementaux des populations respectives des parties contractantes et des générations futures.[36]

32 Traité entre l'Allemagne et le Togo relatif à l'encouragement des investissements de capitaux, signé le 16 mai 1961.

33 *Interim Agreement establishing an Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part and the Republic of Cameroon, of the other part,* 9 mars 2021.

34 Voir aussi le préambule de l'Accord Royaume-Uni-Tunisie mentionnant, dans le considérant 3, *Protocol Establishing a Forum for Political, Economic and Cultural Dialogue between the Ministry of Foreign Affairs of the Republic of Tunisia and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland*, fait à Tunis le 25 février 2009.

35 E Sardinha 'Protecting cultural heritage in international investment law: tracing the evolution and treatment of cultural considerations in recent FTAs and investor-state jurisprudence' in J Chaisse, L Choukroune & S Jusoh (eds) *Handbook of International Investment Law and Policy* (2021) 1882.

36 Article 7 of Economic Partnership Agreement between the Southern African Customs Union Member States and Mozambique, of the one part, and the United Kingdom.

Ensuite, d'autres accords étendent le pouvoir de règlementation étatique aux considérations culturelles.[37] Toujours en ce qui concerne le pouvoir de réglementation étatique, il existe des accords qui permettent aux États de poser un certain nombre d'actes et d'actions qui, lorsqu'ils sont pris de bonne foi et aux fins du bien-être public, exonèrent lesdits États de toute responsabilité au titre du traité d'investissements: les clauses d'exception générale. Dans ce sens, le traité Singapore-Rwanda mentionne, dans ces exceptions générales, les mesures nécessaires à la protection des trésors nationaux de valeur artistique, historique ou archéologique.[38] Mieux, certains traités permettent à l'État-hôte de soustraire certains secteurs de son économie, du champ d'application des accords d'investissement, et des obligations qui en découlent: il s'agit des mesures de non-conformité. Par exemple, l'article 7 de l'Accord Japon-Côte d'Ivoire permet à une partie contractante de prendre ou maintenir des mesures nouvelles ou plus restrictives, dans des secteurs ou activités spécifiques, et qui ne sont pas conformes aux obligations imposées par le traité. C'est ainsi que la Côte d'Ivoire se réserve le droit

> d'adopter ou de maintenir toute mesure relative aux restrictions à l'exportation des biens culturels produits en République de Côte d'Ivoire dans le domaine culturel des œuvres d'art et de l'artisanat ancien, des productions littéraires et artistiques, œuvres du folklore, objets rituels et vestiges préhistoriques et historiques d'intérêt culturel.[39]

Ce qui constitue une exception à l'interdiction des prescriptions de résultats (mentionné à l'article 6). Un dernier aspect du pouvoir de règlementation étatique en faveur de la culture réside au niveau de la prise en considération du patrimoine commun de l'humanité dans l'analyse des 'circonstances analogues' nécessaire pour déterminer si le traitement de la nation la plus favorisée a été accordée à un investisseur.[40]

Plus important encore, certains récents traités 'obligent' les investisseurs à respecter les objectifs et valeurs socio-culturels[41] et à se conformer aux normes minimales en matière d'évaluation et d'examen

37 Dans ce sens, l'article 3(1) du Traité bilatéral d'investissement Hongrie-Cap-Vert affirme que 'The provisions of this Agreement shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity'.

38 Art 27(d) Singapore-Rwanda BIT; voir aussi article 9(1)(h) Code des investissements de la CEDEAO de juillet 2018; art 68(e) of the Stepping Stone Economic Partnership Agreement, between the United Kingdom of Great Britain and Northern Ireland, of the one part, and Côte d'Ivoire, of the other part London, 15 October 2020.

39 Voir Annexe II Mesures non conformes visées au paragraphe 2 de l'article 7 du TBI Japon-Côte d'Ivoire, calendrier de la République de Côte d'Ivoire, secteur 4: biens culturels.

40 Article 7(3)(b) Code panafricain (n 31).

41 Selon l'article 20(1)(b) du Code panafricain (n 31) 'Les investisseurs doivent respecter des obligations socio-politiques, y compris, notamment (…) le respect des valeurs socio-culturelles'. L'article 32(1)(b) Code des investissements CEDEAO (n 38) contient la même disposition.

de l'impact environnemental et socioculturel.[42] Une innovation de ces instruments juridiques réside, par ailleurs, dans les dispositions promouvant la diversité culturelle[43] et de même que la coopération culturelle.[44]

Enfin, les biens faisant partie du patrimoine culturel, de même que ceux faisant partie d'une exposition d'objets d'intérêt scientifique, culturel ou historique, ne peuvent faire l'objet d'aucune mesure de contrainte (telle que saisie, arrestation ou exécution) dans le cadre de l'exécution d'une sentence arbitrale.[45]

Au vu de ce qui précède, on pourrait affirmer que les considérations culturelles ont progressivement frayé leur chemin dans le contexte du droit des investissements. Une telle émergence peut permettre d'éviter un conflit normatif entre normes d'investissements et normes culturelles,[46] et aboutir à une meilleure prise en considération du facteur culturel lorsqu'il s'agit d'interpréter ou d'appliquer les règles d'investissements ou encore de trancher des différends d'investissements ayant des implications culturelles.

La protection normative de la culture africaine en droit des investissements se perçoit aussi au travers de la protection qui est accordée aux communautés indigènes.

2.1.2 La protection des intérêts culturels par le biais de la protection accordée aux communautés locales

Les communautés locales (notamment les peuples autochtones et indigènes) sont particulièrement affectées par les activités d'investissements.[47] Ces communautés entretiennent, en effet un

42 Selon l'article 12(1) de l'Acte additionnel CEDEAO (n 30) 'the investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the member states shall adopt at the first meeting of the parties, to the extent that these are applicable to the investment in question'.

43 L'article 38 de Code panafricain (n 31) encourage les Etats africains à 'adopter des politiques sur la diversité culturelle et linguistique en vue de promouvoir les investissements'.

44 Selon l'article 74(1) de l'Accord Euro-Méditerranéen établissant une association entre les Communautés européennes et leurs États membres, d'une part, et le Royaume du Maroc, d'autre part, 'Afin d'améliorer leurs connaissance et compréhension réciproques et en tenant compte des actions déjà développées, les parties s'engagent, dans le respect mutuel des cultures, à mieux asseoir les conditions d'un dialogue culturel durable et à promouvoir une coopération culturelle soutenue entre elles, sans exclure a priori aucun domaine d'activité'; voir aussi le point d (ii) de l'ANNEX l du CIFA Brésil-Éthiopie.

45 Article 16(15)(d) et (e) de l'Accord Maroc-Japon.

46 Voir, par exemple, V Vadi, 'Culture clash? World heritage and investors' rights in international investment law and arbitration' (2013) 28 *ICSID Review* 123-143.

47 Voir, dans ce sens, les rapports thématiques annuels du Rapporteur spécial sur les droits des peuples autochtones notamment celui de la Rapporteuse spéciale sur les droits des peuples autochtones sur les incidences des investissements internationaux et du libre-échange sur les droits de l'homme des peuples autochtones, AGNU, A/70/301, 7 août 2015 de même que le Rapport de la

rapport spécial avec la terre.[48] Or les territoires qu'elles occupent, regorgent, le plus souvent, de ressources naturelles qui sont convoitées et utilisées dans le cadre des activités économiques et des projets de développement.[49] De plus, la propriété desdites communautés sur ces territoires n'est pas toujours établie car un nombre important de ceux-ci ont, pendant longtemps, été considérés comme *terra nullius*.[50] Ce qui entraîne souvent le déplacement de ces communautés (et donc la perte d'un pan de leur culture) pour laisser la place aux activités d'exploitation économique de ces terres.[51] Le gouvernement Sud-africain résume cet état de fait lorsqu'il affirme que

> les droits de la personne sont perçus comme un coût de production élevé et les populations qui vivent dans les territoires visés par des projets de développement comme un risque juridique dont il faut tenir compte. Les communautés locales doivent quitter leurs territoires traditionnels au profit de projets d'investissement, sans toutefois avoir accès à de nouveaux emplois ou à de nouvelles opportunités, et en ne prêtant que peu ou aucune attention à leurs attaches culturelles, sociales et politiques qui les lient à ces territoires.[52]

Consacrer une attention spéciale à ces populations autochtones et indigènes dans les accords d'investissements se comprend donc aisément. Dans ce sens, l'article 9(1i) du Code des investissements de la CEDEAO permet aux États de prendre des mesures visant à préserver

Rapporteuse spéciale sur les droits des peuples autochtones, Conseil des droits de l'homme, A/HRC/33/42, 11 août 2016.

48 Le rapport entretenu avec la terre est un élément d'identification des populations autochtones. La Cour affirme que 'pour l'identification des populations autochtones et la compréhension de cette notion, les facteurs pertinents à considérer sont la priorité dans le temps en ce qui concerne l'occupation et l'exploitation d'un territoire spécifique, une perpétuation volontaire du caractère distinctif culturel, qui peut inclure des aspects de la langue, l'organisation sociale, la religion et les valeurs spirituelles, les modes de production, les lois et les institutions, l'auto-identification ainsi que la reconnaissance par d'autres groupes ou par les autorités de l'État en tant que collectivité distincte et une expérience d'assujettissement, de marginalisation, de dépossession, d'exclusion ou de discrimination, que ces conditions persistent ou non' *Commission africaine* (n 1), para 107.

49 'Les communautés … autochtones d'Afrique occupaient des régions bien dotées en ressources naturelles. Ces territoires étaient suffisants en termes de dimension et de paramètres écologiques qui constituaient des sources de subsistance et l'héritage de ces communautés'; Rapport du groupe de travail d'experts de la Commission africaine des droits de l'homme et des peuples sur les populations/communautés autochtones, adopté par la Commission africaine des droits de l'homme et des peuples lors de sa 28ème session ordinaire, p. 26, disponible à https://www.iwgia.org/images/publications/African_Commission_book_French.pdf (consulté le 10 septembre 2021).

50 Rapport du groupe de travail d'experts de la Commission africaine des droits de l'homme et des peuples sur les populations/communautés autochtones (n 49), pp. 25-40. Voir aussi S Nasirumbi 'Revisiting the *Endorois* and *Ogiek* cases: is the African human rights mechanism a toothless bulldog?' (2020) *African Human Rights Yearbook* 503-505.

51 Rapporteuse spéciale sur les droits des peuples autochtones sur les incidences des investissements internationaux et du libre-échange sur les droits de l'homme des peuples autochtones (n 47) pp. 14-15, paras 35-36.

52 Commission des Nations unies pour le droit commercial international Groupe de travail III (Réforme du règlement des différends entre investisseurs et États) 38e session, Vienne, 14-18 octobre 2019, Éventuelle réforme du règlement des différends entre investisseurs et États (RDIE), Communication du Gouvernement sud-africain, A/CN.9/WG.III/WP.176, p 3, para 7.

et à protéger la biodiversité et les droits des communautés locales. De même, les États peuvent prendre des mesures visant à remédier aux disparités économiques historiques subies par des groupes ethniques ou culturels identifiables en raison de mesures discriminatoires ou oppressives à l'encontre de ces groupes, dans le passé.[53] Par ailleurs, les Etats membres et les investisseurs doivent «protéger les systèmes de connaissance traditionnelle et les expressions culturelles ainsi que les ressources génétiques recherchés, utilisés, ou exploités par les investisseurs, ou qui sont pertinents pour leurs contrats, pratiques et autres opérations dans les Etats membres».[54] Les systèmes de connaissance traditionnelle sont définis comme étant les

> pratiques, représentations, expressions, connaissances, compétences – ainsi que les instruments, objets, artefacts et espaces culturels associés – que les communautés et les groupes dans les États membres, reconnaissent comme patrimoine transmis de génération en génération. Cet héritage est constamment recréé par les communautés et les groupes dans leur environnement, dans leur interaction avec la nature et leur histoire, ce qui leur donne un sentiment d'identité et de continuité.[55]

Ces différentes provisions témoignent d'une ouverture, quoiqu'embryonnaire, du droit des investissements à des considérations non-économiques notamment en ce qui concerne les droits des peuples autochtones. Cette ouverture peut permettre d'aboutir à un régime des investissements plus inclusif et plus équilibré. Cet objectif d'inclusion et de durabilité est aussi partagé par l'Agenda 2063 qui promeut le développement inclusif et durable du continent Africain.[56]

2.2 … mais encore insuffisante

Cette insuffisance découle de la portée réduite de certains des accords d'investissements examinés plus haut (2.2.1). Aussi, une comparaison avec des accords récents, signés par des États non africains, permettra d'apprécier le caractère suffisant ou non des accords signés par les États africains (2.2.2).

2.2.1 La portée réduite de certains traités d'investissement

Comme examiné précédemment, un certain nombre de récents accords d'investissement, impliquant les États africains, prennent en compte des considérations culturelles. Toutefois, la majorité desdits accords

53 'Member States may introduce measures to promote domestic investments and local content. Measures covered by this Paragraph include, inter alia: … (d) measures to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the adoption of this Protocol' art 17(1d) Code des investissements CEDEAO (n 38); voir aussi art 17(2d) Code panafricain (n 31).

54 Art 25 Code panafricain (n 31); voir aussi l'article 49 Code des investissements CEDEAO (n 38).

55 Art 49(2a) Code des investissements CEDEAO (n 38).

56 Voir l'Aspiration 1 de l'Agenda 2063.

sont des accords non-contraignants, soit parce qu'ils ont été adoptés sous la forme «d'instrument d'orientation»,[57] ou parce qu'ils ont été signés mais pas encore ratifiés.[58] En conséquence, ceux-ci ne peuvent être directement invoqués comme source d'obligations directes à la charge des États et investisseurs en matière de protection culturelle.

De même, les accords signés par les États africains avec leurs principaux partenaires commerciaux (qui sont aussi les pays d'origine des investissements et d'investisseurs) sont des accords dits de l'ancienne génération qui, pour la plupart, si ce n'est la totalité, ne prennent pas en considération les considérations culturelles.[59]

En outre, certains accords semblent induire un certain déséquilibre (ou une différence de traitement) en matière de protection culturelle. C'est notamment le cas de l'Accord de Libre-échange Chine-Maurice.[60] Son chapitre 12, consacré à la coopération économique, contient un article relatif aux arts, à la culture et aux sports (article 12-14). Le premier alinéa dudit article reconnaît l'importance de promouvoir les échanges culturels entre les deux pays, compte tenu de leurs liens uniques qui sont fondés sur leur patrimoine culturel et leurs traditions communs.

Ainsi, ces deux États conviennent d'un certain nombre d'actions, notamment d'encourager les échanges d'expertise et de bonnes pratiques concernant la protection des sites du patrimoine culturel et des monuments historiques, y compris l'environnement et les paysages culturels (a); de promouvoir les échanges d'artistes dans la restauration des documents des archives nationales, de la bibliothèque nationale et la restauration des peintures (c).

Toutefois, l'une de ces actions est de collaborer à la promotion de la culture 'chinoise' dans le cadre de l'organisation d'événements culturels et de la présentation de différentes formes de culture chinoise telles que les opéras traditionnels, la musique, les arts martiaux et la cuisine. Un tel alinéa interroge: est-ce à dire que la culture mauricienne est suffisamment développée en matière de musique, d'opéra traditionnels pour ne pas avoir besoin de promotion? Ou cela est-il révélateur d'une certaine asymétrie des pouvoirs en matière de négociation d'accords internationaux?

2.2.2 L'Accord économique et commercial global (AECG)

On pourrait s'interroger sur l'opportunité d'une analyse comparée avec l'Accord économique et commercial global (AECG) et quelle peut être

57 Voir art 2(1) Code panafricain (n 31).

58 Par exemple, en dépit de toutes ses dispositions innovantes, le traité bilatéral d'investissement Maroc-Nigeria n'est toujours pas entré en vigueur.

59 Selon le 2021 World Investment Report, la majorité des affaires d'investissement initiées en 2020 se base sur des accords d'investissement, signés dans les années 1990 ou plus tôt, voir UNCTAD (2021) *World Investment Report 2021, Investing in Sustainable Recovery* 129-130, disponible à https://unctad.org/system/files/official-document/wir2021_en.pdf (consulté le 10 septembre 2021).

60 Signé le 17 octobre 2019.

l'incidence d'un tel accord sur la protection du fait culturel africain en droit des investissements? Sans doute, faut-il rappeler que le Canada et les pays de l'Union européenne sont ceux qui ont conclu le plus d'accords d'investissements avec les États africains.[61] Ensuite, tout comme en Afrique, la question culturelle s'est posée dans plusieurs affaires ayant impliqué le Canada, ses investisseurs[62] et ses communautés indigènes.[63] Compte tenu de cette similarité de situations, il serait intéressant de voir quelle protection est accordée à la culture dans cet accord et comparer cette protection avec celle découlant des accords d'investissement africains.

L'AECG est un accord commercial entre l'UE et le Canada qui vise à stimuler les échanges commerciaux et à soutenir la croissance et l'emploi.[64] Il a même été qualifié «d'accord d'avenir»,[65] compte tenu de ses multiples innovations qui s'étendent notamment aux questions culturelles.

Dans le préambule, l'AECG mentionne expressément la Convention sur la protection et la promotion de la diversité des expressions culturelles de l'UNESCO de 2005.[66] A notre connaissance, il est le seul accord à inclure une telle référence qui pourrait aussi guider les tribunaux arbitraux sur l'équilibre qui devrait exister entre la promotion des questions culturelles et la protection des droits garanties aux investisseurs. Ledit préambule reconnaît, par ailleurs, aux États le droit

> de maintenir, d'établir et de mettre en œuvre leurs politiques culturelles, de soutenir leurs industries culturelles dans le but de renforcer la diversité des expressions culturelles, et de préserver leur identité culturelle, y compris par le recours à des mesures de réglementation et à un soutien financier.[67]

L'instrument interprétatif commun concernant l'accord économique et commercial global (AECG) souligne l'importance de telles mentions dans le Préambule, en affirmant qu'elles permettront aux parties signataires de conserver «la capacité de réaliser les objectifs légitimes de politique publique définis par leurs institutions démocratiques dans

61 Le Canada a, par exemple, signé 12 accords d'investissement avec des États africains (Guinée, Burkina Faso, Côte d'Ivoire, Mali, Sénégal, Nigeria, Cameroun, Tanzanie, Bénin, Afrique du Sud, Égypte) soit environ 1/5 des pays du continent africain, voir https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search (consulté le 10 septembre 2021).

62 *Bear Creek Mining Corporation v Peru*, ICSID Case ARB/14/2.

63 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Canada*, UNCITRAL, PCA Case 2009-04.

64 Cet accord a été signé le 30 octobre 2016 et est entré en vigueur, à titre provisoire, le 21 septembre 2017.

65 https://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155009.pdf (consulté le 4 septembre 2021).

66 'Affirmant leurs engagements en tant que parties à la Convention sur la protection et la promotion de la diversité des expressions culturelles de l'UNESCO, faite à Paris le 20 octobre 2005', Préambule de l'AECG, considérant 7.

67 Voir *supra*, considérant 6.

des domaines tels que (…) la promotion et la protection de la diversité culturelle».[68]

Relativement au droit de règlementer, ledit accord réaffirme le droit, pour les parties signataires, de

> réglementer sur leurs territoires en vue de réaliser des objectifs légitimes en matière de politique, tels que la protection de la santé publique, de la sécurité, de l'environnement ou de la moralité publique, la protection sociale ou des consommateurs, ou la promotion et la protection de la diversité culturelle. Il est entendu que le simple fait qu'une Partie exerce son droit de réglementer, notamment par la modification de sa législation, d'une manière qui a des effets défavorables sur un investissement ou qui interfère avec les attentes d'un investisseur, y compris ses attentes de profit, ne constitue pas une violation d'une obligation prévue dans la présente section.[69]

Toutefois, l'absence d'une exception culturelle a été critiquée car celle-ci aurait permis d'exempter les mesures visant à protéger les aspects culturels, d'un certain nombre d'obligations (l'obligation du traitement national par exemple).[70] Le récent modèle d'Accord sur la promotion et la protection des investissements étrangers (APIE) du Canada de 2021[71] va un peu plus loin dans la protection de la culture et des droits des peuples autochtones notamment au travers de l'ajout d'une exception générale permettant au Canada «d'adopter ou de maintenir une mesure nécessaire pour mettre en œuvre les droits ancestraux ou issus de traités des peuples autochtones tels qu'ils sont reconnus et confirmés par l'article 35 de la Loi constitutionnelle de 1982».[72] De plus, les investisseurs sont encouragés à

> instaurer et à entretenir des relations et un dialogue constructifs avec les peuples autochtones et les communautés locales, conformément aux normes, lignes

68 Instrument interprétatif commun concernant l'accord économique et commercial global (AECG) entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part, p. 3, disponible à https://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/fr/pdf (consulté le 4 septembre 2021). Par ailleurs, 'e) Le présent instrument interprétatif expose clairement et sans ambiguïté, au sens de l'article 31 de la convention de Vienne sur le droit des traités, ce sur quoi le Canada ainsi que l'Union européenne et ses États membres se sont entendus dans un certain nombre de dispositions de l'AECG qui ont fait l'objet de débats et de préoccupations au sein de l'opinion publique, et dont il donne une interprétation qui a été établie d'un commun accord. Cela concerne, notamment, l'incidence de l'AECG sur la capacité des gouvernements à réglementer dans l'intérêt public, ainsi que les dispositions sur la protection des investissements et le règlement des différends, et sur le développement durable, les droits des travailleurs et la protection de l'environnement'.

69 Art 8(9)(1) et (2) de l'AECG. Selon l'instrument interprétatif commun 'L'AECG préserve la capacité de l'Union européenne et de ses États membres ainsi que du Canada à adopter et à appliquer leurs propres dispositions législatives et réglementaires destinéesà réglementer les activités économiques dans l'intérêt public, à réaliser des objectifs légitimes de politique publique tels que (…) la promotion et la protection de la diversité culturelle', p. 3.

70 G Gagne *The trade and culture debate: evidence from US trade agreements* (2016) xxi–xxii (préface de Christian Deblock).

71 Celui-ci s'est notamment inspiré de l'AECG. Le texte entier du Modèle d'APIE est disponible à https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=fra#article-22 (consulté le 4 septembre 2021).

72 Article 22(1) du Modèle d'APIE.

directrices et principes internationaux en matière de conduite responsable des entreprises auxquels la Partie a donné son adhésion ou son appui.[73]

Le constat qui peut être dressé à la fin de cette partie est que l'on assiste à l'émergence d'une protection de la culture africaine au travers notamment des dispositions et clauses des accords d'investissements. Quoique pouvant être améliorée, cette protection normative témoigne d'une progressive 'africanisation' des normes d'investissements. Cette protection s'étend-elle au règlement des différends d'investissements?

3 L'INSUFFISANCE DE LA PROTECTION JURIDICTIONNELLE DE LA CULTURE AFRICAINE EN DROIT INTERNATIONAL DES INVESTISSEMENTS

Dans cette partie, l'analyse se concentre sur le contentieux d'investissement à l'occasion duquel ces intérêts culturels ont été invoqués. L'examen de celui-ci permettra de discuter du traitement réservé aux considérations culturelles africaines et des implications possibles de cette jurisprudence arbitrale sur le futur du droit des investissements en Afrique.

Les tribunaux d'investissements devraient-ils traiter des questions culturelles? Cette question a déjà été débattue.[74] Il est vrai, en effet, que la mission première desdits tribunaux n'est pas de connaître du contentieux culturel mais plutôt de juger des questions économiques et d'investissement en particulier. Toutefois, il n'existe pas de tribunal international culturel. De plus, et compte tenu des interactions entre la culture et le droit des investissements, certaines affaires soumises aux tribunaux d'investissement comportent des aspects culturels. Lesdits tribunaux ont donc été amenés à connaître incidemment des questions cultuelles et l'analyse de cette partie se limitera au contentieux impliquant les acteurs africains.

La question culturelle s'est posée de façon incidente devant les tribunaux d'investissement, soit parce que l'État défendeur l'invoque pour justifier ses actions (3.1) ou parce que les populations locales s'y réfèrent pour réclamer un droit de participation dans la procédure arbitrale (3.2).

73 Article 16(3) du Modèle d'APIE. Pour un aperçu des principales innovations, voir https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa_summary-2021_modele_apie_resume.aspx?lang=fra (consulté le 4 septembre 2021).

74 Vadi (n 46) 123-143; V Vadi 'Crossed destinies: international economic courts and the protection of cultural heritage' (2015) 18 *Journal of International Economic Law* 51-77.

3.1 La prise en compte de la culture africaine dans la détermination de la compensation

L'invocation des questions culturelles pour justifier des mesures étatiques est un aspect de la défense d'intérêt général ou d'intérêt public.[75] Ce moyen de défense a été, par exemple, invoqué par l'Égypte dans l'affaire *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,*[76] relative au développement d'équipements touristiques et de villégiature en Égypte. Celle-ci a débuté avec la signature du protocole d'accord entre l'État égyptien et la société Southern Pacific Properties (SPP), le 23 septembre 1974. Cette signature fut suivie par un certain nombre d'actions visant à la bonne exécution du projet telles que la signature d'un contrat pour le développement de deux projets touristiques dans la zone des Pyramides et sur le site de Ras El Hekma, la constitution d'une joint-venture à cet effet. Toutefois, et après la découverte d'antiquités dans la partie ouest de la région des pyramides d'Al-Gizeh, l'exécution dudit projet se heurta à un certain nombre d'oppositions et fut finalement interrompue après le retrait de l'approbation gouvernementale, l'annulation du décret présidentiel et la prise d'un décret, par le Premier ministre, déclarant ces terres d'utilité publique, le 11 juillet 1978.

Quelques mois plus tard, les sociétés Southern Pacific Properties et Southern Pacific Properties (Middle East) introduisirent une requête, le 7 décembre 1978, devant la Chambre de commerce internationale qui, par une décision du 16 février 1983, condamna l'État Égyptien à verser 12 500 000 de dollars américains aux requérants. Cette décision fut annulée par la Cour d'Appel en France, le 12 juillet 1984, et le subséquent pourvoi en cassation fut rejeté par la Cour de cassation française, le 6 janvier 1987.

Parallèlement, les investisseurs saisirent aussi le Centre international pour le règlement des différends relatifs aux investissements (Centre CIRDI) d'une requête arbitrale en date du 24 août 1984 au motif que l'annulation du projet touristique équivalait à une expropriation de leurs investissements pour laquelle ceux-ci avaient droit à une compensation. En réponse, l'État Égyptien justifiait les mesures prises par, entre autres, les obligations découlant de la Convention UNESCO de 1972 et que ladite annulation n'équivalait pas

75 R Loschi & F Valika, Public Interest, JusMundi, https://jusmundi.com/en/document/wiki/en-public-interest (consulté le 4 septembre 2021); G Abdulkadir 'The necessity, public interest, and proportionality in international investment law: a comparative analysis' (2019) 6 *University of Baltimore Journal of International Law* 215-265.

76 *Southern Pacific Properties (Middle East) Limited v Egypt*, ICSID Case ARB/84/3, sentence, 20 mai 1992.

à une confiscation ou une nationalisation. Sans remettre en cause la pertinence de ladite convention,[77] les investisseurs affirmaient que les actes d'expropriation de l'État Égyptien n'étaient pas fondés sur la Convention de l'UNESCO qui avait été ratifiée, par ledit État, un an avant l'autorisation du projet «Pyramids Oasis».[78] Ils rajoutent que la Convention n'a été invoquée que comme justification *a posteriori* d'un acte d'expropriation, n'ayant rien à voir avec la Convention.

De l'avis du Tribunal, la Convention de l'UNESCO à elle seule ne saurait justifier l'annulation du projet, ni priver les investisseurs de leur droit à une indemnisation. Toutefois, et à partir de la date d'inscription d'un bien sur la liste du patrimoine mondial de l'UNESCO, une «hypothétique poursuite des activités d'investissement interférant avec les antiquités dans la région pourrait être considérée comme illégale du point de vue international».[79] En conséquence, les investisseurs peuvent être indemnisés jusqu'à cette date d'inscription et non après. En d'autres termes, les considérations culturelles (plus précisément, l'inscription sur la liste du patrimoine mondial de l'UNESCO) sont prises en considération dans la détermination de la compensation.[80] Toutefois, d'autres tribunaux arbitraux n'ont pas été sensibles aux considérations culturelles comme, par exemple, dans l'affaire *Compañía del Desarrollo de Santa Elena, SA c. la République du Costa Rica* où le tribunal a affirmé que:[81]

> Les mesures environnementales d'expropriation, aussi louables et bénéfiques pour la société dans son ensemble, sont, à cet égard, similaires à toutes les autres mesures d'expropriation qu'un État peut prendre pour mettre en œuvre ses politiques: en cas d'expropriation, même à des fins environnementales, qu'elles soient nationales ou internationales, l'obligation de l'État de verser une indemnisation demeure (traduction de l'auteur).

77 Devant la Cour d'Appel française, les investisseurs déclaraient que 'les Etats étaient susceptibles d'engager leur responsabilité intemationale envers Ies autres Etats signataires en persistant dans des actes ou contrats devenus contraires aux regles de la Convention (de l'UNESCO)', *Southern Pacific Properties v Egypt* (n 86) 351, para 78.

78 *Southern Pacific Properties v Egypt* (n 76) 371, para 153.

79 *Southern Pacific Properties v Egypt* (n 76) 371-372, para 154.

80 'Thus, even if the Tribunal were disposed to accept the validity of the Claimants' DCF calculations, it could only award *lucrum cessans* until 1979, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent. From that date forward, the Claimants' activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable', *Southern Pacific Properties v Egypt* (n 76) 382, para 191.

81 'Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains', *Compañía del Desarrollo de Santa Elena, SA and Costa Rica*, ICSID Case ARB/96/1, Final Award, 17 February 2000, 192, para 72.

De plus, certains États n'ont pas mentionné leurs obligations vis-à-vis des communautés indigènes dans leurs moyens de défense comme ce fut le cas dans les affaires *Border Timbers and others v Republic of Zimbabwe*[82] et *Bernhard von Pezold and Others v Republic of Zimbabwe*[83] impliquant les droits des populations indigènes (voir section suivante). Dans l'affaire *Border Timbers and others v Republic of Zimbabwe*, par exemple, le tribunal arbitral constata que l'État zimbabwéen n'a pas invoqué ses obligations envers les communautés autochtones, comme moyen de défense.[84] Une telle omission fut l'une des raisons invoquées, par le tribunal, pour refuser la participation desdites communautés dans la procédure arbitrale.

3.2 La participation des communautés locales africaines dans les procédures arbitrales impliquant leurs droits culturels

Comme souligné plus haut, les activités d'investissements ont une incidence particulière sur les communautés autochtones et les peuples indigènes. On pourrait donc se demander si ceux-ci participent au règlement juridictionnel des litiges impliquant leurs droits culturels? Dans l'affirmative, quelle forme revêt cette participation et quelles leçons pouvons-nous en tirer?

3.2.1 Une tierce-participation aux résultats mitigés

La discussion des affaires *Border Timbers and others v Republic of Zimbabwe* et *Bernhard von Pezold and others v Republic of Zimbabwe* nous permettra de répondre à ces interrogations.[85] La question foncière était au coeur de ces deux affaires. A son arrivée au pouvoir, le Président Mugabe a initié un programme agraire pour corriger un certain nombre d'inégalités historiques. Ce programme, qui a connu plusieurs phases, s'est accompagné de l'adoption de plusieurs lois et a, finalement, débouché sur l'acquisition sans compensation des propriétés des investisseurs. Ceux-ci saisirent donc les tribunaux CIRDI pour cause d'expropriation illégale de leurs terres.

82 *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Zimbabwe* (ICSID Case ARB/10/25).

83 *Bernhard von Pezold and Others v Zimbabwe* (ICSID Case ARB/10/15).

84 'However, the Respondent has neither raised as a defence in these proceedings that it has obligations towards the indigenous communities under international law nor has it indicated that a submission from the Petitioners based on their Application may be relevant to factual or legal issues in these proceedings', *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Zimbabwe* (ICSID Case ARB/10/25), Procedural Order 2, 19, para 59.

85 Voir aussi R Radilofe 'Perspectives africaines des droits de l'homme en droit international des investissements' (2020) 4 *Annuaire africain des droits de l'homme* 267-270.

Des communautés indigènes, les peuples Chikukwa, Ngorima, Chinyai et Nyaruwa, assistées d'une organisation non gouvernementale (ONG), introduisirent une requête aux fins de participation dans ladite procédure compte tenu notamment de l'implication de leurs droits culturels dans la procédure.[86] Plus spécifiquement, elles demandaient l'autorisation de présenter une soumission écrite (en tant qu'*amici curiae*) et de participer aux plaidoiries orales de même que l'accès aux principaux documents de la procédure.[87] Compte tenu de «l'interdépendance du droit international des investissements et du droit international des droits de l'homme», lesdites communautés exhortaient les Tribunaux arbitraux à prendre dûment en considération les devoirs des États et les responsabilités des entreprises en ce qui concerne les droits des communautés autochtones.[88]

Tout en reconnaissant que certaines des terres querellées avaient une «importance culturelle particulière» pour lesdites communautés,[89] les investisseurs s'opposèrent à la participation de celles-ci dans la procédure.[90] De son côté, l'État défendeur ne voyait aucune objection à cette tierce-intervention même s'il s'était, auparavant, accordé avec les demandeurs, sur l'inapplicabilité de la Règle 37(2) à cette procédure.[91] Finalement, le tribunal arbitral a estimé que lesdites communautés n'avaient pas d'«intérêt significatif dans la procédure»[92] et a aussi émis des doutes sur leur indépendance et neutralité. En conséquence, il refusa cette tierce-participation en affirmant que celle-ci causerait un préjudice injuste aux demandeurs.[93] En d'autres termes, et même si leurs droits culturels étaient au cœur de ces deux affaires, les peuples indigènes ne purent participer dans lesdites procédures arbitrales. Et l'État défendeur n'a pas non plus mentionné ses obligations vis-à-vis des communautés indigènes comme possible justifications des actions posées.

Historiquement, la tierce-participation n'était pas prévue dans l'arbitrage d'investissement et, dans le cas de l'arbitrage CIRDI, il a fallu attendre une réforme de 2006 pour que cette possibilité soit

86 'The indigenous communities explain that they each have a distinct cultural identity and social history which is inextricably linked to their ancestral lands. They submit that the outcome of the present arbitral proceedings will determine not only the future rights and obligations of the disputing parties with regard to these lands, but may also potentially impact on the indigenous communities' collective and individual rights' *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 6, para 21.

87 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 4-5, para 14.

88 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 8, para 26.

89 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 10, para 32.

90 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 9-14, paras 29-46.

91 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 2-3, para 5.

92 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 20, para 61.

93 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 21, para 62.

mentionnée à l'article 37(2) du Règlement d'Arbitrage selon la Convention CIRDI[94] qui affirme qu'

> [a]près consultation des parties, le Tribunal peut permettre à une personne ou entité qui n'est pas partie au différend (appelée dans le présent article la «partie non contestante») de déposer une soumission écrite auprès du Tribunal relative à une question qui s'inscrit dans le cadre du différend. Afin de déterminer s'il autorise une telle soumission, le Tribunal considère, entre autres, dans quelle mesure:
>
> (a) la soumission de la partie non contestante assisterait le Tribunal à trancher une question de fait ou de droit relative à l'instance en y apportant un point de vue, une connaissance ou un éclairage particulier distincts de ceux présentés par les parties au différend;
>
> (b) la soumission de la partie non contestante porte sur une question qui s'inscrit dans le cadre du différend;
>
> (c) la partie non contestante porte à l'instance un intérêt significatif.
>
> Le Tribunal s'assure que la soumission de la partie non contestante ne perturbe pas l'instance ou qu'elle n'impose pas une charge excessive à l'une des parties ou lui cause injustement un préjudice, et que les deux parties ont la faculté de présenter leurs observations sur la soumission de la partie non contestante.

A l'analyse, on s'aperçoit que cette tierce intervention reste soumise à la libre appréciation du tribunal arbitral et que les parties litigantes ont un droit de consultation à cet effet. Aussi, cette participation consiste en une soumission écrite sans participation aux plaidoiries. Ce qui peut consister un frein à l'efficacité dudit mécanisme. Le Règlement de la Commission des Nations Unies pour le droit commercial international (CNUDCI) sur la transparence dans l'arbitrage mentionne aussi de la tierce intervention en son article 4, dans des proportions assez similaires.[95]

La règle selon laquelle la soumission de la partie non contestante ne doit pas causer un préjudice injuste à l'une des parties n'est pas très explicite. Qu'est-ce qu'un préjudice injuste? Dans le cas des communautés indigènes, il faut rappeler que celles-ci ont des intérêts concurrents à ceux des investisseurs qui exploitent les terres occupées par celles-ci. L'existence d'intérêts concurrents suffit-elle pour parler de préjudice injuste à l'encontre d'une partie? C'est la position que semble soutenir le tribunal arbitral dans l'affaire susmentionnée.[96] Ce qui pourrait aboutir à un refus systématique de la participation desdites communautés dans l'arbitrage d'investissement compte tenu de leur rapport à la terre. Le paragraphe suivant est suffisamment explicite à cet effet:[97]

94 Règlement d'Arbitrage selon la Convention CIRDI, tel que modifié et entré en vigueur le 10 avril 2006, disponible sous https://icsid.worldbank.org/fr/ressources/reglements/convention/reglement-d-arbitrage-selon-la-convention (consulté le 4 septembre 2021).

95 Règlement de la CNUDCI sur la transparence dans l'arbitrage entre investisseurs et États fondé sur des traités (date d'entrée en vigueur: 1 avril 2014), disponible à https://uncitral.un.org/fr/texts/arbitration/contractualtexts/transparency (consulté le 4 septembre 2021).

96 'As the indigenous communities appear to lay claim over or in relation to some of the lands in respect of which the Claimants assert a right to full, unencumbered legal title and exclusive control, they appear to be in conflict with the Claimants' primary position in these proceedings' *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 16-17, para 51.

97 *Border Timbers Limited v Zimbabwe*, Procedural Order 2, 20-21, para 62.

> En ce qui concerne les communautés autochtones, les demandeurs eux-mêmes reconnaissent qu'elles ont un certain intérêt dans les terres sur lesquelles les demandeurs revendiquent un titre juridique complet et leur ont donc historiquement accordé l'accès à des parties du domaine frontalier (…). Il se peut donc bien que les décisions des Tribunaux arbitraux dans ces procédures aient un impact sur les intérêts des communautés autochtones. Cependant, comme indiqué ci-dessus, les Tribunaux arbitraux ont des réserves quant à l'indépendance et/ou la neutralité des Requérants, y compris les chefs des communautés autochtones. Il existe une tension latente dans les critères de l'article 37(2) qui exigent qu'une partie non-contestante soit indépendante tout en possédant également un intérêt important dans la procédure. Indépendamment du fait que l'un de ces critères ou les deux soient remplis, cependant, le paragraphe 37(2) prévoit également qu'une présentation de la partie non-contestante ne doit pas nuire injustement à l'une ou l'autre des parties. En l'espèce, les Tribunaux arbitraux sont d'avis que les circonstances entourant ces Requérants sont telles que les Demanderesses peuvent être injustement lésées par leur participation et la Requête doit donc être rejetée (traduction de l'auteur).

Certaines autres communautés locales africaines ont utilisé le mécanisme de la tierce-participation dans d'autres affaires d'investissement: dans l'affaire *Piero Foresti v South Africa*, par exemple, quatre ONGs avec une expérience considérable en matière de défense des personnes vulnérables et marginalisées ont introduit une requête aux fins de participation dans la procédure.[98] Le tribunal a autorisé ces ONGs à soumettre des observations écrites et à avoir accès aux documents soumis par les parties au procès et qui sont nécessaires pour permettre à ces ONGs de soumettre des observations de qualité, sans pour autant assister ou présenter des observations orales à l'audience.[99] Toutefois, et avec le désistement de l'instance intervenu entre-temps, lesdites organisations ne purent soumettre leurs observations. Par contre, dans l'affaire *Biwater Gauff v Tanzania*, lesdites ONGs purent soumettre leurs observations écrites[100] qui furent, d'ailleurs, appréciées par le tribunal. Celui-ci a estimé qu'elles ont été utiles dans la procédure.[101] Toutefois, elles ont finalement eu peu d'impact sur la décision finale. On peut, dès lors, s'interroger sur «la pertinence d'accepter des interventions tierces dont l'utilité, en définitive, n'est pas franchement évidente».[102] D'où la nécessité d'apporter des réformes au système.

98 *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, ICSID Case ARB(AF)/07/01, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, 17 juillet 2009.

99 *Piero Foresti, Laura de Carli & Others v South Africa*, ICSID Case ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 octobre 2009.

100 *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case ARB/05/22, Petition for Amicus Curiae Status, 27 novembre 2006.

101 'The Arbitral Tribunal has found the Amici's observations useful. Their submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the Amici's submissions are returned to in that context', *Biwater Gauff (Tanzania) Ltd. v Tanzania*, ICSID Case ARB/05/22, Award, 24 July 2008, 112, para 392.

102 P Jacob, F Latty & A De Nanteuil 'Arbitrage d'investissement et droit international général (2017) 63 *Annuaire français de droit international* 697. Pour une analyse sur l'impact limité de la tierce-participation, voir N Butler 'Non-disputing party participation in ICSID disputes: faux *amici*?' (2019) 66 *Netherlands International Law Review* 143-178.

3.2.2 Quelles réformes pour une meilleure prise en considération de la culture dans le contentieux d'investissement ?

Dans le contexte actuel des discussions autour des reformes à apporter au système de règlement des différends entre investisseurs et États (RDIE), la question de la tierce-participation et de la participation des communautés locales s'est posée. Pour le gouvernement Sud-africain, par exemple, la pratique des mémoires d'*amicus curiae* est «désordonnée et incohérente» et il faudrait des règles écrites claires pour permettre une participation effective du public.[103] Le Groupe de Travail III de la Commission des Nations Unies pour le droit commercial international (CNUDCI) a aussi rappelé la nécessité d'assurer la participation de tiers, y compris celle du public et des communautés locales touchées par l'investissement ou le différend en question, dans la procédure de règlement des différends investisseurs-États:[104]

> Il a été dit qu'actuellement, les tiers intéressés n'avaient guère la possibilité de prendre part aux procédures. Il a été souligné que la participation de tiers au RDIE pourrait permettre de présenter au tribunal, pour qu'il les examine, les intérêts concernés, par exemple sur des questions relatives à l'environnement, à la protection des droits de l'homme ou aux obligations des investisseurs. Il a en outre été dit que pour assurer la légitimité du système, il serait important que les communautés et individus touchés ainsi que les organisations d'intérêt public concernées puissent prendre part aux procédures de RDIE, et que cette participation ne se limite pas à la présentation d'observations en tant que tiers.

Une telle participation est importante pour promotion et la protection des questions culturelles des populations locales comme rappelé dans l'affaire *Glamis Gold, Ltd v The United States of America*.[105] En l'espèce, la nation indienne Quechan a demandé à intervenir dans la procédure arbitrale pour que la nature 'sensible et sérieuse des zones sacrées autochtones' soit prise en compte et cela, en insistant sur les questions relatives à la valeur des ressources culturelles et environnementales de la région.[106] De l'avis de la nation indienne Quechan, aucune des parties au procès, aussi bien les investisseurs que

103 Communication du Gouvernement sud-africain (n 52) 10, para 53.

104 Commission des Nations Unies pour le droit commercial international Groupe de travail III (Réforme du règlement des différends entre investisseurs et États) 37e session, New York, 1-5 april 2019, Rapport du Groupe de travail, A/CN.9/970, 7, para 31; Voir aussi Communication du Gouvernement sud-africain (n 52) 7, para 32 de même que le document soumis par Columbia Center on Sustainable Investment, International Institute for Environment and Development, International Institute on Sustainable Development, *Third-Party Rights in Investor-State Dispute Settlement: Options for Reform*, 15 July 2019, disponible à https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/uncitral-submission-third-party-participation-en.pdf (consulté le 4 septembre 2021).

105 *Glamis Gold, Ltd v The United States of America*, UNCITRAL.

106 *Glamis Gold, Ltd v The United States of America,* Quechan Indian Nation application for leave to file a Non-party submission, 19 August 2005, 2-3.

l'État défendeur, n'a la légitimité encore moins l'expertise pour apporter une telle perspective indigène dans la procédure arbitrale:[107] «The tribe is thus uniquely positioned to comment on the impacts *of the proposed* mine to cultural resources, cultural landscape or context».

Cette participation pourrait-elle prendre la forme d'un droit d'initier des procédures arbitrales? C'est l'avis du gouvernement Sud-africain pour qui toute personne concernée par la procédure devrait avoir qualité pour agir:

> En permettant aux investisseurs d'intenter des actions contre les États et aussi à d'autres personnes ou communautés concernées de poursuivre les investisseurs, on permet aux personnes physiques ou morales ayant un intérêt direct et actuel d'intervenir dans la procédure, ce qui est nécessaire pour rendre le processus plus équitable et protéger les droits de tous – pas seulement ceux des multinationales.[108]

Il est vrai que les communautés locales africaines ont récemment obtenu gain de cause devant certains tribunaux des États d'origine des investisseurs.[109] Cette possibilité est d'ailleurs prévue dans certains accords d'investissements, récemment conclu, comme l'article 20 du traité bilatéral d'investissement Maroc-Nigeria. Ce droit d'initier la procédure peut-il s'étendre au contentieux d'investissement?

Toujours en ce qui concerne les réformes, le récent Modèle APIE du Canada prévoit la possibilité pour un tribunal d'investissement de nommer ses propres experts pour faire rapport sur les questions relatives aux droits des peuples autochtones.[110] Il est vrai que la possibilité de nommer des experts existe déjà pour les tribunaux arbitraux. L'innovation réside ici dans le mandat de ceux-ci qui va concerner les peuples autochtones.

4 CONCLUSION

Au terme de cette analyse, il appert que les rapports entre droits culturels africains et le droit des investissements s'organisent autour de deux logiques: une logique d'harmonisation, assez récente, qui

107 *Glamis Gold, Ltd v The United States of America,* Quechan Indian Nation application for leave to file a Non-party submission, 4. Toutefois, il faut noter que la participation de la nation indienne a finalement eu peu d'impact sur la décision finale car le tribunal arbitral a décidé de ne pas trancher sur plusieurs questions les plus controversées qui ont été soulevées, *Glamis Gold, Ltd v The United States of America,* Award, 8 juin 2009, 3.

108 Commission des Nations Unies pour le droit commercial international Groupe de travail III (Réforme du règlement des différends entre investisseurs et États) Trente-huitième session, Vienne, 14-18 octobre 2019, Éventuelle réforme du règlement des différends entre investisseurs et États (RDIE), Communication du Gouvernement sud-africain, A/CN.9/WG.III/WP.176, 10, para 52.

109 Voir par exemple, les tribunaux hollandais ont condamné l'entreprise hollandaise Royal Dutch Shell pour des actions de sa filiale au Nigeria et qui ont entraîné des dommages dans les vies de certaines communautés nigérianes, voir https://www.business-humanrights.org/fr/dernières-actualités/pollution-pétrolière-au-nigeria-shell-condamnée-à-verser-des-indemnités-à-des-fermiers/ (consulté le 4 septembre 2021).

110 Art 38 Modele APIE.

s'observe essentiellement en matière d'élaboration des normes d'investissements. Dans ce sens, plusieurs récents accords d'investissements, conclus par les États africains, accordent une certaine place à la culture. Cette logique d'harmonisation et d'intégration des normes culturelles dans le droit des investissements peut, toutefois, être améliorée comme l'a démontrée une analyse comparée avec notamment l'AECG. La seconde logique s'observe en matière juridictionnelle et peut être qualifiée de tumultueuse[111] ou de conflictuelle dans le sens où les droits culturels sont vus en opposition à ceux des investisseurs et de leurs investissements. Ce qui témoigne d'une certaine insuffisance de la protection juridictionnelle de la culture africaine en matière de RDIE. Certaines options de réformes, actuellement en cours de discussion, ont un lien direct avec les droits culturels et il est à espérer que celles-ci se concrétisent afin que les intérêts culturels soient mieux protégés.

111 Selon l'expression de Valentina Vadi qui parle de relation houleuse (*stormy relationship* en anglais), voir vs vadi 'cultural heritage and international investment law: a stormy relationship' (2008) 15 *International Journal of Cultural Property* 1-24.

III

CASE COMMENTARIES

COMMENTAIRES DE DECISIONS

Decriminalising vagrancy offences in Africa beyond the African Court's Advisory Opinion: *quo vadis*?

*Willene Holness**
https://orcid.org/0000-0002-8232-2702

ABSTRACT: The African Court on Human and Peoples' Rights (African Court) advisory opinion in *Pan African Lawyers Union on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments in Africa (PALU opinion)* 1/2018 recommends that states amend or repeal vagrancy offences that criminalise the life-sustaining activities of many persons targeted by these laws. The Court's main opinion is that states' national laws and by-laws containing vagrancy offences are vague, overly broad and ambiguous, conferring broad discretion on the police for their enforcement and targets people in terms of their status, not their conduct. These laws violate articles 2, 3, 5, 6, 7, 12 and 18 of the African Charter on Human and Peoples' Rights; articles 3 and 17 of the African Charter on the Rights and Welfare of the Child; and article 24 of the Protocol to the African Charter on the Rights of Women in Africa. The main opinion insufficiently addresses the colonial root of vagrancy. A separate concurring opinion elaborates on the margin of appreciation and good faith principle that allow states to formulate context-specific answers to amend and repeal vagrancy offences. This article identifies the impact of the COVID-19 pandemic on petty offences enforcement and draws lessons from litigation such as *Gwanda v The State* and interventions from national human rights institutions such as the South African Human Rights Commission; as well as guidance from the African Commission on Human and Peoples' Rights Principles on Decriminalisation of Petty Offences in Africa (2017). It is argued that specific institutional and non-material interventions are needed to bring the systemic change required, in tandem with the banning of vagrancy offences, for cities that promote inclusion and sustainable development for all.

TITRE ET RÉSUMÉ EN FRANCAIS:

Dépénalisation des délits de vagabondage en Afrique au-delà de l'Avis consultatif de la Cour africaine: *quo vadis*?

RÉSUMÉ: Avis consultatif de la Cour africaine des droits de l'homme et des peuples, (Cour africaine) dans*: l'Union panafricaine des avocats sur la convenance des lois sur le vagabondage avec la Charte africaine des droits de l'homme et des peuples et d'autres instruments des droits de l'homme en Afrique* (avis de l'UPA) 001/2018, recommande que les États modifient ou abrogent les infractions de vagabondage qui criminalisent les activités de survie de nombreuses personnes ciblées par ces lois. L'opinion principale de l'Cour africaine) constate que les lois et les règlementations nationales des États contenant des infractions de vagabondage sont vagues, trop

* BA, LLB (Rhodes), LLM (UKZN), LLD (UP), Senior Lecturer at the School of Law, University of KwaZulu-Natal, Howard College campus. Member of the Navi Pillay Research Group. holnessw@ukzn.ac.za. Immense thanks to Dr Janine Hicks for her critical input on earlier drafts of this paper and also to Dr David Barraclough for his technical editing. All errors are my own.

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larges et ambigus, conférant un large pouvoir discrétionnaire à la police pour leur application et ciblent les personnes en fonction de leur statut, et non de leur conduite. Ces lois violent les articles 2, 3, 5, 6, 7, 12 et 18 de la Charte africaine des droits de l'homme et des peuples; les articles 3 et 17 de la Charte africaine des droits et du bien-être de l'enfant, ainsi que l'article 24 du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique. L'opinion principale aborde insuffisamment le lien colonial du vagabondage. L'opinion concordante séparée donne des précisions sur la marge d'appréciation et le principe de bonne foi qui permettent aux États de formuler des réponses spécifiques au contexte pour modifier et abroger les infractions de vagabondage. Cet article identifie l'impact de la pandémie de COVID-19 sur l'application des infractions mineures et tire des enseignements de litiges tels que Gwanda contre l'état (*Gwanda v The State*) et des interventions d'institutions nationales des droits de l'homme telles que la Commission sud-africaine des droits de l'homme; ainsi que des orientations de la Commission africaine des principes des droits de l'homme et des peuples sur la dépénalisation des délits mineurs en Afrique (2017). Il est avancé que des interventions spécifiques à impact institutionnel et non matériel sont nécessaires pour apporter le changement systémique requis, en tandem avec l'interdiction des délits de vagabondage, pour les villes qui promeuvent l'inclusion et le développement durable pour tous.

KEY WORDS: petty offences, vagrancy, African Court on Human and Peoples' Rights, *PALU* Advisory Opinion, African Commission on Human and Peoples' Rights Principles on Decriminalisation of Petty Offences in Africa

CONTENT:

1 INTRODUCTION

Petty offences are found in national penal legislation or local government by-laws and target particular persons on the basis of their status or conduct, with sanctions such as warnings, community service, fines or imprisonment.[1] The status of persons as 'vagrants' or 'rogue and vagabond', 'idle or disorderly', 'a reputed thief', 'being without a fixed abode', beggars, hawkers and vendors, or conduct such as 'loitering' and life-sustaining activities such as urinating in public or washing clothes are criminalised through many of these laws in Africa and elsewhere.[2] The concept of vagrancy created by colonial masters was not expunged from statutes after the independence of African states. Instead, national and local governments continue to draft and

1 African Commission on Human and Peoples' Rights (African Commission) *Principles on Decriminalisation of Petty Offences in Africa* ACHPR/Res. 366 (EXT.OS/XX1) (2017) para 1 (Decriminalisation Principles).

2 Southern African Litigation Center *Vagrancy-related provisions in various criminal laws and criminal procedure laws in Africa* (2018) https://icj-kenya.org/wp-content/uploads/2018/01/Vagrancy-laws-in-Africa-by-Southern-Africa-Litigation-Center-SALC.pdf (This summary identifies South Africa as not having vagrancy offences in criminal law. However, local government by-laws do contain vagrancy offences).

pass criminal laws, including by-laws, with vagrancy related offences that criminalise the life-sustaining activities of poor, homeless and unemployed persons, hawkers and vendors as well as out-groups such as sex workers and LGBTIQ persons and persons with disabilities living within the city limits. Civil society,[3] scholars and the international and regional community[4] (including the African Commission on Human and Peoples' Rights (African Commission)), have cited evidence of wide-scale rights violations[5] and called for the banning or amendment of such laws to comply with regional and international human rights laws.[6] These calls finally found a sounding board.

The African Court on Human and Peoples Rights' (African Court) seventh advisory opinion was delivered on 4 December 2020 in *the Pan African Lawyers Union on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments in Africa* (PALU opinion).[7] The tabling of the issue of the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights (Banjul Charter)[8] and the African Charter on the Rights and Welfare of the Child (Children's Charter),[9] as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[10] emanated from a request from the Pan African Lawyers Union (PALU). The PALU opinion focused on a wide array of offences under the rubric of vagrancy.

PALU is a non-governmental umbrella organisation representing Tanzanian national and African regional lawyers' associations.[11] The organisation plays a vital role in extending African human rights

3 Open Society Foundations (Human Rights Initiative) *Campaign on the decriminalisation and declassification of petty offences in Africa* www.pettyoffences.org; Network of African National Human Rights Institutions (NANHRI) Enhancing The role of African national human rights institutions in decriminalisation of petty offences project phase II https://www.nanhri.org/decriminalization-of-petty-offences/ (accessed 7 February 2022).

4 The Kampala Declaration on Prison Conditions in Africa (1996); ACHPR The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (2002).

5 L Muntingh & K Peterson *Punished for being poor: evidence and arguments for the decriminalisation and declassification of petty offences* (2015).

6 Decriminalisation Principles (n 1) para 14.

7 https://www.african-court.org/cpmt/details-advisory/0012020

8 Organization of African Unity (OAU) African Charter on Human and Peoples' Rights 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

9 OAU African Charter on the Rights and Welfare of the Child 11 July 1990, CAB/LEG/24.9/49 (1990).

10 African Union Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 11 July (2003).

11 The registration of an organisation in an African country with sub-regional, regional or continental branches and activities that extend beyond its country of registration, confers jurisdiction. See Request for Advisory Opinion by L'Association Africaine de Defense des Droits de l'Homme 28 September 2017 2 AfCLR 637 para 27.

jurisprudence as litigator, consultant and legal aid provider before the African Court.[12] PALU has a memorandum of understanding with the African Union (represented by the chairperson of the African Commission).[13] Mere observer status with the African Commission does not confer standing to bring a request for advisory opinion as the requirement is that an NGO seeking access must be an 'African organization' recognised by the African Union. Six organisations were granted leave to file briefs as *amici curiae*, and one country, Burkina Faso, made a submission to the African Court. The material jurisdiction of PALU was recognised in that it requested interpretation on particular provisions for the three specified treaties on particular legal aspects related to vagrancy and petty offences.[14] Admissibility was granted in light of the African Commission's response to the African Court's request about matters pending before it. The African Commission asked the African Court to consider the Principles on the Decriminalisation of Petty Offences in Africa (Decriminalisation Principles) in relation to the legal matters before it. The Decriminalisation Principles set out a normative framework for dealing with outdated, vague and arbitrary criminal laws pertaining to vagrancy.

The African Court considers matters referred to it by the African Commission, legally binding findings are conferred on the subject matter concerned in contentious cases but not if the Commission would request an advisory opinion.[15] Advisory opinions are aimed at providing guidance on the interpretation and clarification of treaties and other instruments to domestic courts and tribunals in terms of resolving legal disputes and is not binding.[16] The advisory jurisdiction of the African Court is broader than any other court or commission, including in relation to subject matter, as it can advise not only on the interpretation of treaties, but also on human rights instruments.[17] Its finesse lies in the soft approach where, due to the lack of dispute of facts and the lack of named perpetrating states or actors, advice and encouragement to change a course of violations and a call for implementing the relevant human rights norms are made.[18] The persuasiveness of advisory opinions in the international and regional

12 PALU (undated) https://lawyersofafrica.org/wp-content/uploads/core-01-about-PALUs-work.pdf (accessed 7 February 2022).

13 The existence of such a memorandum of understanding confers jurisdiction. See Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and others 28 September 2017 3 AfCLR 622 para 49.

14 Rule 82(2) of the Rules.

15 AP van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* at 27.

16 Art 3 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) Court Protocol).

17 Art 4 of the Establishment Protocol. van der Mei (n 15) 38; R Murray 'The human rights jurisdiction of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh and others (eds) *The African court of justice and human and peoples' rights in context: development and challenges* (2019) 967.

18 Van der Mei (n 15) 30.

arena is promoted as an alternative to coercion.[19] The advisory role of the international or regional court (such as the International Court of Justice or the African Court), however, is not limited to the passivity of 'formal confirmation', and they can develop the law where there is ambiguity.[20] The effect of advisory opinions, however, lies in the adoption of international or regional legal norms in state practice.

The substantive aspects of the PALU opinion are now discussed, including the submissions made by *amici* and Burkina Faso.

2 SUMMARY OF THE MAIN FINDINGS IN THE PALU ADVISORY OPINION

2.1 The arguments of the requester and intervening parties

PALU sought clarity from the African Court on whether vagrancy national laws and by-laws from numerous African countries violate specified articles from the Banjul Charter, the Children's Charter and the Maputo Protocol based on the assertion that these laws contain offences that;

(a) Criminalise not conduct per se, but rather the 'status' of a person as 'being without a fixed home, employment or means of subsistence; having no fixed abode nor means of subsistence and trade or profession; being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and being idle and who does not have visible means of subsistence and cannot give good account of him or herself'.

(b) Mandate ordering a person's deportation to another area after declaring such a person a 'vagrant or rogue and vagabond'.

(c) Allow a person's arrest 'without a warrant' on the basis that a person has no 'means of subsistence and cannot give a satisfactory account' of him or herself.

In summary, PALU's submissions to the African Court rested on several arguments. The laws:

(a) Criminalise poverty; punish persons based on an involuntary status, not on the basis of particular conduct; and target or disproportionately impact on poor and vulnerable persons. These outcomes infringe persons' dignity, equality before the law and the right to non-discrimination under the Banjul Charter.

(b) Allow arrest by the police based on the mere suspicion of having committed an offence or doing so in the future and without evidence or the attempt to obtain evidence. As a result they lead to harassment of particular groups of persons, investigation of 'unclear offences' and the removal of 'undesirable' populations from the streets. These purposes were argued to be 'unnecessary for the legitimate purpose of crime prevention'. Furthermore, the mere suspicion of an offence being committed violates the presumption of innocence until proven guilty in terms of the Banjul Charter.

19 K Oellers-Frahm 'Lawmaking through advisory opinions?' (2011) 12 *German Law Journal* at 1050.

20 F Mayr & J Mayr-Singer 'Keep the wheels spinning: The contributions of advisory opinions of the International Court of Justice to the development of international law' (2016) 76 *ZaöRV* at 447.

(c) Lead to degrading detention where conditions are appalling, include a lack of food; lead to overcrowding; and such arrests and detentions place a burden on the person's family to provide food or to pay for bail.

(d) Are imprecise, inaccessible and vague, leaving broad discretion to the police. This results in 'arbitrary and discriminatory enforcement' based on their 'prejudice and social stigma which disproportionately targets poor and marginalised populations'. This therefore violates the rights to equality and equality before the law in terms of the Banjul Charter.

(e) Can result in banishment to a person's place of origin or deportation where the person is not a citizen, so violating rights to dignity, freedom of movement and protection of the family in terms of the Banjul Charter.

(f) Are used to arrest street children in violation of their rights to dignity and equal protection of the law; children of families where caregivers are detained suffer food insecurity or likely come into conflict with the law; and children are forcibly relocated in violation of their rights to non-discrimination, best interests and a fair trial, which is in conflict with the Children's Charter.

(g) Disproportionately affect women who often spend more time in pre-trial detention as they are unable to pay fines, bail or obtain legal representation, so conflicting with their entitlement to protection under the Maputo Protocol.

The submissions of Burkina Faso and the *amici* focused on the effect of the laws. First, the rights violations suffered by the offenders are continuous (during the arrest, before the trial, during and after the trial), and thus flout the prohibition of arbitrary arrest and detention under international human rights law.[21] Second, the laws impact the right to a fair trial, so affecting the presumption of innocence.[22] Third, unnecessary incarceration exacerbates unsafe prison conditions.[23] Fourth, the laws are an ineffective and disproportionate and discriminatory response to social problems such as unemployment, poverty and homelessness and target particular persons, including women, victims of domestic violence and sex workers, and violate the rights to equality before the law and non-discrimination.[24] Fifth, this penal response harms the individual and his/her family, and also in socio-economic terms.[25] Sixth, the laws are used to arrest and detain persons not for the purpose of prosecution but for intimidation and to remove them from the streets.[26] Seventh, the laws criminalise the status of the person and not particular conduct.[27] Eighth, the laws 'are a colonial relic that work to reinforce patterns of discrimination instituted by colonial regimes'.[28] Ninth, arrest and detention of street children flouts their best interests and constitutes 'exploitation, abuse, discrimination and stigmatisation'.[29] Tenth, vagrancy laws criminalise women and gender non-conforming persons and prejudice their economic activity, including in the informal sector.[30] The broad

21 ICJ-Kenya (n 2) para 52.
22 Burkina Faso (n 7) para 50.
23 NAHRI para 51.
24 Burkina Faso and NAHRI paras 50 & 52.
25 ICJ-Kenya and NAHRI paras 51-52.
26 Centre for Human Rights (CHR) and Dullah Omar Institute (DOI) para 54.
27 HRC-Miami and Lawyers Alert para 55.
28 Open Society Justice Initiative para 56.
29 NAHRI para 111.
30 HRC-Miami, Lawyers Alert, CHR & DOI paras 132 to 133.

discretion conferred on law enforcement allows corrupt practices such as exploitation of women's vulnerability and the extortion of bribes.[31] Detained women and their children are harmed by the enforcement of these laws, including where their partners and spouses are detained, as women then carry the household responsibilities.[32]

The requester's second question, whether a positive obligation rests on states to amend or repeal such laws and the nature of such obligations, was supported by the *amici*. In this regard, the *amici* and Burkina Faso made submissions relating to mechanisms available to states to implement relevant measures.[33] For example, states could fully decriminalise the offences such as with Burkina Faso's example[34] or reclassify them into civil offences, or partially do so where deferred or supervisory sanctions are preferred over detention and incarceration,[35] and states could release prisoners convicted of petty offences to ameliorate prison overcrowding as has already been done in Kenya and Egypt.[36] Some of the consequences to decriminalisation advocated for by the *amici* included: decreasing prison overcrowding by releasing inmates, which would also address health concerns such as COVID-19; and respect for the dignity and rights of children and women that would be signalled to law-enforcement agencies.[37] PALU highlighted the application of the Kampala Declaration on Prison Conditions in Africa of 1996 and the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa to reconsider the use of prisons to prevent crime and to decriminalise petty offences.[38]

2.2 The African Court's position

A unanimous decision was handed down, with a separate opinion filed by Justice Blaise Tchikaya in French.[39] The Court's main opinion was that 'vagrancy' as a concept refers to a person's status and relied on the dictionary meaning and academic writing to articulate the sociological background to this practice of criminalising particular persons.[40] Importantly, the African Court describes vagrancy as

31 CHR & DOI para 133.

32 CHR & DOI.

33 ICJ-Kenya flagged the Ouagadougou Declaration's call for decriminalisation of these offences, including sex work, failure to pay debts and disobedience to parents (these particular aspects were not discussed in the opinion) para 146.

34 Burkina Faso decriminalised the offence of 'wandering' para 145.

35 ICJ-Kenya para 146.

36 NAHRI para 147.

37 NAHRI para 147 and OSJI para 148.

38 Main opinion paras 143-144.

39 An official English translation is not available. This separate opinion was translated for the purpose of this case note and is not authoritative.

40 para 59, 72.

> a course of conduct or a manner of living, rather than a single act. The term vagrancy is generic. It refers to misconduct brought about by a perceived socially harmful condition or mode of life.[41]

The colonial root of vagrancy laws and its discriminatory impact are identified as follows: 'These terms, the Court holds, are a reflection of an outdated largely colonial perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status.'[42] This is the extent of its consideration of the influence of colonialism on these laws – despite the receipt of submissions on this aspect. The colonial origin of vagrancy laws in many provinces, including in KwaZulu-Natal Province, South Africa, where the eThekwini municipality is situated, is well established.[43] Perhaps the Court's omission in further addressing the perpetuation of this colonial legacy is understandable in that the African Commission did not reference this origin in its Decriminalisation Principles. However, it would have been apt for the African Court to expose the colonial premise[44] as an added incentive for states to change their stance towards 'vagrants' broadly speaking, in order to bring transformative change in pursuit of sustainable, inclusive development.

The main opinion did not offer in-depth examples of vagrancy laws in Africa. Instead, passing reference is made to the existence of such offences in penal codes of 18 states and there are summaries of the definition or conceptions of vagrancy under various codes in one paragraph.[45] The African Court identifies that the purpose of its use of examples of some states' laws or practices during the opinion is to 'highlight the practical dimensions of the opinion and does not amount to a decision on any factual situation', which is in line with jurisprudence from the Inter-American Court on Human Rights (Inter American Court) delineating this jurisdictional limitation.[46] Its reference to penal codes in particular countries that criminalise vagrancy,[47] including a by-law in South Africa, are therefore merely identified examples of potentially impugned vagrancy laws.

The African Court erroneously referred to the example of the by-laws of Ubuhlebezwe local municipality from 2009.[48] However, the town of Ixopo and surrounds in this municipality have no beach – as

41 para 57.

42 para 79.

43 J Martens 'Polygamy, sexual danger, and the creation of vagrancy legislation in colonial Natal' (2003) 31 *Journal of Imperial and Commonwealth History* 24; M Killander 'Criminalising homelessness and survival strategies through municipal by-laws: Colonial legacy and constitutionality' (2019) 35 *South African Journal on Human Rights* 70.

44 For a historical perspective, see AL Beier & P OcoBock *Cast out: vagrancy and homelessness in global and historical perspectives* (2008).

45 Main opinion paras 60 & 135.

46 Main opinion para 36 and fn 17 referring to IACHR Advisory Opinion OC-18/03 of September 2003 *Requested by the United Mexican States, Juridical Condition and rights of undocumented migrants* paras 63-65.

47 Main opinion (n 7) para 60.

48 Main opinion (n 7) 25.

referenced in the by-laws. It is assumed that the African Court meant to refer to the eThekwini Municipality's by-laws from 2016, which were identified by two of the *amici curiae* in their submissions: the Centre for Human Rights (CHR) and the Dullah Omar Institute (DOI). The eThekwini Nuisances and Behaviour in Public Spaces By-Law of 2015,[49] and its Beaches By-law of 2015[50] criminalise begging, loitering and life-sustaining activities. Interestingly, the proposed Public Amenities by-laws of Ubuhlebezwe local municipality in 2016 continue to identify loitering as an offence.[51]

The separate opinion more carefully traversed examples of vagrancy offences and articulates the fluidity of the concept of vagrancy and the 'African perception' thereof.[52] Justice Tchikaya concludes that the concept of vagrancy under these examples does not 'specify an act or a commission' and that 'being a beggar, poor or wandering cannot in themselves constitute offences'.[53]

In both advisory opinions, the African Court observed that some state legislatures repealed vagrancy laws.[54] Courts have declared these to be unconstitutional in other instances, such as in the Malawian case of *Gwanda v The State*, where a street vendor was arrested on his way to work under 'rogue and vagabond' charges.[55]

The African Court in its advisory opinion also took judicial notice of the ECOWAS decision in *Njemanze and others v Federal Republic of Nigeria*[56] but curiously not the Kenyan decision in *Nyambura & another v Town Clerk, Municipal Council of Mombasa & 2 others*.[57] The latter decision, however, was not successful, as insufficient evidence was led to convince the court that sex workers' arrest and detention under a loitering law was unconstitutional on the basis of gender discrimination.[58] The ECOWAS decision found multiple violations of the Banjul Charter, the Maputo Protocol and the Convention on the Elimination of all forms of Discrimination against

49 Clause 5(2).

50 Clause 10(1).

51 Clause 10 of the draft Public Amenities by-laws of Ubuhlebezwe local municipality (2016): 'No person leading the life of a vagrant or who lacks any determinable and legal refuge or who leads a lazy, debauched or disorderly existence or who habitually sleeps in a public street, public place or other non-private place or who habitually begs for money or goods or persuades others to beg for money or goods on his behalf, may loiter or linger about or sleep on, in or at a public amenity.'

52 Separate opinion paras 17 to 22, referring to penal codes of Senegal, Algeria, Mali, and Ivory Coast.

53 para 24.

54 For example, repeal in Angola, Cape Verde, Kenya, Lesotho, Mozambique, Rwanda and Zimbabwe; and modifications or decriminalisation in Tunisia, Burkina Fasa and Kenya.

55 Main opinion para 61; separate opinion para 39. *Gwanda v The State* [2017] MWHC 23. Sec of 184(1)(c) of the Penal Code.

56 ECW/CCJ/JUD/08/17 (ECOWAS).

57 [2011] eKLR available at http://kenyaliisync.africanlii.org/node/117667 (no page numbers).

58 W Holness 'eThekwini's discriminatory by-laws: Criminalising homelessness' (2020) 24 *Law, Democracy and Development* at 484-491, 492.

Women (CEDAW), where Nigerian women were arrested on suspicion of being sex workers under loitering laws – simply for being on the street late at night.[59] Indeed, Jjuuko and Balya explain that such laws perpetuate the control of sexuality of particular persons such as LGBTIQ and sex workers in particular, including in Uganda.[60]

On the impugned rights violations, the African Court agreed with all of the submissions of PALU and, unsurprisingly, these findings are also in line with the articulation of such violations in the Decriminalisation Principles. Specifically, the African Court expressed the view that vagrancy laws infringe articles 2 and 3 of the Banjul Charter on the prohibition against unfair discrimination on the basis of a number of statuses and equality before the law. Here the African Court noted that these laws 'punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors and individuals who otherwise use public spaces to earn a living' – primarily based on their 'economic' and 'underprivileged' status.[61] The exacerbation of their socio-economic situation by the enforcement of such laws is also acknowledged.[62] The Court agrees that arrest under these laws does not meet the purpose of crime prevention or 'keeping people off the streets',[63] and, as such, is irrational.[64] The Court found that differential treatment on the basis of the status of persons labelled 'vagrants' denies them equal protection of the law.[65] Furthermore, arresting persons without a warrant and without reasonable suspicion of an offence committed or about to be committed, flouts articles 2, 3 and 5 of the Banjul Charter. This is because such arrests are 'substantially connected to the status of the individual' and are both a 'disproportionate response' to their poverty and also discriminatory.[66]

The African Court identifies that the lack of clarity and precision in the 'vague, unclear and imprecise language' and 'overly broad and ambiguous nature' of the vagrancy laws do not identify the prohibited conduct to persons subjected to its enforcement by police conferred with broad discretion or the general public.[67] As a result, vagrancy laws violate articles 2, 3 and 6 (on the right to liberty) of the Banjul Charter.

The right to dignity and the prohibition of cruel, inhuman and degrading treatment under article 5 of the Banjul Charter are affirmed in the court's finding that the terminology such as 'rogue', 'vagabond', 'idle' and 'disorderly' are 'outdated', perpetuate a 'colonial perception'

59 ECOWAS found violations of arts 1, 2, 3 & 18(3) of the ACHPR, arts 2, 3, 4, 8 & 25 of the Maputo Protocol, and arts 2, 3, 5(a) & 15(1) of CEDAW.

60 A Jjuuko & J Balya 'Taking advantage of political processes to challenge the use of "idle and disorderly" offenses to police sexuality in Uganda' (2020) 75 *University of Miami Law Review Caveat* at 44.

61 Main opinion (n 7) 70, 72 & 74.

62 Main opinion (n 7) para 70.

63 Main opinion (n 7) para 72.

64 Main opinion (n 7) para 82.

65 Main opinion (n 7) para 73.

66 Main opinion (n 7) paras 74, 75 & 82.

67 Main opinion paras 71 & 86.

of persons as not being rights bearers, and this 'dehumanizes and degrades individuals with perceived lower status'.[68] The court articulated its recognition of a 'right to enjoy a decent life' linked to the right to dignity, where it observed that the application of vagrancy laws interferes with peoples' 'efforts to maintain or build a decent life or to enjoy a lifestyle they pursue'.[69] Furthermore, forceful relocation, sometimes with the use of force, violates articles 5 and 12 (freedom of movement) of the Banjul Charter.

The main opinion finds that the arrest of persons and also requiring them to provide explanations about potential criminal culpability, thus requiring self-incrimination, violates the presumption of innocence in article 7(1) of the Banjul Charter.[70] The separate opinion argues that article 7(2) in relation to the principle of legality requiring an offence being an omission or an action, is infringed, as vagrancy laws do not meet this requirement.[71]

Limitations to the right to freedom of movement must, according to the court, be proscribed by law and be necessary in order to 'protect national security, public order, public health or morals or the rights and freedoms of others', and must be consistent with the other rights in the Charter.[72] The first condition is met by vagrancy laws, but the last two are not due to them not meeting their purpose in that 'there is no correlation between vagrancy and the criminal propensity of an individual' and because less restrictive measures are available to assist persons affected by these laws.[73] Accordingly, the court found that the enforcement of vagrancy laws violates article 12 of the Banjul Charter on the right to freedom of movement.

The right to the protection of the family includes an entitlement to protection from forcible separation.[74] The court finds that the arrests and detentions in terms of these laws forcibly removes persons from their families, sometimes relocating them and causing their families 'deprivation of financial and emotional support' – particularly for children, the elderly and persons with disabilities – as well as affecting the physical and moral health of the family in contravention of article 18 of the Banjul Charter.[75]

68 Main opinion para 79. This opinion, the court reached, after recalling *Purohit and Moore v The Gambia* [2003] ACHPR 49 para 59 (dehumanizing terminology meted out to persons with psycho-social disabilities).

69 Main opinion para 80, in line with the decision in *Purohit and Moore v The Gambia* (n 68) para 61.

70 Main opinion paras 89 and 94. The Court relies also on the interpretation of art 14 of the ICCPR and the African Charter's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, regarding the principle against self-incrimination.

71 Separate opinion para 46.

72 Main opinion paras 97 to 99 relying on art 7 of the African Charter and art 12(3) of the ICCPR.

73 para 101.

74 para 104 citing the protection of the family unit encapsulated in various international human rights instruments, fn 50.

75 Main opinion paras 105 and 107.

Children's right to non-discrimination under article 3 of the Children's Charter, the court found, is infringed by their arrest, detention and forcible relocation.[76] This is primarily based on the discrimination they face based on their status.[77] Furthermore, the requirement that they provide an account to avoid arrest affects particular 'underprivileged and marginalised' children.[78] The court also notes that their removal results in a loss of their 'community and means of livelihood' and where their caregivers are relocated or detained, they suffer 'instability in family relationships and financial problems'.[79] As a cross-cutting principle,[80] the court holds that the application of the laws infringes on children's best interests, without explaining the basis on which this finding is made in relation to the specific averments made by PALU or the *amici*. Children's fair trial rights under article 17 of the Children's Charter are also impugned by arrests of children without a warrant, in terms of ambiguous and vague vagrancy laws, and can also be a 'precursor for further violations of the rights of children'.[81] The dignity and 'worth' of children in conflict with the law and the recognition of age-appropriate treatment and reintegration is recognised.[82]

The court explains that the composite obligation of article 24 of the Maputo Protocol protects women who are poor, and who are heads of households and from marginalised populations.[83] The court recognises the multiple violations suffered by such women as a result of the application of vagrancy laws, including in relation to their rights to dignity, non-discrimination and equality.[84] Furthermore, their economic activities are targeted by these laws.[85] The court finds that these laws violate state obligation in terms of the Protocol, to protect them and provide 'an environment suitable to their condition and their special physical, economic and social needs'.[86]

As for the requester's question about the nature of states' positive obligations to repeal or amend vagrancy laws to conform with the rights under the three treaties, the court disappointingly simply states that the state has a positive obligation to take necessary measures. These include legislative or other measures under articles 1 of the three treaties, and as such they need to 'amend or repeal all their vagrancy

76 para 120.
77 para 119.
78 para 118.
79 para 119.
80 The Court relies on the African Children's Committee General Comment 5 'State obligations under the African Charter on the Rights and Welfare of the Child (article 1) and System Strengthening for Child Protection' (2018).
81 Main opinion para 126.
82 para 127.
83 para 137.
84 para 138.
85 para 139.
86 para 140.

laws, related by-laws and other laws and regulations' – to bring them in line with the three treaties.[87]

The separate opinion of Justice Tchikaya illuminates more thoroughly some of the debates that animated the Court in its deliberations and yet which were not traversed in the main opinion. Justice Tchikaya notes that the colonial origin of the laws is indisputable and that they were used for 'arbitrary arrests and for the excessive and abusive use of colonial power'.[88] The vexed issue of succession between the colonial states and current sovereign African states is delineated. Justice Tchikaya advises that while the laws may have had colonial roots, the 'criminal treatment that States currently administer to the so-called vagrants proceed under their own authority'.[89] The Justice explains further that it is up to the states concerned to 'set the framework and intervene' – as states have 'irreducible national jurisdiction in criminal matters'. The inference here is two-fold:

First, states have the discretion on what to make of the obligation to amend and ban vagrancy offences based on the 'national margin of appreciation' that exists to 'temper the obligations of states'.[90] Justice Tchikaya refers with approval to the African Commission's decision in *Prince v South Africa,* where the doctrine of the margin of appreciation was stated to mean that a state is itself 'better prepared to adopt [relevant] policies' as it 'knows very well its society, its needs, its resources … and the necessary fair balance between the competing and sometimes conflicting forces that form its society'.[91]

The second inference comes from the reiteration of the principle of the application of the good faith principle of treaties' binding nature, which is derived from the Vienna Convention on the Law of Treaties.[92] The separate opinion articulates that where a violation is 'manifestly and objectively' evident, such as with the 'sociologically practical domain of vagrancy', states must act in good faith and 'respond to a situation of social proximity'.[93] In other words, states must act, but how they do so is circumscribed by their own contexts.

Fortunately, Justice Tchikaya identifies that the African Court's opinion that the states are obliged to take measures 'as soon as possible' should have been discussed more in the main opinion – for example in relation to whether this means a 'reasonable time' or 'a short time'.[94] However, urgency in taking action is implied by the statement that as 'a general principle of law, the maintenance of an illegality constitutes a

87 para 154.
88 Separate opinion para 48.
89 para 50 referring to the principle that transfer of laws and regulations is a result of territorial sovereignty.
90 Separate opinion para 53.
91 *Prince v South Africa* (2004) AHLHR 105; para 51 referred to in the Separate opinion para 55.
92 Arts 26 and 46(2) of the Vienna Convention on the Law of Treaties.
93 Separate opinion para 37.
94 para 33.

legal uncertainty which must be remedied'.[95] The 'abrupt' nature of the African Court's answer to PALU's request about the nature of the states' positive obligation to review their laws, is therefore defended in the separate opinion.[96]

3 DISCUSSION OF THE PALU ADVISORY OPINION

The intervention of PALU to seek advice from the African Court's comes on the back of a concerted campaign by stakeholders, who have sought social justice for persons affected by petty offences. Civil society has supported the enhancement of the role of national human rights institutions (NHRIs), such as the South African Human Rights Commission (SAHRC),[97] in guiding states on how to meet their international obligations in relation to decriminalising petty offences in laws, policies and administrative measures, and exploring different ways of dealing with petty offences that do not violate human rights. Nonetheless, the perspective of NHRIs such as the SAHRC is premised on measures dealing with prison overcrowding,[98] and not on the serious rights violations perpetrated by state-sanctioned petty offences that require their unbanning.

That said, the impact of the COVID-19 pandemic on the rights of homeless persons has highlighted some of the acute struggles that they face and the need for social interventions, not criminal interventions, to assist these groups. Promisingly, the SAHRC took a strong stance in its litigation into the Cape Town metropolitan municipality's egregious approach to shelters for homeless persons during the lockdowns.[99] Other states and NHRIs in Africa, however, have started making strides to undo the damage that vagrancy offences cause to affected persons.[100] Where law reform is still in process, presidential directives

95 Van der Mei (n 15) 30.

96 Main opinion para 34.

97 SAHRC *National consultation on the African Commission Principles on Decriminalisation of Petty Offences in Africa* (21 November 2018) https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1664-media-alert-national-consultation-on-the-african-commission-principles-on-decriminalisation-of-petty-offences-in-africa (no report on this consultation is available publicly); African Policing Civilian Oversight Forum & SAHRC *Report on Dialogue on Human Rights and Policing* (2 May 2018) 4-6 http://apcof.org/wp-content/uploads/apcofhumanrightsdialoguereport-2-3may2018johannesburg.pdf (this report does not mention the role of banning or amending laws that create petty offences, but engages with the role of the police and policy development).

98 SAHRC *Report of the South African Human Rights Commission: The implementation of the OPCAT in South Africa* 2019/2020 (2020) 29 https://www.justice.gov.za/ilr/docs/2019-20-NPM-AnnualReport-SAHRC.pdf (accessed 16 February 2022).

99 Discussed below.

100 Uganda's NHRI calls for decriminalisation of petty offences and amendment of their Penal Code Act; Human Rights Awareness and Promotion Forum 'When being poor and 'undesirable' is a crime: reflections on the impact of the 'Idle and disorderly' laws on marginalised groups in Uganda' (2018) 5 *The Human Rights*

have been used to release persons arrested under petty offences.[101] The request for the PALU opinion was lodged in 2018, pre-COVID-19 and it is not clear from public records when submissions closed. This means that it is possible that submissions regarding the impact of COVID-19 on the enforcement of petty offences and its prejudice in respect of particular populations such as the homeless and migrants – constituting violations of a variety of provisions of the three treaties considered – was not properly before the African Court. This is so, except for a limited reference made in the opinion to a submission by an *amicus* that decriminalisation will address some of the prison overcrowding – considering the COVID-19 pandemic and its impact on prisoner health.[102] This advisory opinion, given the timing of the judgment, was an opportune moment for the African Court to reflect on the dire need for decriminalisation of petty offences, particularly as COVID-19 continues to wreak havoc in Africa in relation to the health and movement restrictions of persons. The African Policing Civilian Oversight Forum (APCOF) made a submission to the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa.[103] It identified that the 'enactment of legislative and regulatory instruments to curb the spread of COVID-19' disproportionately affects poor and marginalised persons and results in 'criminal justice sanctions in the context of what are public health and social justice issues'. APCOF argued that the impact of petty offence criminalisation on the poor, including overcrowding, exacerbates pre-existing public health and human rights violations and that states should decriminalise life-sustaining activities in public spaces and rather find permanent alternatives to detention for petty offences during and after the COVID-era.

The findings of rights violations in the opinion are not controversial as they correspond to those in the Decriminalisation Principles. While the African Court was called on to determine the compatibility of petty offences with the three AU treaties, it also referred to its own jurisprudence, United Nations treaties, general comments from treaty monitoring bodies (TMBs), and an ECOWAS decision. The broad mandate of the African Court where it interprets and applies treaties outside of the AU, is not problematic *per se*, and will not result in

Advocate Magazine https://hrapf.org/index.php/resources/human-rights-advocate-magazine/102-fifth-issue-of-the-human-rights-advocate/file; Jjuuko & Balya (n 60) 43; Sierra Leone's New Bail and Sentencing guidelines were developed to provide non-custodial sentences for petty offences.

101 IGP orders release of 'Idle and disorderly' offenders *The Independent* 2 October 2019 https://www.independent.co.ug/igp-orders-release-of-idle-and-disorderly-offenders/ (accessed 16 February 2022).

102 OSJI submission para 148.

103 APCOF Submission to the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa at the 66th Ordinary Session of the African Commission on Human and Peoples' Rights July 2020 available at https://osisa.org/66th-ordinary-session-of-the-african-commission-on-human-and-peoples-rights/ (accessed 16 February 2022).

jurisprudential chaos.[104] Indeed, the reference to the ICCPR's conceptualisation of the right to freedom of movement and the African Court's interpretation that limitations to this right should not 'nullify its essential content', are not controversial. Helpfully, in light of a lack of guidance from the African Commission or other TMBs such as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the right to freedom of movement, the African Court's reliance on the Human Rights Committee's interpretation of this right as not being subjected to the person's 'purpose or reason for staying in or moving out of a specific place', is crucial. This is to determine the much needed link with the status or reason for a person occupying a public space or using it for life-sustaining activities.

Surprisingly, the African Court did not refer to the report of the Special Rapporteur on Extreme Poverty and Human Rights,[105] the guidelines of the Special Rapporteur on the Right to Adequate Housing,[106] or the UN Committee on the Rights of the Child's General Comment on children in street situations.[107] These call for the review of laws, policies and measures that discriminate against poor and homeless persons by criminalising vagrancy/loitering, and forcibly evicting homeless persons – including street children. The fact that vagrancy offences, where convicted, left a person with a criminal record, further impacted on their acute marginalisation. This was not traversed in the PALU opinion, perhaps because it was not raised by PALU. However, this argument has been made by other commentators.[108]

Of concern is the lack of explicit examples of state vagrancy laws described in the main opinion (though this is partly remedied in the separate opinion), particularly the wording of criminal provisions – except the mention of the South African by-law example. Curiously, the examples provided are summaries of descriptions such as 'suspected person or reputed thief who has no visible means of subsistence and cannot give a good account' or being a 'rogue' or 'vagabond'. While one can clearly group many nations' offences in this way, the distinct impression derived from the main opinion is that the justices shied away from naming and shaming particular states. The South African

104 A Rachovista 'On new 'judicial animals': the curious case of an African Court with material jurisdiction of a global scope' (2019) 19 *Human Rights Law Review* at 255.

105 United Nations Office of the Human Rights Commissioner (UNOHRC) *Report of the Special Rapporteur on extreme poverty and human rights, Ms Maria Magdalena Sepúlveda Carmona on the penalization of people living in poverty* 4 August 2011 A/66/265 para 21.

106 United Nations General Assembly *Guidelines for the implementation of the right to adequate housing Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context* 29 December 2019 A/HRC/43/43 para 33.

107 Committee on the Rights of the Child *General Comment No 21 on Children in Street Situations* (2017) CRC/GC21/2017 para 14.

108 K Peterson 'Law and policy: Barriers to accessing justice for sustainable development' (2020) 21 *ESR Review* at 25.

example is helpful as it is the only by-law that is mentioned in the opinion – as both main and the separate opinion refer to impugned penal codes (national laws). The reference to the *Gwanda* case by the African Court was brief.[109] That case, with three judgments, is helpful to potential litigants, *amici,* legislatures and other domestic courts for comparative reasons.

Five aspects from these judgments are noteworthy. First, the main judgment in *Gwanda* by Justice Mtambo lists many cases where rogue and vagabond convictions were overturned but the courts did not invalidate the law.[110] Those cases are instructive as the courts identified the poverty targeting aspect of the law, despite making *obiter* statements about it criminalising poverty. Second, the court only declared one subsection of the law unconstitutional.[111] In another *obiter* statement, the Malawian High Court stated that the 'reputable thief without visible means of subsistence who cannot give a good account of himself' offence[112] criminalises such suspected persons and is overbroad. However, it did not declare it unconstitutional. Third, the court identified that there are other laws available to law enforcement that can be used to question and arrest persons in a 'more investigative and/or targeted manner with respect to clear offences' or on 'reasonable suspicion' of committing an arrestable offence.[113] Fortunately, this instruction is somewhat tempered by the court indicating that 'heavy handed' police conduct will not be countenanced – even under the guise of legitimate offences.[114] Fourth, the court accepted evidence from an *amicus* of a research report which found that the deterrent effect of these laws is not supported and thus the law is not proportional.[115] Fifth, the main judgment, concerningly stated, but again *obiter,* that parliament should draft a 'new vagrancy law'.[116] Justice Kalembera's concurring judgment elucidated the status targeting aspect of the criminalising law.[117] Justice Ntaba's concurring judgment sought to provide a remedy that is broader than mere declaration of invalidity. It would have: ordered the legislature and executive to fill the gap created by striking down this law, ordered an

109 The judgments can be found at https://malawilii.org/mw/judgment/high-court-general-division/2017/23.

110 For example *Republic v Balala* [1997] 2 MLR 67; *Chidziwe v Republic*, Criminal Appeal 14 of 2013 (unreported).

111 *Gwanda* (n 55) 26.

112 Sec 184(1)(b) of the Malawian Penal Code.

113 The offence of criminal trespass (sec 319 of the Penal Code); and arrest of persons about to commit an arrestable offence or on the basis of reasonable grounds of suspecting to be about to commit an arrestable offence (sec 28 of the Criminal Procedure and Evidence Code). *Gwanda, Mtambo* judgment, 26. Justice Ntaba' judgment para 4.64, however disagrees and opines that sec 28 is procedural and does not create an 'offence'.

114 *Gwanda* (n 55) *Mtambo* judgment, 27.

115 Referring to the study that the *amicus* Centre for Human Rights Education, Advice and Assistance (CHREAA) cited, namely A Meerkotter and others *No justice for the poor: a preliminary study of the law and practice relating to arrests for nuisance-related offences in Blantyre, Malawi* (2013) 66.

116 *Gwanda* (n 55) *Mtambo* judgment, 26.

117 *Kalembera* judgment, 13.

assessment and review of all vagrancy offences to bring states' legislation in line with the constitutional prescripts, and directed the police to audit pending cases under this law and to appropriately deal with them.[118] All three justices traced the colonial roots of this law.[119]

Litigators can learn from this case. Relief sought should be couched carefully to ensure that remnants of vagrancy offences do not remain on the statute books. Empirical studies can be tendered as evidence to bolster arguments on discriminatory impacts of these laws and to support a finding of irrationality. Litigators must be mindful that policing attitudes will not change if different laws are used to target persons with the same *undesirable* status. However, political will is vital to turn the tide against poor persons. Malawi's penal reform in 2000 did not consider rogue and vagabond offences.[120] The *Gwanda* main judgment still does not provide scope for the broader legislative reform required to address anti-poor sentiments. The law, then, is not the only sword and shield. Policy changes are also needed to address the harm occasioned by criminalising the poor. The *Gwanda* main judgment and the limited court order keeping strictly to separation of powers bounds, supports an old argument that the judiciary is 'reluctant to see the courts as an arena for social transformation'.[121]

While South Africa no longer has vagrancy offences in national legislation, the Criminal Procedure Law renders any 'offence' created by municipal by-laws criminal. Killander traces back South Africa's history of vagrancy laws to 1809 and continuing through successive governments, including colonies, Boer republics, the Union and the apartheid government. This illustrates how both colonial and apartheid sentiments imbued these laws in order to 'socially [control] the poor' and as a tool of racism.[122] Some by-laws from that era remain, and others have been drafted in recent years – such as the eThekwini municipality example.

The municipality funded a study into homelessness in the city, which was undertaken by the Human Sciences Research Council (HSRC).[123] The authors of the study, in a policy brief, argue for a comprehensive policy to be drafted to address the needs of the homeless population in Durban and surrounds, and refer to

118 *Ntaba* judgment, 31, paras 5.7.1-5.7.3.

119 *Mtambo* judgment, 4; *Ntaba* judgment, paras 4.2 to 4.4; *Kalembera* judgment, 5.

120 C Banda & A Meerkotter 'Examining the constitutionality of rogue and vagabond offences in Malawi' in Southern Africa Litigation Centre, judiciary of Malawi, National Association of Women Judges and Magistrates of Botswana (NAWABO) *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi, and Zambia* (2014) at 71.

121 S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: economic marginalization, vulnerability, and the law' (2007) 5(2) *International Journal of Constitutional Law* at 290.

122 Killander (n 43) 73-78.

123 HSRC *Ikhaya lami: understanding homelessness in Durban: final report* (2016) http://www.hsrc.ac.za/en/research-outputs/view/8181 (accessed 7 February 2022).

unsatisfactory 'regulatory and programmatic' responses of the city government.[124] The authors do not state explicitly that the rights violations unearthed in the main study (such as experience of violence at the hands of police) are a direct result of the enforcement of the vagrancy by-laws. Holness critically unpacks the eThekwini Municipality's Nuisances and Behaviour in Public Places By-Laws of 2015 and Beaches By-Laws of 2015,[125] and their effect on homeless persons in the city limits. She argues that these laws are contrary to the rule of law and are an irrational extension of local government powers to develop and maintain law and order within municipal boundaries. She posits that these constitute unfair discrimination in respect of a number of protected and unlisted bases that cannot be justified – because they criminalise homelessness and poverty.[126] Holness relies on the concept of the 'right to the city' as developed by Pieterse[127] to explicate the need for a sustainable policy to address the needs of homeless persons, in line with the local government developmental mandate. The eThekwini by-laws criminalise loitering, begging, urinating, washing oneself and one's clothing, and sleeping in public spaces (including at the beach).[128]

Evolving jurisprudence in South Africa has successfully attacked some adjunct issues implicated by the enforcement of the similar by-laws, but no successful challenge against the constitutionality of the by-laws has been reported. Some of the issues are: the police's confiscation and destruction of the property of homeless persons in Johannesburg was declared unlawful as it violated their rights to property and dignity;[129] and the issuance of fines and destruction of property were interdicted in Cape Town.[130]

The unhygienic living conditions of a temporary shelter for homeless persons during the hard lockdown in Cape Town, used to mitigate the spread of COVID-19, came before the Western Cape High Court in the *Strandfontein* case.[131] The SAHRC faced off against a stoic city that was apparently unwilling to change its stance on the housing of homeless persons, and blocked human rights monitors from accessing the camp. The Strandfontein shelter was established in

124 C Desmond et al '*Towards the development of a contextualised homelessness policy: A Durban case study*' (2017) HSRC Policy Brief 2 (accessed 7 February 2022).

125 eThekwini Municipality *Bylaws* http://www.durban.gov.za/Resource_Centre/Pages/By-Laws.aspx (accessed 7 February 2022).

126 Holness (n 58) 484-491.

127 M Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2014) 131 *South African Law Journal* at 149. See also Cf Killander (n 43) 72 (referring to Lefebvre's coining of the concept).

128 Clauses 5(2)(c), (d), (e), (k), (r) and (u), as well as clauses 12(1)(b) and 12(2) of the Nuisances and Behaviour By-laws. Clause 10(1)(5) of the Beaches By-laws.

129 *Ngomane & others v City of Johannesburg Metropolitan Municipality & another* 2020 (1) SA 52 (SCA).

130 *Gelderbloem and six others v the City of Cape Town* case 14669/2019 (not yet finalised).

131 Withdrawn.

March 2020, but after allegations of overcrowding and unsanitary living conditions it was shut down after an interdict was brought by various NGOs, 20 days after it was opened. The High Court issued the interim interdict. It was shut down in May 2021. Unfortunately, alternative accommodation was not offered to homeless persons who occupied the shelter, after the camp was disbanded.[132] The City of Cape Town's conduct in the forced removal of homeless persons to this inadequate shelter and subsequently denial of access to the media and human rights monitors from the SAHRC, was widely criticised.[133] The High Court found against the city in the SLAPP suit brought against the SAHRC, finding that the human rights monitors had a lawful right to enter the camp for monitoring purposes.[134] Such city responses to the poor during the COVID-19 pandemic evince continuing anti-poor sentiments. Recently, a challenge was filed against the by-laws of the City of Cape Town in the Western Cape High Court and Equality Court.[135] That matter is still to be heard.

Learning from the outcome in *Gwanda* and obtaining a strategic victory from a judgment that declares a by-law unconstitutional, will be unhelpful if instrumental change is not brought and non-material impact is not sought through dedicated training and awareness. Instrumental change occurs where a law is successfully repealed or amended or a policy introduced to change the *status quo*, and non-material impact is obtained where long-standing prejudices are addressed through, for example, attitudinal changes.[136] Court declarations of unconstitutionality are only the starting point for some states in decriminalising petty offences – as the *Gwanda* decision shows.

132 V Cruywagen 'City of Cape Town defends dumping of homeless under bridge' 25 May 2020 *The Daily Maverick* https://www.dailymaverick.co.za/article/2020-05-25-city-of-cape-town-defends-dumping-of-homeless-under-bridge/#gsc.tab=0 (accessed 7 February 2022).

133 J Cogger 'The Strandfontein shelter touches a societal and political nerve' 27 May 2020 *The Mail & Guardian* https://mg.co.za/opinion/2020-05-27-the-strandfontein-shelter-touches-a-societal-and-political-nerve/ (accessed 7 February 2022).

134 *City of Cape Town v South African Human Rights Commission and others* Case 5633/2020 WCHC (unreported). See J Stent 'Court slams City of Cape Town for barring access to homeless camp' *Groundup* 17 March 2021 https://www.dailymaverick.co.za/article/2021-03-17-court-slams-city-of-cape-town-for-barring-access-to-homeless-camp/ (accessed 7 February 2022).

135 *Gelderbloem & others v City of Cape Town* Case no 5708/21 (WCHC); *Gelderbloem & others v City of Cape Town* Case no 06/21 (WCEC) challenging the Streets, Public Places and the Prevention of Noise Nuisances (2007) and Integrated Waste Management (2009) By-Laws.

136 Open Society Justice Initiative (2018) *Strategic litigation impacts: Insights from global experience* https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf (accessed 7 February 2022).

There are reports that other offences retained on the statute books such as being 'idle and disorderly' are being relied on to arrest and detain people in Malawi since the decision was handed down.[137] While some instrumental impact was felt in that instance as the impugned laws were struck down, non-material change has not occurred, as police have not been trained to reverse prejudices against homeless persons, vendors and others targeted by vagrancy laws – and other measures are still being used to repress them. Should a similar challenge against a vagrancy law be successful in a South African court, more will be needed to undo the continuing colonial and racist roots of vagrancy laws in policing practice and local government management of public spaces. The question then is – how do states, including local governments, craft laws that are compliant with their regional and international law obligations as directed in the PALU opinion?

The opinion leaves a wide margin of appreciation to states on how to address this issue of compliance. States' own contexts will be determinative, and even within states different provinces, cities and towns have differing contexts.[138] However, more could have been stated in the opinion in relation to pinpointing which laws are to be repealed and which would still pass muster. This is because although some of the examples listed in the opinion are clear contraventions of the obligations in the Banjul Charter, Children's Charter and Maputo Protocol, the court left it to states to 'amend or repeal' relevant laws and regulations. But where do states obtain guidance on the way forward?

The Decriminalisation Principles provide basic guidelines to states to decriminalise petty offences that are 'broad, vague and ambiguous' and that criminalise the status of a person or their appearance and life-sustaining activities in public spaces.[139] Any offences referring to the status of a person as 'criminal' should be repealed – for example, vagabond, rogue, idle and disorderly. However, what about begging and other life-sustaining activities? To what extent should those be repealed?

The offences that states decide not to decriminalise, the Principles proceed, should be reviewed so that alternatives to arrest and detention can be offered, and such alternatives are to incorporate reasonable accommodation for persons with disabilities and to promote the best interests of children in conflict with the law.[140] The question here is – which offences would pass the thresholds created by the Advisory Opinion and the Principles? Furthermore, what alternative can be legitimately pursued? There is very limited literature on best practices as alternatives to arrest and detention in the African context. Meerkotter et al explain that vaunted alternatives such as 'move on

137 V Mhango & A Meerkotter 'Policing of petty offences' *The Nation* 19 October 2017 https://www.southernafricalitigationcentre.org/2017/10/18/policing-of-petty-offences/(accessed 7 February 2022).

138 L Edwards 'Africa: A regional campaign to decriminalise petty offences' World Prison Brief 15 June 2021 https://www.prisonstudies.org/news/africa-regional-campaign-decriminalise-petty-offences (accessed 7 February 2022).

139 Principle 14.1.

140 Principle 14.2.3.

powers', recording of names, issuing administrative fines and community policing practices, can be discriminatory and violate many other rights.[141] As for the latter, the effectiveness of community policing often relies on police using the broader discretion granted to them to uplift and work with communities to find solutions.[142] The problem is the legitimacy of such a leadership style in the face of rampant police abuse and corruption in many states such as the sheer brutality experienced at the hands of police enforcing the by-laws in eThekwini.[143] The Decriminalisation Principles articulate some alternatives such as diversion, community service, community-based treatment programmes and alternative dispute resolution, as well as declaration of some offences as 'non-arrestable'.[144] A model law should be drafted, after consultation with persons affected by vagrancy laws and related petty offences, to provide guidance to African states on how to craft developmental laws that do not negate the rights of persons criminalised due to their status as homeless, loitering, vending, sex workers, LGBTIQ persons etc.

Measures to address poverty and other marginalisation such as poverty alleviation programmes are mandated by article 22 of the Banjul Charter on the right to development – which was surprisingly not mentioned in either the main or separate opinions.[145]

4 CONCLUSION

The call for spatial justice recognising the use of free public space for all persons[146] will likely continue to fail where attitudes towards undesirable persons are not changed. The change of laws is a start but will only be effective if scaffolded by large-scale and continuous training of law enforcement and relevant civil servants in local and national governments. This training should be on the rights of affected persons in the three treaties and soft law instruments such as the Luanda guidelines, the Decriminalisation Principles, and others, and on positive policing and local government management practices.

The PALU opinion is remiss in failing to provide guidelines to states on how to align statutes and regulations with the three treaties in question. This was a missed opportunity for the African Court to identify what categories of laws should be repealed, such as those criminalising status and vagrancy, and which would comply with states'

141 Meerkotter et al (n 115) 122.

142 WF Walsh 'Compstat: An analysis of an emerging police managerial paradigm' (2001) 24 *Policing: an International Journal of Police Strategies & Management* at 351, cited in Meerkotter et al (n 141) 119.

143 HSRC (n 123) 26.

144 Principle 14.2.2.

145 But see principle 14.3.1 of the Decriminalisation Principles.

146 I Kriel 'Engaging with homelessness in the City of Tshwane: Ethical and practical considerations' (2017) 34(4) *Development Southern Africa* at 468; V Naidoo (2010) 'Government responses to street homelessness in South Africa' (2010) 27 *Development Southern Africa* at 129.

obligations in terms of international law. While states are left to amend or repeal their own legislative framework, in accordance with their contexts, minimum standards at best and recommendations at least could have been proposed by this body to eradicate the lingering colonial legacy targeting the poor and homeless and to protect and promote their rights. The Decriminalisation Principles is the vehicle for change at a soft law level. The PALU opinion could have given more credence to these principles to inform states' best practice.

Civil society stakeholders working with homeless people have generated many practical recommendations on alternative, rights-based approaches to accommodating homelessness in cities that promote the notion of the 'right to the city'.[147] As a starting point, in line with the Decriminalisation Principles, any municipal by-laws or regulations that include petty offences that are 'broad, vague and ambiguous' and which criminalise a person's status or life-sustaining economic activities in public spaces should be struck down.[148] Any criminal law response triggered by a person seeking food or shelter will inevitably criminalise poverty. Concepts derived from colonial, racist pasts, such as 'vagabond', 'rogue' 'idle and disorderly', which effectively criminalise a person's status, have no place in constitutional democracies promoting dignity, equality and freedom.

The following measures could address the systemic rights violations for homeless persons, for example. First, measures should be enacted to guide law enforcement officials on the revised regulatory framework pertaining to homelessness and how to interact with homeless people, and to implement training to transform current policing practice. Such measures include regulations on the confiscation protocol of any goods confiscated, to end the current wanton destruction of homeless people's property and to ensure the return of their possessions. Regulations prohibiting profiling of homeless people and random searches and arrests without due cause should also be introduced, together with necessary training and complaints mechanisms to ensure their implementation and enforcement. Second, cities should be challenged to adopt a participatory approach to policy formulation and should undertake consultative processes with civil society partners and stakeholders likely to be affected by by-law development and implementation. This would be to yield more responsive public policy that is more likely to be implemented effectively. Third, legal representation to persons affected by vagrancy laws should be prioritised by state legal aid provision and law clinics and private firms acting pro bono in line with the Decriminalisation Principles.[149] Similar measures could be adopted depending on the needs and context of other groups affected by these laws, such as sex workers, informal traders, LGBTIQ. In all measures,

147 T Görgens & M van Donk 2012 'Exploring the potential of the "Right to the City" to integrate the vision and practice of civil society in the struggle for the socio-spatial transformation of South African Cities', Isandla Institute, Cape Town.

148 Principle 14.1.

149 Principle 14.4.1(b).

the rights of persons with disabilities to equality before the law, non-discrimination, dignity and equal participation should be incorporated.

The suggested measures include those of institutional strategic change, in identifying categories of laws and regulations that should be struck down immediately, as well as non-material impact interventions to address stigma and transform discriminatory attitudes, and to promote best practice in managing African cities and their diverse inhabitants. Such responses could be the basis of a transformative approach to foster truly developmental, inclusive, caring cities. The proposed suggestions could be taken up in policy advocacy initiatives with cities and could ultimately be sought by public litigants as court orders following on strategic litigation against recalcitrant cities.

In theory, strategic litigation should not be strictly necessary as states have been issued with the advice of the African Court to 'as soon as possible' repeal or review vagrancy offences as described by the court. As the *Gwanda* case shows, however, litigation is not always the answer. In practice, states are unlikely to prioritise the political will to do so, particularly where alternative approaches to criminalisation and developmental policies are lacking. An African model law drafted with input from affected persons may offer more concrete examples to states on compliant legislative approaches where offences are not repealed outright but are rather amended.

The roles of NHRIs in monitoring and evaluating the systemic change that is needed at state level should be strengthened through research and financial capacitation. The unrelenting nature of the COVID-19 pandemic and its drain on state and humanitarian resources means that now is the time is to decriminalise vagrancy offences and implement developmentally oriented solutions to address poverty and attendant harms. In South Africa, it is hoped that the local governments will heed the call of the African Court and the African Commission's Decriminalisation Principles and repeal apartheid and colonial era vestiges retained in vagrancy laws.

Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania*

*Andrew Novak**
https://orcid.org/0000-0002-7049-1015

ABSTRACT: In November 2019, the African Court on Human and Peoples' Rights in *Rajabu v Tanzania* issued its first major decision related to the substance of the death penalty. The Court found that Tanzania's mandatory death penalty violated article 4 of the African Charter on Human and Peoples' Rights (the right to life), because it constituted an 'arbitrary' deprivation of life. This decision accords with case law from other international treaty bodies and judgments of domestic courts. In addition, the Court found that hanging as a method of execution was 'inherently degrading,' a notable finding because most retentionist African countries still use hanging. By assessing the mandatory death penalty under article 4 instead of article 7 (right to a fair trial), the Court's holding has limited applicability to other mandatory sentences, but the author contends that the Court should extend this precedent in the future to mandatory life imprisonment. The most important question that remains open is whether article 4 requires an individualised sentencing hearing in every case, including where persons with mandatory death sentences have already had their sentences commuted to imprisonment terms by the president without an opportunity to present mitigating evidence. *Rajabu* significantly contributes to the erosion of the death penalty in Africa and is an incremental precursor to total abolition under article 4 of the Charter.

TITRE ET RÉSUMÉ EN FRANCAIS:

La pendaison et la peine de mort obligatoire en Afrique: la contribution de l'affaire *Rajabu c. Tanzanie*

RÉSUMÉ: En novembre 2019, la Cour africaine des droits de l'homme et des peuples a rendu, dans l'affaire *Rajabu c. Tanzanie*, sa première décision majeure liée à la substance de la peine de mort. La Cour a estimé que la peine de mort obligatoire en Tanzanie violait l'article 4 de la Charte africaine des droits de l'homme et des peuples (le droit à la vie), car elle constituait une privation 'arbitraire' de la vie. Cette décision est conforme à la jurisprudence d'autres organes de traités internationaux et aux jugements des tribunaux nationaux. En outre, la Cour a estimé que la pendaison en tant que méthode d'exécution était 'intrinsèquement dégradante', une conclusion notable car la plupart des pays africains favorables au maintien de la peine de mort y ont encore recours. En évaluant la peine de mort obligatoire en vertu de l'article 4 plutôt que de l'article 7 (droit à un procès équitable), la décision de la Cour a une applicabilité limitée aux autres peines obligatoires, mais l'auteur soutient que la Cour devrait étendre ce précédent à l'avenir à l'emprisonnement à vie obligatoire. La question la plus importante qui reste ouverte est de savoir si l'article 4 exige une audience de détermination de la peine individualisée dans tous les cas, y compris lorsque des personnes condamnées à la peine de mort obligatoire ont déjà vu leur peine commuée en peine d'emprisonnement par le président sans avoir eu la

* BA (George Washington), MSc (London), JD (Boston), PhD (Middlesex); Assistant Professor, George Mason University, Department of Criminology Law and Society; anovak2@gmu.edu.

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possibilité de présenter des preuves atténuantes. *Rajabu* contribue de manière significative à l'érosion de la peine de mort en Afrique et constitue un précurseur progressif de l'abolition totale en vertu de l'article 4 de la Charte.

KEY WORDS: death penalty, mandatory, hanging, Tanzania

CONTENT:

1 INTRODUCTION

On 28 November 2019, the African Court on Human and Peoples' Rights (African Court) found Tanzania's mandatory death penalty violated the right to life and the right to human dignity, respectively articles 4 and 5 of the African Charter on Human and Peoples' Rights.[1] This case, *Ally Rajabu and others v Tanzania*, was brought by four Tanzanian death row inmates as applicants who argued that Tanzanian law was incompatible with the African Charter to the extent that judges did not have discretion to substitute a lesser sentence than death upon conviction for murder.[2] The applicants also argued that hanging as a method of execution violated article 5.[3] In addition to articles 4 and 5, the applicants also argued that their fair trial rights were violated under article 7 of the African Charter to the extent that their death sentences were not imposed in a reasonable time and by a competent court, though these claims were ultimately rejected.[4] While the 10 judges of the panel unanimously agreed with the outcome, two wrote separate concurring opinions on different aspects of the main decision. The first concurrence, by Judge Chafika Bensaoula, pertained to admissibility of the case owing to the applicants' delay in filing the application at the African Court.[5] The second and more substantive concurrence by Judge Blaise Tchikaya conceived the Court's judgment on the merits as too

1 Article 4 states: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' Article 5 states: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.' African Charter on Human and Peoples' Rights (1981).

2 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Judgment (28 November 2019).

3 *Rajabu* (n 2) para 115.

4 *Rajabu* (n 2) paras 60-91.

5 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Concurring Opinion of Chafika Bensaoula (28 November 2019).

limiting and instead advocated a broader holding against the legality of the death penalty per se in international law.[6]

Rajabu and others v Tanzania closed the merits question left open in *Dexter Eddie Johnson v Ghana*, decided by the African Court earlier in 2019.[7] In *Johnson*, the Court found a challenge to the mandatory death penalty in Ghana to be inadmissible owing to that applicant's earlier filing at the UN Human Rights Committee, which resulted in that body's finding that Ghana's mandatory death penalty regime violated article 6 of the International Covenant on Civil and Political Rights (ICCPR).[8] The African Court interpreted the *non bis in idem* principle as preventing the applicant from bringing the same merits question to two different international human rights treaty bodies, pursuant to the principles of finality codified in article 56(7) of the African Charter.[9] Notably, Judge Tchikaya, the concurring judge in *Rajabu* who advocated for total prohibition of the death penalty under article 4 of the African Charter, also dissented in *Johnson*, arguing that Johnson's claim was admissible under a more expansive reading of article 56(7).[10]

The death penalty for murder was mandatory at English common law, a colonial-era holdover that has now been abolished in the overwhelming majority of Commonwealth countries.[11] An unusually strong consensus has developed at international tribunals and

6 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Concurring Opinion of Blaise Tchikaya (28 November 2019).

7 A Novak 'A missed opportunity on the mandatory death penalty: A commentary on *Dexter Eddie Johnson v Ghana* at the African Court on Human and Peoples' Rights' (2019) 3 AHRY 456. This volume also included an interesting rebuttal by Mwiza Jo Nkhata. MJ Nkata 'Is the African Court's decision in *Dexter Eddie Johnson v Ghana* a missed opportunity? A reply to Andrew Novak' (2019) 3 *African Human Rights Yearbook* 470. This rebuttal argued first that Johnson's counsel did not frame Ghana's violation as 'continuing' and therefore the alleged violation was the same as that before the UNHR Committee. The rebuttal also notes that my argument assumed what it also sought to prove: in other words, the Court should find a case against the mandatory death penalty is admissible because it is a violation of the African Charter. The rebuttal took the position that progress against the death penalty and the mandatory death penalty in particular 'has not been uniform and universal' – in other words, not as self-evident as I portrayed it. Nkhata, 476. I note that to date, only three jurisdictions have upheld the mandatory death penalty as constitutional in a direct challenge: Malaysia and Singapore, which are persistent objectors and have constitutions without protections for the right to life or prohibition on cruel and degrading punishment, and Ghana, where the Supreme Court frankly misapplied its own law in *Dexter Johnson v Republic* (2011) 2 SCGLR 601, the very situation that I advocated the African Court should redress (but see the decision of the Tanzania High Court in *Kambole v Attorney General*, [2019] TZHC 6 (18 July 2019), finding the mandatory death penalty constitutional without reaching the merits).

8 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Ruling (Jurisdiction and Admissibility) (28 March 2019).

9 *Johnson* (n 8) paras 54-55.

10 See *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Ruling (Jurisdiction and Admissibility), Dissenting Opinion of Blaise Tchikaya (28 March 2019).

11 A Novak *The global decline of the mandatory death penalty: constitutional jurisprudence and legislative reform in Africa, Asia, and the Caribbean* (2014) 3-4.

domestic constitutional courts that an insufficiently individualised sentence could be too harsh and therefore constituted cruel and degrading punishment.[12] The African Commission's General Comment 3, issued in 2015, categorically prohibits mandatory death sentences, as does the 2018 General Comment on the Right to Life from the UN Human Rights Committee.[13] In addition to international lawmaking on this point, state practice has also evolved. In the past five years, only four Commonwealth countries – Nigeria, Pakistan, Malaysia, and Singapore – carried out death sentences that were mandatory upon conviction, and even these have declined in number over time.[14] As considered below, the uniformity of state practice and the decline of mandatory death sentences may be evidence of an emerging peremptory norm that all death sentences must be tailored to the offense and the offender, in accordance with the restriction that the death penalty be limited only to the 'most serious crimes' under article 6 of the ICCPR.[15] It is axiomatic that the death penalty is in rapid and irreversible decline across the world and that a prohibition on the death penalty in international law is in progressive development.[16] The African Court's decision in *Rajabu* tightens the screws on capital punishment and is another milestone in the incremental abolition of capital punishment through collateral or procedural challenges.[17]

12 See *Woodson v North Carolina* (1976) 428 US 280; *Mithu v Punjab* (1983) 2 SCR 690 (India); *Reyes v Queen* [2002] UKPC 11 (Belize); *Fox v Queen* [2002] 2 AC 284 (PC) (Saint Kitts and Nevis); *Balson v State* [2005] 4 LRC 147 (PC) (Dominica); *Coard v Attorney General* [2007] UKPC 7 (Grenada); *Queen v Monelle* Criminal Case 15/2007 (Antigua and Barbuda HCJ, 18 September 2008); *Bowe v Queen* (2006) 68 WIR 10 (PC) (Bahamas); *Nervais and Severin v Queen* [2018] CCJ 19 (AJ) (Barbados); *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); *Bangladesh Legal Aid and Services Trust v Bangladesh* (2010) 30 BLD (HCD) 194. For the Inter-American Commission on Human Rights, see *Edwards v Bahamas* case 12.067, Inter-American Commission on Human Rights, Report No 48/01, OEA/SerL/V/II.111, doc 20 (2000). For the UNHR Committee, see *Thompson v Saint Vincent & the Grenadines* Communication 806/1998, UNHR Committee, UN Doc CCPR/C/70/D/806/1998 (2000).

13 General Comment 36 on article 6 of the International Covenant on Civil and Political Rights, On the Right to Life, UNHR Committee (30 October 2018), UN Doc CCPR/C/GC/36, at para 37; African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights: the right to life (article 4), adopted at 57th Ordinary Session of the African Commission on Human and Peoples' Rights (4 to 18 November 2015).

14 S Lehrfreund 'Undoing the British colonial legacy: the judicial reform of the death penalty' in CS Steiker & JM Steiker (eds) *Comparative capital punishment* (2019) 272, 298. Note that Botswana, the only Sub-Saharan African country to consistently carry out executions, does not have a mandatory death penalty. Novak (n 11) 78-85.

15 International Covenant on Civil and Political Rights (1966) art 6(2):

16 R Hood 'Staying optimistic' in L Scherdin (ed) *Capital punishment: A hazard to a sustainable criminal justice system?* (2014) 297-300; W Schabas 'International law, politics, diplomacy and the abolition of the death penalty' (2004) 13 *William & Mary Bill of Rights Journal* 418-19.

17 For further reading on the use of human rights litigation to attack collateral or procedural aspects of the death penalty with the goal of total abolition, see Q Whitaker 'Challenging the death penalty in the Caribbean: Litigation at the

With no executions since 1994, Tanzania is 'de facto abolitionist,' defined as a country that has not carried out an execution in the last ten years.[18] The right to life at article 14 of the Tanzanian Constitution is strong and does not specifically authorise the death penalty: 'Every person has the right to live and to the protection of his life by the society in accordance with law.'[19] Although the Tanzanian High Court found the death penalty unconstitutional in 1994, this decision was later overturned by the Court of Appeal.[20] In that case, which received significant academic criticism, the Court of Appeal ruled the death penalty was cruel and degrading punishment, but was nonetheless constitutional because of a 'lawful sanction' exception that was incorporated into the constitutional definition of torture.[21] However, *Mbushuu* did not directly address the *mandatory* nature of Tanzania's death penalty directly. This fell to a later case, *Kambole v Attorney General*, in which the High Court found that the mandatory death penalty was constitutional because of the Court of Appeal's decision in *Mbushuu*, rejecting the petitioner's argument that only a discretionary death penalty was saved rather than a mandatory one.[22] Consequently, until the Court of Appeal directly addresses the question, the mandatory death penalty will remain in section 197 of the Penal Code, which authorizes the mandatory death penalty for murder. The societal consensus appears to be that the President will regularly commute death row to life imprisonment, which creates its own challenges of delay and uncertainty.[23] In her study of fair trial rights in death penalty cases, Chenwi observed that Tanzanian death row inmates often receive inadequate legal representation, owing to poor remuneration for indigent defense counsel.[24]

Like the Tanzanian constitution, the African Charter does not provide explicit authorisation for capital punishment, although the subsequent charters on children's rights and the rights of women do

Privy Council' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 101; 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 (for a critical perspective on this process).

18 Amnesty International *Death sentences and executions 2020* (2021) 58, https://www.amnesty.org/download/Documents/ACT5037602021ENGLISH.PDF.

19 Tanzania Constitution art 14 (1977).

20 *Republic v Mbushuu* [1994] TZHC 7 (22 June 1994); A Gaitan & B Kuschnik 'Tanzania's death penalty debate: an epilogue on *Republic v Mbushuu*' (2009) 9 AHRLR 459, at 472-474 (noting that the Court of Appeal reversed the High Court decision by finding that the death penalty, although constituting torture, was nonetheless justified by the public interest).

21 A Gaitan & B Kuschnik 'Tanzania's death penalty debate: An epilogue on *Republic v Mbushuu*' (2009) 9 AHRLR 459, at 467-469.

22 *Kambole v Attorney General* [2019] TZHC 6 (18 July 2019).

23 LP Shaidi 'The death penalty in Tanzania: law and practice' Paper presented at the British Institute of International and Comparative Law Conference, application of the death penalty in Commonwealth Africa (10-11 May 2004) (noting that presidential clemency reconciles public support for the death penalty with official nonuse).

24 L Chenwi 'Fair trial rights and their relation to the death penalty in Africa' (2006) 55(3) *International and Comparative Law Quarterly* 609, at 628.

include explicit death penalty prohibitions for juveniles and pregnant women, respectively.[25] In 2015, the African Commission published a new General Comment 3 on the Right to Life (Article 4), which states at paragraph 24: 'In no circumstances shall the imposition of the death penalty be mandatory for an offence.'[26] The General Comment also states that while the death penalty is not prohibited per se by the African Charter, it may only be applied for intentional killing, and with a fair individual trial in civilian court and an opportunity to seek clemency. The General Comment prohibits the death penalty for pregnant or nursing women, children, the elderly, and persons with intellectual disabilities, and obligates states parties to transparency in the sentencing and execution process, including dignified treatment of next of kin.[27]

The African Commission's case law on the death penalty has primarily concerned fair trial rights. In a case against Malawi, the African Commission found a violation where the defendant facing the death penalty did not have the right to counsel or the right to appeal.[28] In several cases involving Nigeria, the African Commission found violations of article 7 (right to a fair trial) where the death sentence was pronounced by a specially-created court, where the defendant faced intimidation or harassment, or where the defendant was presumed guilty before conviction.[29] In *Interights (on behalf of Bosch) v Botswana*, the African Commission did not find a violation of article 4 (right to life) or article 7 (right to a fair trial) of the African Charter, as the trial court properly considered the evidence and mitigating factors and the defendant had reasonable time to seek clemency.[30] In 2013, the African Commission considered the death penalty again in *Spilg (on behalf of Kobedi) v Botswana*, in which the Commission found no violation of the African Charter either for hanging as a method of execution or of delay in executing a sentence where the delay was the fault of the defendant.[31] However, the Commission did find a violation

25 L Chenwi 'Breaking new ground: The need for a protocol to the African Charter on the abolition of the death penalty in Africa' (2005) 5 *African Human Rights Law Journal* 89, at 92-93.

26 African Commission on Human Rights, General Comment 3 on the African Charter: The right to life (article 4), adopted 4-18 November 2015.

27 African Commission, General Comment No 3.

28 *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, consolidated with *Achuthan (on behalf of Aleke Banda)* (2000) AHRLR 144 (African Commission on Human and Peoples' Rights 1995).

29 *International Pen (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (African Commission on Human and Peoples' Rights 1998); *Constitutional Rights Project (in respect of Akamu and Ors) v Nigeria* (2000) AHRLR 180 (African Commission on Human and Peoples' Rights 1995). See also *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (African Commission on Human and Peoples' Rights 2000) (finding the denial of the right to appeal to violate article 7).

30 *Interights (on behalf of Mariette Sonjaleen Bosch) v Botswana* (2003) AHRLR 55 (African Commission on Human and Peoples' Rights, 6-20 November 2003).

31 *Spilg, Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*, Communication 277/2003, African Commission on Human and Peoples' Rights (12 October 2013).

of article 5 because of Botswana's failure to notify the family or legal representatives of the pending execution.[32]

In 2015, the Commission considered *Interights & Ditshwanelo (on behalf of Ping) v Botswana*, which modified the decision in *Spilg (Kobedi)* without citing it. In *Interights (Ping)*, the petitioners raised both article 4 (life) and article 5 (degrading punishment) claims.[33] As to article 4, the petitioners claimed that Botswana's *pro deo* system of legal aid, the presumption in favour of death known as the doctrine of extenuating circumstances, and the lack of genuine clemency consideration violated the right to life.[34] The Commission dismissed these claims, finding that Botswana's procedure for legal aid, consideration of mitigating factors, and petition process for clemency were compliant on paper with the African Charter. However, the Commission did find a violation of article 5, on the grounds that hanging as a method of execution was cruel and degrading, and the secrecy of the execution process violated human dignity. The Commission rejected, as in *Spilg (Kobedi)*, the 'death row syndrome' argument on the basis that the delay in Ping's death sentence was not sufficiently established. Interestingly, the Commission in *Interights (Ping)* started from the premise that international law had to authorise a method of execution, rather than from the premise that methods of execution were acceptable unless they violated international law. According to the Commission, 'Currently, no method of execution has been found to be acceptable under international law. This complicates the current inquiry since it seems that no method of execution is appropriate under international law.'[35] The Commission's implication here is that the death penalty was lawful under the African Charter but no methods of execution were permissible. In 2015, the African Commission also considered a draft protocol on the abolition of the death penalty, but other African Union policy organs did not act on it.[36] Against this background, the African Court decided its first major death penalty case in *Rajabu v Tanzania*.[37]

32 *Spilg (on behalf of Kobedi)* (n 32) at para 177.

33 *Interights & Ditshwanelo (on behalf of Oteng Modisane Ping) v Botswana*, Communication 319/2006, African Commission on Human and Peoples' Rights (4-18 November 2015).

34 I have argued elsewhere that Botswana's 'doctrine of extenuating circumstances' operates as a presumption in favor of death and is neither as rational nor as transparent as a truly discretionary death penalty. In an 'extenuating circumstances' jurisdiction, the defendant has the burden of proving mitigating factors, unlike a discretionary death penalty where the prosecutor must prove aggravating factors. I believe the 'doctrine of extenuating circumstances' does not comport with the ICCPR's requirement to limit the death penalty to only the 'most serious crimes' under article 6. See A Novak 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14(1) *African Human Rights Law Journal* 24. In *Ping*, the African Commission rejected the distinction I am making. For more on Botswana's *pro deo* system and clemency proceedings, see E Maxwell & A Mogwe *In the shadow of the noose* (Ditshwanelo 2006).

35 *Interights (on behalf of Ping)* (n 33) at para 85.

36 Amnesty International *The state of African regional human rights bodies and mechanisms: 2019-2020* (2020) 27.

37 See Amnesty International (n 36) 25.

2 THE DECISION IN *ALLY RAJABU AND OTHERS V TANZANIA*

In its analysis of jurisdiction, the Court found that the Application properly alleged a violation of the African Charter within the Court's scope of review.[38] The Court also determined that the case was admissible because the applicants exhausted domestic remedies and filed the Application within reasonable time.[39] In their cases, all applicants had their convictions affirmed on appeal and filed their cases about two years after the sentences became final, appropriate considering that the applicants were 'lay, indigent and incarcerated.'[40] The other criteria of admissibility were not in dispute.

On the merits, the applicants alleged three violations of the African Charter: a violation of articles 4 (right to life), 5 (right to dignity), and 7 (right to a fair trial). Additionally, the applicants also alleged a violation of article 1, a state's duty to comply with the Charter, owing to Tanzania's failure to amend its penal code to prohibit the mandatory death sentence.[41] An article 1 violation is derivative and requires the Court to find a violation of another right under the African Charter in order to show a violation.[42]

Turning first to the claim under article 7, the applicants alleged three violations of the right to a fair trial: first, that they were not tried in a reasonable time pursuant to article 7(1)(d); second, that the state did not provide the applicants with the right to be heard under article 7(1); and third, that the court that tried them was not competent because the preliminary hearing and trial were conducted by two different judges, in violation of article 7(1)(a).[43] The Court dismissed the first allegation, noting that the 'real' delay in processing the appeal was only two years rather than the 4 years, 2 months claimed by the Appellants as they had not shown that the fault for the entire delay was on the part of the state.[44] Rather, the applicants waited two years before filing the application for review with the Tanzanian appellate court, which accounted for half the total delay.[45] As to the second allegation, the African Court explained that the Tanzanian High Court used a standard of guilt beyond a reasonable doubt in determining its verdicts and had occasion to review all credible evidence.[46] The more specific allegations involved the High Court's reliance on witness testimony and

38 *Rajabu* (n 2) paras 18-33.

39 *Rajabu* (n 2) paras 34-54.

40 *Rajabu* (n 2) paras 49-50.

41 Article 1 states: 'The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.' African Charter on Human and Peoples' Rights (1981) art 1.

42 *Rajabu* (n 2) para 94.

43 *Rajabu* (n 2) paras 59-91.

44 *Rajabu* (n 2) paras 60-73.

45 *Rajabu* (n 2) para 71.

46 *Rajabu* (n 2) paras 74-85.

the investigation of a single police officer, both of which complied with Tanzanian law.[47] Insofar as the High Court's verdicts did not reveal any manifest error, the African Court found no violation of the right to be heard. Finally, as to the right to be heard by a competent court, the African Court explained that Tanzanian law did not require the judge who performed the preliminary hearing and the judge who presided over the trial to be the same person.[48]

Although the Court dismissed the applicants' claim that their death sentences violated the right to a fair trial, the judges did find violations of the right to life (article 4) and the right to dignity (article 5), and therefore a violation of article 1, Tanzania's duty to comply with the Charter.[49] As to the right to life, the Court in *Rajabu* explained that 'despite a global trend towards the abolition of the death penalty, including the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the prohibition of the death sentence in international law is still not absolute.'[50] Although the ICCPR and the Inter-American Convention on Human Rights both have explicit savings for the death penalty in a narrow class of cases, article 4 of the African Charter states only in relevant part that '[n]o one may be arbitrarily deprived of this right.'[51] As the Court noted, the primary constraint here is that a deprivation of the right to life cannot be 'arbitrary,' and although article 4 does not mention the death penalty, by implication if a death sentence were passed according to law and by a competent court it would not be 'arbitrary'.[52] This holding will be disappointing to observers who see the abolition of the death penalty in international law as absolute, as argued in the concurring opinion by Judge Tchikaya, but it is not a surprising holding and accords with other international legal sources.[53]

Although the Court did not find the death penalty per se was 'arbitrary' under article 4, it did find that a death penalty that was

47 *Rajabu* (n 2) paras 81-83.

48 *Rajabu* (n 2) paras 86-91.

49 *Rajabu* (n 2) paras 114, 119-20, 126.

50 *Rajabu* (n 2) para 96.

51 African Charter on Human and Peoples' Rights (1981) art 4. Compare International Covenant on Civil and Political Rights (1966) art 6(2): 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime…' See also American Convention on Human Rights (1969) art 6: 'In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.'

52 *Rajabu* (n 2) para 98.

53 General comment number 6 of the UNHR Committee states that while 'states parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes".' The comment also states that 'abolition is desirable' and 'all measures of abolition should be considered as progress in the enjoyment of the right to life.' UNHR Committee, CCPR General Comment No 6: Article 6 (Right to life), 30 April 1982. The revised General Comment on the Right to Life, No 36, is more elaborate and contains far more restrictions on the death penalty, but does not go so far as to prohibit the death penalty altogether. See General Comment 36 (n 13).

mandatory on conviction was arbitrary, and therefore a violation of the Charter.[54] The Court's analysis of 'arbitrary' deprivation of life was searching, recalling the African Commission's earlier precedents in *Interights (on behalf of Bosch) v Botswana* that death sentences must be provided by law and imposed by a competent court.[55] In addition, the Court also cited the seminal death penalty cases *International Pen (Ken Saro-Wiwa) v Nigeria* and *Forum of Conscience v Sierra Leone* that any violation of fair trial rights under article 7 could make a death sentence an arbitrary deprivation of the right to life under article 4.[56] As to the arbitrariness of the mandatory death sentence, the African Court noted precedent from the UN Human Rights Committee in *Thompson v St Vincent and the Grenadines* that the mandatory nature of the death penalty was fundamentally arbitrary because it did not permit courts to consider whether the death penalty was appropriate in a particular case.[57] The Inter-American Court of Human Rights was in accord, noting in *Hilaire, Constaintine and Benjamin v Trinidad and Tobago* that because the mandatory death penalty 'automatically and generically imposes the death penalty for all persons found guilty of murder,' it was arbitrary under article 4 of the American Convention.[58] The African Court also cited the senior courts of Tanzania's near neighbours, Kenya, Malawi, and Uganda, which had found unconstitutional a similar penal code provision authorizing the mandatory death penalty.[59] Notably, however, the Court did not cite the African Commission's jurisprudence in *Spilg (on behalf of Kobedi)* and *Interights (on behalf of Ping)*, evidently because those cases only found violations of article 5, cruel and degrading treatment, rather than the right to life under article 4.

According to the African Court in *Rajabu*, the deprivation of life as 'arbitrary' should be measured according to three metrics: first, it must be provided for in law; second, it must be passed by a competent court; and three, the death penalty decision must comport with due process.[60] The Court found in mandatory death sentence cases, that the first two provisions were met since the trial courts complied with existing law. However, mandatory death sentences are 'arbitrary' because they violate the principle of due process, which extends not just to procedural rights at trial but also to sentencing.[61] Section 197 of Tanzania's penal code violated due process because the 'automatic and mechanical application of this provision in cases of murder' denied a convicted person the ability to present mitigating evidence and did not

54 *Rajabu* (n 2) para 111. Specifically, the Court found that Section 197 of the Tanzanian penal code did 'not uphold fairness and due process as guaranteed under article 7(1) of the Charter.' As a result, the provision violated article 4's prohibition on 'arbitrary' deprivation of life.

55 *Rajabu* (n 2) para 99, citing *Interights* (n 30).

56 *Rajabu* (n 2) para 100, citing *International Pen* and *Forum of Conscience* (n 29).

57 *Rajabu* (n 2) para 102, citing *Thompson* (n 12).

58 *Hilaire, Constantine & Benjamin v Trinidad & Tobago* Inter-American Court of Human Rights (ser C) No 94 (21 June 2002), paras 103-104.

59 These are summarised above in n 12.

60 *Rajabu* (n 2) para 104.

61 *Rajabu* (n 2) para 107.

have regard to the circumstances in which the offense was committed.[62] Contrary to the punishment fitting the crime, 'the trial court lacks discretion to take into account specific and crucial circumstances such as the participation of each individual offender in the crime.'[63] As a result, the Court determined that the mandatory death penalty in Section 197 of Tanzania's penal code violated the due process provisions of article 7(1) and therefore constituted 'arbitrary' deprivation of the right to life under article 4.[64] As noted, while article 4 does not explicitly save the death penalty, an exception could be implied so long as the deprivation of life was not 'arbitrary.' In balancing the right with the limitation, the Court explained that the 'right to life' was strongly worded and the exception to the right comparatively weaker.[65]

The violation of article 5, human dignity, focused on a different procedural aspect of the death penalty: hanging as a method of execution. According to the Court, 'many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.'[66] Here the Court laid down a standard: 'in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible'.[67] The Court found that hanging was 'inherently degrading' and 'inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment'.[68] As a result, the respondent state violated article 5 of the Charter. Notably, this is a strong holding as hanging is the predominant method of execution on the books in retentionist Africa.[69] Also of note is the citation to *Ng v Canada*, in which the UN Human Rights Committee found that asphyxiation with poison gas was cruel and degrading treatment.[70] The *Rajabu* court's condemnation of hanging as a method of execution comes after the African Commission's earlier ruling in *Interights (on behalf of Ping)* that found hanging to be a violation of article 5, though the Court did not directly cite that opinion.[71]

62 *Rajabu* (n 2) para 108.

63 *Rajabu* (n 2) para 109.

64 *Rajabu* (n 2) paras 111-114.

65 *Rajabu* (n 2) para 112.

66 *Rajabu* (n 2) para 118.

67 *Rajabu* (n 2) para 118.

68 *Rajabu* (n 2) para 119.

69 R Hood & C Hoyle *The death penalty: A worldwide perspective* (2015) 178-79.

70 *Charles Chitat Ng v Canada* (No 469/1991), UN Doc CCPR/C/49/D/469/1991 (1996) (UNHR).

71 The issue of hanging as a method of execution was initially raised before the African Commission in *Interights (on behalf of Bosch)*, but as the Commission noted in its decision: 'One of the six issues namely "whether the methods of execution in Botswana, by hanging, breached article 5 of the African Charter" was abandoned during the hearing of the matter at the African Commission's 31st Ordinary Session.' *Interights (on behalf of Bosch)*, (2003) AHRLR 55 (African Commission on Human and Peoples' Rights, 6-20 November 2003). However, the

The remainder of the decision concerned Tanzania's violation of article 1 for failing to comply with the African Charter followed by an analysis of reparations to the applicants. In summary, the Court ordered payment of 4 million Tanzanian shillings for the psychological impact of remaining on death row between the time of sentencing and the current judgment.[72] Citing to *Soering v United Kingdom* from the European Court of Human Rights, which concerned the so-called death row 'syndrome' (that is, the mental anxiety of death row), the *Rajabu* court agreed that the tension of a pending execution constituted psychological suffering.[73] The Court also ordered some non-pecuniary reparations, including a change to the Tanzanian penal code to ensure the death penalty was discretionary and to remove the sentence of hanging.[74] The Court found other claims for damages were not proven.

The substantive concurrence by Judge Blaise Tchikaya also merits brief commentary. Judge Tchikaya advocates for a stronger position that the death penalty is always 'arbitrary' and therefore violates article 4 of the African Charter. He traces the progressive development of an anti-death penalty norm in international law and notes the widespread moratoria on executions in most retentionist African countries.[75] This appears to be a philosophical difference between Judge Tchikaya and the rest of the Court: should international law reflect the consensus of existing state practice or should it make a normative statement in order to shape state practice going forward?[76] Observers have noted that death penalty cases frequently do both: a decision against the death

Commission found hanging to breach article 5 in *Interights (on behalf of Ping)* in 2015. As noted above, however, the Commission's rationale for this holding was extremely broad, stating that 'no method of execution has been found acceptable under international law.' *Interights (Ping)* (n 33) para 85. The implication in *Interights (Ping)* was that all methods of execution were violations of the African Charter, so that the death penalty could not be carried out at all. The *Rajabu* Court's failure to cite *Ping* directly may have been an implicit rejection of such a broad rationale.

72 *Rajabu* (n 2) paras 147-150.

73 *Rajabu* (n 2) para 149, citing *Soering v United Kingdom* (1989) 161 European Court of Human Rights (ser A). The UN Human Rights Committee has not found that delay alone constitutes cruel and degrading punishment but may be combined with prison conditions or other stresses of death row. See eg *Francis v Jamaica* (No. 606/1994), UN Doc CCPR/C/54/D/606/1994 (1995) (UNHR); *Johnson v Jamaica* (No 588/1994), UN Doc CCPR/C/56/D/588/1994 (1996) (UNHR).

74 *Rajabu* (n 2) paras 162-163.

75 *Rajabu*, concurring opinion of Judge Tchikaya (n 6) at paras 16-19, 22-27.

76 The descriptive versus normative debate is well known to international law scholars. See AE Roberts 'Traditional and modern approaches to customary international law: a reconciliation' (2001) 95 *American Journal of International Law* 761-62. As she writes, 'prescriptive and normative rules are often confused because both express an imperative to act. Prescriptive laws express a legal imperative to act (you should do x because x is legally required), while normative rules express a moral imperative to act (you should do x because x is morally required).' See page 761. In this case, Judge Tchikaya is taking a more normative position on what international law is compared to the rest of the Court. He says as much, noting that *Rajabu* 'limit[s] the Court's power of interpretation' and 'pays little attention to the Praetorian powers of the Human Rights judge to advance the protection of the right to life.' *Rajabu*, concurring opinion of Judge Tchikaya (n 6) at paras 21, 24.

penalty in one jurisdiction confirms the progressive abolition of the death penalty, but it also strengthens the normative case against capital punishment by extending that consensus further.[77] In this case, however, nothing is stopping the African Court from going still further toward death penalty abolition at a later time. The majority made clear that *Rajabu* is a human rights 'floor' rather than a 'ceiling' and does not prevent progress toward full abolition.

3 ANALYSIS

The first notable aspect of the decision in *Rajabu* is that the African Court analysed the mandatory death penalty under article 4 (right to life) rather than article 7 (right to a fair trial), treating the death penalty analysis separately from its article 7 analysis. Rather, the 'right to a fair trial' mattered in the article 4 analysis because it shed light on what 'arbitrary' deprivation of human life meant. The Inter-American Court of Human Rights decision in *Hilaire, Constantine and Benjamin v Trinidad and Tobago* as well treated the mandatory death penalty in its analysis of the 'right to life' under article 4 of the American Convention on Human Rights.[78] Because of a mandatory death sentence, the applicants' right to be heard was denied *after the verdict and on appeal*, not in the original trial, because the trial court had no jurisdiction to hear mitigating evidence in a sentencing hearing and the appellate court had no mitigating evidence to review.[79] As a result, the African Court could have construed the violation here as a violation of the right to be heard by a competent court under article 7 rather than as an 'arbitrary' deprivation of life under article 4.

Of course, the end result of either analysis is still the same: the mandatory death penalty violates the Charter. Using a 'right to life' analysis, however, may limit the applicability of *Rajabu* to other mandatory (non-death) sentences, because the Court's fault with Tanzania's mandatory death penalty was the 'arbitrary' deprivation of life not the mandatory nature of the sentence per se. Using an article 7 analysis rather than an article 4 analysis could well have opened the door to challenges of mandatory life imprisonment or mandatory minimum cases, because these too could arguably limit the ability of

77 R Hood & C Hoyle 'Towards the global elimination of the death penalty: a cruel, inhuman and degrading punishment' (2017) in P Carlen & LA França (eds) *Alternative criminologies* 409 ('The influence exerted by the weight of numbers as more and more countries have embraced the human rights case for abolition has itself strengthened the *normative* legitimacy of the case against capital punishment') (emphasis in original).

78 *Hilaire, Constantine & Benjamin v Trinidad & Tobago* Inter-American Court of Human Rights (ser C) No 94 (21 June 2002).

79 Section 197 of the Tanzanian penal code states: 'Any person convicted of murder shall be sentenced to death.' Tanzania Penal Code, chapter 16, Laws of Tanzania revised (1981).

appellate courts' jurisdiction to review sentences. By using a right to life analysis, the African Court is essentially saying 'death is different'.[80] In at least one category of cases, however, *Rajabu* may still be relevant: mandatory life imprisonment without parole cases. Academic observers have long cautioned that mandatory life without parole essentially constitutes a form of the death penalty in which the method of execution is abandonment.[81] Such a sentence would likely not satisfy the African Commission's General Comment 3, on the Right to Life (Article 4), which 'envisages the protection not only of life in a narrow sense, but of dignified life.'[82] The US Supreme Court relied on its decision abolishing juvenile capital punishment to prohibit mandatory life without parole to juveniles, for the first time bringing together its death penalty and non-death penalty jurisprudence.[83] In a case arising from Mauritius, the Judicial Committee of the Privy Council accepted the appellant's argument that a mandatory sentence of life imprisonment 'was subject to almost all the vices held to be inherent in the mandatory death sentence itself,' including its arbitrariness and lack of individualised consideration.[84] In *Makoni v Commissioner of Prisons*, the Zimbabwe Constitutional Court found unconstitutional a provision of that country's penal code that automatically made all life-term inmates ineligible for parole, relying in part on case law on the mandatory death penalty.[85] A 'death is different' approach has limitations, and it is encouraged that the African Court consider the 'right to life' expansively in a future challenge to mandatory life imprisonment, especially where no provision exists in law for parole or early release.

In *Rajabu*, the Court left open another urgent question: whether all death row prisoners have a right to an individualised sentencing hearing after conviction, or whether a summary process such as by an executive clemency authority, appellate court, or pardon/parole board is sufficient. This question would likely arise only if Tanzania attempts to short-circuit the individualised hearing process by 'batch-sorting' death row inmates as groups rather than as individuals. Likely,

80 The phrase 'death is different' is an inexact quote from Justice William Brennan's concurrence in *Furman v Georgia*, 408 US 238, 286 (1972) ('death is a unique punishment in the United States'). The phrase captures the U.S. Supreme Court's different Eighth Amendment standards in capital punishment cases versus non-capital punishment cases, a distinction that has come under significant and even withering criticism from scholars. RE Barkow 'The court of life and death: the two tracks of constitutional sentencing law and the case for uniformity' (2009) 107 *Michigan Law Review* 1145. Essentially, this criticism holds, courts should avoid applying more deferential punishment standards in non-death penalty cases: if a punishment is cruel and unusual in death, it may also be cruel and unusual in life.

81 C Appleton & B Grøver 'The pros and cons of life without parole' (2007) 47 *British Journal of Criminology* 597, 609-11; E Girling 'Sites of crossing and death in punishment: the parallel lives, trade-offs and equivalencies of the death penalty and life without parole in the US' (2016) 55 *Howard Journal of Crime and Justice* 345.

82 African Commission, General Comment 3.

83 *Miller v Alabama*, 567 U.S. 460 (2012), citing *Roper v Simmons*, 543 US 551 (2005).

84 *Boucherville v Mauritius* [2008] UKPC 37 (9 July 2008).

85 *Makoni v Commissioner of Prisons* [2016] ZWCC 8 (13 July 2016).

hundreds of inmates are on death row in Tanzania owing to its mandatory death penalty laws, notwithstanding a mass commutation of 256 inmates on 9 December 2020 in commemoration of the country's Independence Day.[86] Providing them all with an individualised sentencing hearing is a significant investment of time and resources. If the mandatory death penalty is arbitrary, it is also arbitrary for persons sentenced to death without a sentencing hearing who have had their sentences commuted by the president. Kenya, which had an even larger death row owing to the mandatory death penalty for robbery, has struggled with providing sentencing hearings not only to current death row inmates but to prior inmates whose sentences were commuted to life or terms of years without a sentencing hearing.[87] In April 2021, the Malawi Supreme Court of Appeal found the death penalty per se unconstitutional in part because of gaps created by its earlier decision striking down the mandatory death penalty, which left certain categories of prisoners – for instance, those whose cases were on appeal at the time and those whose sentences were already commuted to life – in legal limbo.[88] It is absolutely essential that the African Court make clear in the future that all Tanzanian death row inmates are entitled to an individualised sentencing hearing, *even if their sentences have already been commuted by the President*. The 'arbitrary' right to life violation is not cured through mass grants of executive grants of clemency, and indeed categorising prisoners based solely on the timing of a clemency grant would seem to accentuate rather than alleviate the arbitrariness.

The African Court's decision in *Rajabu* completes the unanimous condemnation of the mandatory death penalty by international human rights bodies, bringing the African Charter in line with the ICCPR and the American Convention on Human Rights. It also validates the consensus of domestic courts from across the Commonwealth where the mandatory death penalty has been abolished in recent years.[89] Since the development of international human rights law on this point so closely accords with the decline of the mandatory death penalty in state practice, we may even speak of a possible peremptory norm in development that a fact-finder in a capital case must have the ability to consider mitigating circumstances in sentencing.

The African Court's holding on hanging as a method of execution was much briefer, barely a page and a half. Yet, this holding has the potential to transform the administration of the death penalty in Sub-

86 Kizito Makoye 'Tanzania commutes death sentences of 256 convicts' *Anadolu Agency News* (9 December 2020), https://www.aa.com.tr/en/africa/tanzania-commutes-death-sentences-of-256-convicts/2071191 (accessed 2 February 2022).

87 Death Penalty Project *Pathways to justice: Implementing a fair and effective remedy following abolition of the mandatory death penalty in Kenya* (2019) (offering several proposals for streamlining sentencing hearings to large numbers of death row inmates).

88 *Khoviwa v Republic* [2021] MWSC 3.

89 In addition to the cases listed at n 12, see also P Jabbar 'Imposing a "mandatory" death penalty: a practice out of sync with evolving standards' in CS Steiker & JM Steiker (eds) *Comparative capital punishment* (2019) 133, 143-45; Lehrfreund (n 14) 292-98.

Saharan Africa insofar as nearly all retentionist African states rely on hanging as a method of execution.[90] Notably, the Court used article 5 of the Charter (right to dignity) rather than article 4 (right to life) to analyse hanging as a method of execution, which was consistent with the restrained nature of the *Rajabu* decision in not finding the death penalty per se to be a violation of article 4. In its 'hanging' holding, the Court laid out a standard: 'methods of execution must exclude suffering or involve the least suffering possible'.[91] The Court then determined hanging did not sufficiently exclude suffering. However, the Court provided no indication of what methods of execution would be permissible and did not require applicants to suggest an alternative method of execution (though we know, based on the Court's citation to *Ng v Canada*, that gas asphyxiation is also impermissible). This holding then has the potential to exclude all permissible methods of execution as violations of article 5, which would effectively find all executions to be violations of article 5.[92] This leads to the result advocated in the concurring opinion by Judge Tchikaya (total abolition of the death penalty in international law) but via the 'right to dignity' rather than the 'right to life.' This is a more progressive holding than the US Supreme Court in *Baze v Rees*, in which a death row inmate challenging a lethal injection protocol had to affirmatively provide a specific alternative that was less 'cruel and unusual,' essentially closing the door on challenges to methods of execution.[93]

The African Court's holdings as to the mandatory death penalty and to hanging lend clarity to African Commission jurisprudence by articulating simpler and clearer standards for what is permissible. In *Spilg (on behalf of Kobedi)*, the African Commission upheld hanging as a method of execution, stating that while hanging 'may not be compatible with respect for the inherent dignity of the individual and the duty to minimise unnecessary suffering,' the Complainants did not demonstrate that the execution 'would be, or was, carried out without due attention to the weight of the condemned'.[94] The Commission therefore ruled that aspect of the complaint was 'speculative.'[95] However, in 2015, the Commission ruled that 'no method of execution has been found to be acceptable under international law,' and rejected hanging as a method of execution in *Interights (on behalf of Ping)*.[96] In *Rajabu*, the African Court implicitly rejected the overbroad dicta in *Ping* that stated no methods of execution were acceptable under international law, which, if taken to its logical conclusion, would end the death penalty outright. Instead, the African Court declared hanging

90 Hood & Hoyle (n 69).

91 *Rajabu* (n 2) para 118.

92 All executions face the risk of physical pain, regardless of method. Hood & Hoyle (n 69) 178.

93 *Baze v Rees*, 553 U.S. 35 (2008). In this case, the Supreme Court ruled that failure to adopt an alternative method of execution (in this case, a different lethal injection protocol) was unconstitutional only when the alternative procedure was feasible and substantially reduced the risk of severe pain.

94 *Spilg (on behalf of Kobedi*) (n 31) at paras 169-170.

95 *Spilg (on behalf of Kobedi*) (n 31) at para 170.

96 *Interights (on behalf of Ping)* (n 33) para 85.

to be 'inherently degrading' in violation of article 5 and laid out a clearer standard that a method of execution 'must exclude suffering or involve the least suffering possible,' without requiring the applicants to suggest an alternative method.[97] The African Court's test for determining whether a death sentence was 'arbitrary' and therefore violative of article 4 was clearer than the *Kobedi* Commission's decision. In *Kobedi*, the African Commission used the 'most serious crimes' standard from article 6 of the ICCPR to uphold a death sentence for murder even though that phrase is not mentioned in article 4 of the African Charter.[98] Of note, unlike *Rajabu*, the *Kobedi* case did not involve a mandatory death sentence, as Botswana adheres to the 'doctrine of extenuating circumstances' which allows a judge to substitute a lesser sentence upon a showing that the defendant was less morally blameworthy for the crime.[99] *Rajabu* is a more favourable and more logical controlling precedent for future death penalty cases than *Kobedi* or *Ping* were.

The remaining question raised in *Rajabu* is, as the concurrence by Judge Tchikaya argues, whether article 4 of the African Charter can be used to prohibit the death penalty per se. Unlike article 4 of the American Convention or article 6 of the ICCPR, the African Charter provides no specific authorisation for capital punishment.[100] The Court's assumption that the phrase 'arbitrarily deprived of this right' in article 4 implicitly allows for a lawful death penalty is by no means the only interpretation possible. The arbitrariness of the death penalty is manifest: legal aid strains resources; death sentences are imposed disproportionately on the poor; forensic evidence and police investigations are limited; and the element of chance at each stage of the process leads to wrongful convictions.[101] And that does not mention the misuses of capital punishment during the colonial and post-independence periods, often for political reasons.[102] The Court's decision in *Rajabu* nonetheless aligns with its incremental jurisprudence restricting the death penalty on procedural grounds and is defensible in part because it reflects the progressive decline of the

97 *Rajabu* (n 2) at paras 118-119.

98 *Rajabu* (n 2) paras 105-109; *Spilg (on behalf of Kobedi)* (n 31) para 206.

99 The 'doctrine of extenuating circumstances' operates as a presumption in favor of the death penalty. It originated in South Africa in 1935. Sec 61 Criminal Procedure and Evidence (Amendment) Act 46 of 1935 (SA). See also DM Davis 'Extenuation: an unnecessary halfway house on the road to a rational sentencing policy' (1989) 2 *South African Journal of Criminal Justice* 211-212; D van Zyl Smit 'Judicial discretion and the sentence of death for murder' (1982) 99 *South African Law Journal* 86.

100 See n 51 and accompanying text.

101 S Babcock 'An unfair fight for justice: legal representation of persons facing the death penalty' in CS Steiker & JM Steiker (eds) *Comparative capital punishment* 96 (2019); A Novak *The death penalty in Africa: foundations and future prospects* (2014) 3-4.

102 AM Karimunda *The death penalty in Africa: the path towards abolition* (2014) 129, 177-78.

death penalty in state practice.[103] However, as the global abolition of the death penalty is progressive, nothing in the *Rajabu* decision prevents the Court from taking a stronger line against the death penalty in the future. Many Commonwealth African constitutions that retain the death penalty contain a right to life 'savings clause' that explicitly authorises the death penalty.[104] These 'savings clauses' are gradually themselves becoming more ambiguous or more restrictive over time (as in the recent constitutions of Kenya and Zimbabwe).[105] Tanzania is the only retentionist country in Commonwealth Africa that has an unqualified right to life in its national constitution, with no savings for the death penalty at all, a contradiction that still has not been reconciled by the Court of Appeal.[106] The African Court's decision in Rajabu will hopefully provide the impetus for domestic reform of Tanzania's mandatory death penalty regime and bring the country closer into compliance with the African Commission's General Comment on the Right to Life.[107]

4 CONCLUSION

The African Court's decision in *Rajabu v Tanzania* was a significant milestone in the global abolition of the mandatory death penalty for murder since it reinforced decisions of other international tribunals and a growing consensus of domestic courts in the English-speaking world. The decision was also more restrictive of the death penalty than earlier African Commission jurisprudence and better represents the Commission's General Comment 3 on the Right to Life (2015), which placed strict limits on the legality of the death penalty under the African Charter. The Court's second notable holding, finding hanging as a method of execution to be inherently degrading, was a significant advancement in international jurisprudence. In *Rajabu*, the Court accepted the African Commission's earlier decision that hanging violated article 5 of the African Charter, but using a more defensible and easier to apply standard than previously laid out.[108] Most importantly, the *Rajabu* decision will hopefully create domestic pressure to reform Tanzania's mandatory death penalty law. Because the Tanzanian

103 A Novak *The African challenge to global death penalty abolition: International human rights norms in local perspective* (2016) 23-24 (on incremental jurisprudence of African human rights system); Hood & Hoyle (n 90) 15 (on progressive global decline of the death penalty).

104 See eg Zambia Constitution art 12; Ghana Constitution art 13; Uganda Constitution art 22; Sierra Leone Constitution art 16; eSwatini Constitution art 15; Gambia Constitution art 18; Nigeria Constitution art 33; Botswana Constitution art 4(1).

105 Kenya Constitution art 26 (2010); Zimbabwe Constitution art 48 (2013).

106 Tanzania Constitution art 14 (1977).

107 Shortly after *Rajabu* was decided, Tanzania ousted jurisdiction of the African Court to hear individual complaints. See 'As African Court releases new judgments, Tanzania withdraws individual access' International Justice Resource Center (5 December 2019), https://ijrcenter.org/2019/12/05/as-african-court-releases-new-judgments-tanzania-withdraws-individual-access.

108 *Interights (on behalf of Ping)* (n 34) para 85.

Constitution provides for an unqualified right to life with no authorisation for the death penalty, the Court of Appeal will eventually have to revisit its own precedent and a pending lower court challenge upholding the death penalty.

A retrospective evaluation of the determination of reparations for non-pecuniary loss: a comment on *Lucien Ikili Rashidi v Tanzania*

*Robert Doya Nanima**
https://orcid.org/0000-0001-8825-3376

ABSTRACT: The African Court on Human and Peoples' Rights is a distinct body that protects human rights and develops jurisprudence in international and regional law. It is on this basis that it often awards compensation for human rights violations. However, while the Court gives reasons for compensation for pecuniary loss, it does not do so for nonpecuniary loss. With the aid of a conceptual approach, the contribution evaluates the argument that the Court's failure to give reasons for compensation for nonpecuniary loss indicates a lack of clarity. With the aid of *Lucien Ikili Rashidi v Tanzania* (2015), *Mtikila v Tanzania* (2011), *Norbert Zongo v Burkina Faso* (2015), *Lohe Issa Konate v Burkina Faso* (2016) and *Armand Guehi v Tanzania* (2015) this contribution evaluates the Court's approach to the grant of compensation for nonpecuniary loss. The Court's failure to give reasons in instances of nonpecuniary loss affects the application of the rule of law in the adjudication of cases. This contribution argues that the Court's jurisprudence presents an inconsistent approach to this problem. To substantiate this argument, this case discussion gives the facts and holding in *Lucien Ikili Rashidi* and identifies the lack of clarity by the African Court in dealing with non-pecuniary loss. This is followed with a close evaluation of the four earlier cases of *Mtikila, Zongo, Konate* and *Guehi*. A two-stage approach in dealing with compensation for the non-monetary loss is proposed. First, a finding of the existence of a human rights violation should be presumed sufficient to warrant the award of compensation for non-pecuniary loss. Second, the Court should then evaluate the amounts claimed against the principles of equity and the circumstances of the case.

TITRE ET RÉSUMÉ EN FRANCAIS:

Une évaluation rétrospective de la détermination des réparations pour préjudice moral: un commentaire de l'affaire *Lucien Ikili Rashidi c. Tanzanie*

RÉSUMÉ: La Cour africaine des droits de l'homme et des peuples est un organe distinct qui protège les droits de l'homme et développe une jurisprudence en droit international et régional. C'est sur cette base qu'elle accorde souvent des réparations pour des violations des droits de l'homme. Cependant, si la Cour motive l'indemnisation du préjudice pécuniaire, elle ne le fait pas pour autant s'agissant des préjudices non pécuniaires. A l'aide d'une approche conceptuelle, la contribution évalue l'argument selon lequel le fait que la Cour ne motive pas l'indemnisation du préjudice moral révèle un manque de clarté. S'appuyant sur les affaires *Lucien Ikili Rashidi c. Tanzanie* (2015), *Reverend Christopher Mtikila c. Tanzanie* (2011),

* LLB (Makerere), Dip LP (Law Development Centre) LLM, LLD (University of the Western Cape); Senior Lecturer, Faculty of Law, University of the Western Cape, member of the African Committee of Experts on the Rights and Welfare of the Child and Special Rapporteur on Children affected by armed conflict; rnanima@uwc.ac.za

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Norbert Zongo et autres c. Burkina Faso (2015), *Lohe Issa Konate c. Burkina Faso* (2016) et *Armand Guehi c. Tanzanie* (2015), cette contribution évalue l'approche de la Cour concernant l'octroi d'une indemnité pour préjudice moral. L'absence de motivation de la Cour dans les cas de préjudice non pécuniaire affecte l'application de la règle de droit dans le jugement des affaires. Cette contribution soutient que la jurisprudence de la Cour présente une approche incohérente de ce problème. Pour étayer cet argument, cette discussion de cas présente les faits et le jugement dans l'affaire *Lucien Ikili Rashidi* et identifie le manque de clarté de la Cour africaine dans le traitement du préjudice non pécuniaire. Elle est suivie d'une évaluation approfondie des quatre affaires antérieures, *Mtikila*, *Zongo*, *Konaté* et *Guehi*. Une approche en deux étapes dans le traitement de la compensation pour le préjudice non pécuniaire est proposée. Premièrement, la constatation de l'existence d'une violation des droits de l'homme devrait être présumée suffisante pour justifier l'octroi d'une indemnisation pour le préjudice non pécuniaire. Deuxièmement, la juridiction devrait alors évaluer les montants demandés en fonction des principes d'équité et des circonstances de l'affaire.

KEY WORDS: compensation, non-material loss, remedies, reparations, rule of law

CONTENT:

1 INTRODUCTION

Reparations refer to steps that a judicial body or tribunal hands down to a person or an individual who has wronged another, to repair the consequences of a violation.[1] Some of the common forms of reparations include restitution, compensation, satisfaction, and guarantees of non-repetition.[2] In comparison with remedies, reparations offer an effective method of ensuring that there is redress for a recognised human rights violation. Consequently, the process that ensures that the redress is effected, informs the reparations. Various scholars believe that reparations offer specific steps that render a remedy to be effective.[3] This definition contextualises reparations as a tool that validates access to justice.

From a historical perspective, reparations were limited to the national or domestic domain. This position changed in the *Factory in*

1 D Shelton *Remedies in international human rights law* (2015) 7.

2 B Bollecker-Stern *Le préjudice dans la théorie de la responsabilité international* (1973) 10.

3 J Sarkin 'Providing reparations in Uganda: substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades' (2014) 14 *Africa Human Rights Law Journal* 528.

Chorzow Case,[4] where the Permanent Court of Justice stated that the reparation 'must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed'.[5] This position was later extended to other international treaties such as the Universal Declaration of Human Rights,[6] the International Covenant on Civil and Political Rights,[7] and the United Nations Convention Against Torture.[8] Other treaties include the Convention on the Rights of a Child,[9] the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict,[10] and the African Charter on the Rights and Welfare of the Child.[11]

The current framework that guides the application of reparations is provided in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law.[12] While these basic principles do not lay down new international or domestic legal obligations, they, however, identify modalities, procedures and methods for the implementation of the existing legal obligations under international human rights law and international humanitarian law.[13] It is also instructive to note the work of the International Law Commission (ILC) in its drafts article of state responsibility.[14] It also recognises various forms of reparations, such as restitution,[15] compensation,[16] rehabilitation,[17] satisfaction,[18] and guarantees of non-repetition.[19] The

4 *Factory in Chorzow Case (Germany v Poland)* 1927 PCIJ (Ser A) No 9.

5 *Chorzow Case* (n 4).

6 Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948, art 8.

7 International Covenant on Civil and Political Rights, 999 UNTS 171 art 2(3)(a), 9(5) & 14(6).

8 United Nations Convention Against Torture, 1465 UNTS 85 art14 (1).

9 The Convention on the Rights of a Child 1577 UNTS 3 article 19.

10 The Optional Protocol to the Convention on the Rights of the Child adds value to the application of Art 19 of the Convention on the Rights of a Child (n 9).

11 African Charter on the Rights and Welfare of Children, CAB/LEG/24.9/49 (1990).

12 Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law, adopted vide Resolution A/RES/60/147 at the 60th session, Agenda item 71(a) of the General Assembly 21 March 2006.

13 Basic principles (n 12) preamble.

14 Part II on art 28 of the ILC Commentaries, 2001.

15 Basic principles (n 12) rule 19.

16 Basic principles (n 12) rule 20.

17 Basic principles (n 12) rule 21. Rehabilitation as a form of reparation includes medical, psychological, legal and social services.

18 Basic principles (n 12).

19 Basic principles (n 12). Finally, the Basic Principles recommend the use of guarantees of non-repetition; largely aimed at requiring the state to take steps to ensure the prevention of the re-occurrence of the violations. These have been used by some international human rights bodies including the Rome Statute of the International Criminal Court.

principles that underscore the grant of compensation for non-pecuniary loss are governed by the decisions from the Court.

Considering the above, the African Court is situated in a position to develop jurisprudence on human rights, including reparations. It is argued that the failure to give reasons for compensation for non-pecuniary loss indicates a lack of clarity. At its core, the Court does not unpack or define the concept of the basis of equity as a critical aspect in determining non-pecuniary loss. This contribution gives the facts and holding in *Lucien Ikili Rashidi* and identifies the lack of clarity by the African Court in dealing with non-pecuniary loss. This is followed with a close evaluation of four earlier cases of *Mtikila*, *Zongo*, *Konate* and *Guehi*. A conclusion and recommendations to improve the Court's approach, follow.

2 FACTS AND HOLDING IN *LUCIEN IKILI RASHIDI* AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS APPLICATION 3 OF 2015 (28 MARCH 2019)

In 1983, the applicant, a Congolese national from the DRC moved to the respondent state on a temporary visa, and his wife and children joined him in 1999.[20] In 2005, when he had filed a civil case in a local court, he lost his passport and applied through his embassy in Dar es Salaam for a replacement.[21] Although the embassy confirmed the process of replacing his passport, and the Tanzanian Police issued him with a certificate of loss of his passport.[22] On 9 June 2006, the Tanzanian immigration authorities arrested the applicant for illegal stay in the country.[23] His wife and children were also arrested and detained for five days before being produced in court on criminal charges of illegal stay. The DRC Embassy obtained an authorisation from the Tanzanian authorities for the applicant to be released and granted seven days to exit the country.[24] After his family exited the country in September 2007, the applicant filed a case against some immigration officers for illegal arrest and degrading treatment. In 2010, he added the Permanent Secretary of the Ministry of Home Affairs and the Attorney General of Tanzania as parties to the case.[25] In January 2014, the High Court ruled that based on the applicant's illegal stay in the country, the applicant's arrest was lawful. He filed a request to the High Court for a copy of the proceedings to pursue an appeal to no avail. He was issued with a 'Notice of Prohibited Immigrant' and the request to have it waived to pursue his appeal was not granted.

20 *Lucien Ikili Rashidi v Tanzania* Application 009/2015 (reparations) (decided 28 March 2019) para 4.

21 *Lucien* (n 20) para 6.

22 *Lucien* (n 20) para 7.

23 *Lucien* (n 20) para 8.

24 *Lucien* (n 20) para 8.

25 *Lucien* (n 20) para 10.

He brought the application before the African Court seeking orders that the respondent state had violated the right to residence and free movement, the right to right to dignity, and the right to a fair trial,[26] and reparations.[27] The applicant claimed eight hundred million Tanzanian Shillings (approximately 348 000 United States Dollars) for non-material loss and one thousand five hundred dollars for each of the indirect victims.[28] The Court found that the respondent state had violated the applicant's right to integrity under article 4 of the Charter. In addition to all the rights specified above, the Court granted reparations for both pecuniary and non-pecuniary loss.[29] It informed itself of the principles that guide the grant of reparations, thus, the applicant had to prove that the state had international responsibility, causation, the burden of proof, and *restitutio in integrum*.[30]

Concerning the prayer for non-pecuniary loss, the Court stated that, first, the findings of violations by the Court led to the presumption that a victim was entitled to compensation for non-pecuniary loss. Second, the Court ordered that the amount to be granted as the compensation had to be calculated on the basis of fairness and circumstances of the case.[31] This use of these principles pointed to some expectations: the first principle is uniformly applied, the second principle is informed by the basis of equity or fairness and the circumstances of the case.[32]

The Court upheld the first expectation, but there was no in-depth reasoning on the application of the basis of equity principle and the circumstances of the case. As indicated in the introduction, the Court did not unpack or define the concept of the basis of equity and the circumstances of the case. The lack of guidance, it is argued, connotes a subjective application of the 'basis of fairness or equity, and the circumstances of the case' without communicating the reasons for the decision. This leads to the conclusion that it exercised its discretion as it deemed fit.[33] While the author does not propose a definition of the key terms, there should be a uniform process in the application of this principle.

This was exacerbated by the grant of a reduced amount of ten million Tanzanian shillings (approximately 4 035 US Dollars). For non-pecuniary loss for indirect victims, the Court reduced the amount to one million Tanzanian Shillings (approximately 435 US Dollars). It should

26 *Lucien* (n 20) para 12.

27 *Lucien* (n 20) para 25(2).

28 *Lucien* (n 20) paras 132-133.

29 *Lucien* (n 20) paras 132-133.

30 The engagement of these principles is beyond the scope of this paper. This is, however, an indication of the principles in the Basic Principles.

31 *Lucien* (n 20) para 119; The court referred to previous jurisprudence of *Nobert Zongo* para 62. This principle has also been referred to as the basis of equity principle.

32 See the discussion of these concepts in the decisions in this comment.

33 *Lucien* (n 20) para 119; the court referred to previous jurisprudence of *Nobert Zongo* para 62. This principle has also been referred to as the basis of equity principle.

be noted that the normative framework of the African Commission does not offer guidance on the concepts of equity of fairness and the circumstances of the case.[34] The closest guidance is in the following provision:

> If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.[35]

Other instructive sources of reparations include the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that requires that victims access mechanisms of justice and prompt redress under national legislation.[36] A look at the guidelines on a fair trial and legal assistance in Africa shows insights into the need to use a 'victim-sensitive approach' concerning reparation, through compassion and respect for their dignity and have access to prompt redress.[37] This principle has not been engaged in the decisions leading to the grant of non-pecuniary compensation.

3 UNPACKING THE PROBLEM

This section unpacks the research problem of the Court's failure to give guidance in dealing with compensation for non-pecuniary loss and the subjective application of the 'basis of equity principle' without due communication of the reasons for the decision. This brings to the fore, the relevance of the rule of law, and the proof and process to be used about the basis of equity and the circumstances of the case.

3.1 Relevance of the rule of law

It is desired that a court offers substantive reasons for its findings as a practice.[38] While this is usually tagged to the independence of the courts in the wider context of the three arms of government, adherence to the rule of law calls for the Court to offer well-reasoned judgments.[39] A reasoned judgment is punctuated by reasons the court uses to justify its evaluation of the law and the facts. It also points to the need to prove some aspects of the prayers sought; an evaluation of the position of the burden of proof; and the decisions by the Court. If the Court in the exercise of this discretion does not give reasons for its findings, but substantively reduces or increases the quantum of damages, the

34 The concept of fairness is not provided for in the Protocol on the Statute of the African Court of Justice and Human Rights, 2008.

35 Protocol (n 34) art 27(1).

36 The Victims' Declaration, adopted 29 November 1985 by GA resolution 40/34); The American Convention on Human Rights, 1985; art 63(1); American Convention on Human Rights, *Godínez Cruz v Honduras* (Interpretation of the Compensatory Damages) IACtHR, Ser C No 10, 17 August 1990, para 27.

37 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

38 *Jacobs and Others v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC).

39 Richardson ILM (2002) generally.

aggrieved litigant is not accorded the right to a fair and speedy trial.[40] As such, this failure amounts to an abuse of the rule of law within the context of the procedural failure to offer reasons. It is not in doubt that a Court relies on the available evidence to quantify the amount of material compensation to a deserving party; the deserving level of scrutiny should also inform the grant of damages in the non-pecuniary loss.[41] The point of departure (as will be shown), that forms the crux of this contribution is the grant of reparations for non-pecuniary loss once the court finds a violation of one's rights under the African Charter. At its core, this contribution evaluates the mode through which a decision on the amount of pecuniary loss is arrived at, based on equity and the circumstances of the case in the determination of compensation.[42]

Consider a hypothetical whether one seeks non-material compensation of 20 000 US Dollars for moral prejudice due to the violation of his right to torture. While the Court may grant the non-monetary compensation due to the violation, it would use the basis of equity requirement and the circumstances of the case to grant the 20 000 dollars. This process of the exercise of discretion that leads to the grant of said amount is tested to establish the engagement of the principle of rule of law by the African Court. In this regard, it is argued that the rule of law is dependent on how the Court subjects the consequential grant of the 20 000 US Dollars to a process, the onus of proof before arriving at the said amount. Based on the evaluation of its subjective or objective approach would subsequently inform its decision. It should be recalled that the African human rights system, requires that remedies have to be available, effective and sufficient.[43] It is further argued such a remedy that is within these bounds answers the erstwhile glaring questions of the nature of the court's evaluation; the reasons that inform the basis of equity of fairness, and the circumstances of the case. Where this process is not adequately clarified, the issue of the grant of non-material compensation will remain a fussy area.

Some principles may be borrowed from domestic courts concerning the need to give reasons for decisions that a court arrives at. The South African Constitutional Court has stated that despite the lack of an express constitutional or statutory provision requiring courts to furnish reasons for their decisions, a reasoned judgment is indispensable because it is a form of accountability by judges.[44] In addition, it points to the greater picture of the rule of law within the adjudication sphere

40 D Slater & G Even-Shoshan 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) available https://bit.ly/30YmzGg (accessed 27 May 2021).

41 JS Lee & JH Lee 'A case study on the recovery criteria of reliance damage in marine transport contract and charterparty' (2017) 333(4) *The Asian Journal of Shipping and Logistics* 245

42 There are cases where the Court leave this role to the domestic courts, which is beyond the scope of this case discussion. This contribution looks at instance where the Court decides the amount to be paid.

43 *Jawara v Gambia* African Commission on Human and Peoples' Rights, Communication 147/95 and 149/96 (2000) para 31.

44 *Strategic Liquor Services v Mvumbi* NO 2010 (2) SA 92 (CC), para 17.

that requires that judges do not act arbitrarily.[45] It is further settled that the furnishing of reasons is an indication to the parties and the public, that the Court imbibes openness, transparency and discipline that curbs arbitrary judicial decisions.[46]

3.2 Use of process and proof

It is important to evaluate the use of process and proof and how it informs the basis of equity and the circumstances of the case to determine the amount that is to be granted as compensation in non-pecuniary losses.[47] Courts must be able to subject their decisions on each main issue to a process, proof thereof, in a manner that should be acceptable to the litigant(s).[48] As such, the process requires that some principles are used to guide the facts in a given case in a manner that portrays objectivity other than subjectivity with a wide array of discretion. As such the court has to identify the issues that arise from the assertion of a party seeking to have a decision passed in his or her favour. It is argued that the collective engagement of the process and the onus of proof informs the reasoned judgment that is acceptable to a party that identifies with the decision. It is imperative that before the Court reduces or increases the quantity of reparation of non-pecuniary losses, it addresses its mind to the legal principles that, first, inform the equity of fairness and, secondly, the circumstances of the case. It is hoped that this will go a long way in ensuring that the applicant and respondent both receive well-reasoned judgments.

If these principles are not evaluated, the court will continue to hand down non- reasoned decisions on the aspects of non-pecuniary loss. As such, this will not help to ensure that the right to a fair trial to the applicant and the respondent state is followed to the letter. Conversely, the Court's objectivity in the grant reparations of a non-material will continue unabated. The issue of fairness in a court decision will be punctuated with a similar question on the Court's ability to maintain a fair trial for all the parties concerning from the inception to the conclusion of the trial.

45 *S v Molawa; S v Mpengesi* (A388/2009, A421/2009) [2010] ZAGPJHC 157; 2011 (1) SACR 350 (GSJ) para 17. It is important in the informing the reasons of appeal, but this is beyond the scope of this contribution.

46 *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC).

47 *Lucien* (n 20) para 119. The court referred to previous jurisprudence of *Nobert Zongo*, para 62. This principle has also been referred to as the basis of equity principle.

48 See *Lucien* (n 20).

4 THE TREND ON THE COURT'S APPROACH IN EARLIER DECISIONS LEADING TO *LUCIEN*

An evaluation of the trend of the Court on the grant of non-pecuniary losses questions the consistency of the approach by the Court; where it exercises discretion to grant compensation for non-pecuniary loss without showing how it deals with the process and proof (or the lack thereof) in arriving at the rate.

4.1 *Mtikila v Tanzania*

In the first case of *Mtikila v Tanzania*,[49] the Court found that the applicant's right to freedom of association,[50] right to free participation in the governance of one's country[51] and the right to equality and equal protection before the law were violated.[52] It should be noted that the violation of these rights arose out of the government's failure to ensure the applicant's enjoyment of his electoral rights. The Court identified that the reparations may be granted once the applicant has established that the state is obligated to make reparations as an element of positive international law.[53] Concerning non-pecuniary damages, it stated that non-material damages may be offered for the moral damages and afflictions accessioned to the applicant as a direct victim, as well as emotional distress to family members of the victim as the indirect victims.[54] Despite the existence of this principle, the facts did not disclose how the violation of the rights of the accused would lead to non-pecuniary loss. Three principles stand out from this case. First, the Court recognised the violation of the rights of the applicant; secondly, the Court recognised that the applicant was entitled to reparations based on the violations and thirdly; the applicant had to prove a nexus between the human rights violations and the compensation for the non-pecuniary loss. The first two requirements align with the position in *Lucien's* case. The third requirement implies a disconnect with the principle in *Lucien* which states that the proof of human rights violations is sufficient for the grant of compensation for non-pecuniary loss. The relevant portion of the ruling on reparations stated that

> with regard to his claim for non-pecuniary damages, the Applicant has failed to produce any evidence to support the claim that these damages were directly caused by the facts of this case. The court will not speculate on the existence, seriousness, and magnitude of the non-pecuniary damages claimed. In any event, in the view of the Court, the finding of a violation by the Respondent in the Court's judgment of

49 *Mtikila v Tanzania* Application 11/2011 (decided 14 June 2013).
50 The African Charter (n 11) art 10, 13.
51 The African Charter (n 11) art 13(1).
52 The African Charter (n 11) art 3(1)(2).
53 *Mtikila* (n 49) paras 27, 28.
54 *Mtikila* (n 49) paras 34, 37.

> 14 June 2013 and the orders contained therein are just satisfaction for the non-pecuniary damages claimed.[55]

This is an indication that the proof of a human rights violation may not be sufficient to warrant the automatic grant of compensation concerning non-monetary loss. As such, the Court's requirement for the applicant to show a connection is an exception to the general rule. The explanation by the Court points to the failure to show the connection to mean that the orders on the violation on their own stand out as a form of satisfaction to the applicant. It suffices to states that since the court found that the applicant had not proved the connection, it had no reason to inquire into the basis of equity requirement and the circumstances of the case. In relation to *Lucien,* a few contradictions are evident. First, the presumption that a victim is entitled to compensation for non-pecuniary loss has an exception that requires that the applicant has to show a nexus between the human rights violation and the compensation that is prayed for. The failure to show this connection eludes the Court from establishing the rate of compensation. Retrospectively, the expectations in the application of the first principle and ultimate failure affect the operation of the second expectation of in-depth reasoning by the court.

Regard should, however, be placed on the nature of the rights that the Court found to have been violated. These were socio-economic rights relating to the right of an individual to participate in the elections and governance of his state. As such, the beginning point should be the analysis of the nature of the human rights violations, before applying the basis of equity requirement, and the circumstances of the case. It is added, that the court should have dealt with this issue differently, in light of the need to give reasons for its decision.

4.2 *Norbert Zongo v Burkina Faso*

In a subsequent case of *Norbert Zongo v Burkina Faso*, the beneficiaries of the estate of Norbert Zongo brought this complaint against the respondent state for its failure to use diligence to apprehend, investigate, prosecute or try the persons responsible for the murder of the deceased.[56] In the main application, it was contended by the estate of the deceased that the state had violated article 1 (on the obligation to take appropriate measures to give effect to the rights enshrined in the Charter); article 3 (equality before the law and equal protection of the law); article 4 (the right to life); article 7 (the right to have one's cause heard by competent national courts); and article 9 (the right to express and disseminate his or her opinion).[57] The Court found that the respondent state had violated the deceased's rights under

55 *Mtikila* (n 49) para 37.

56 *Norbert Zongo v Burkina Faso* Application (Reparations) 13 of 2011 (decided 5 June 2015), para 2.

57 *Zongo* (n 56) para 8.

articles 7 and 1 of the African Charter about the obligation to adopt measures other than legislative measures;[58] and article 9(2) of the Charter. It, however, found that the respondent state had not violated articles 3 and 1 of the Charter as far as they related to the obligation to adopt legislative measures.[59]

The Court reiterated the same principles that govern reparations, thus; before reparations are granted, one has to show state responsibility to make reparations for the injury caused by the unlawful act.[60] Concerning moral prejudice, the applicants stated that on account of the pain, physical and emotional suffering, and the trauma that they suffered during the duration of the lengthy legal process of eight years.[61] As indirect witnesses, beneficiaries of Norbert Zongo claimed a lump sum amount of approximately 332 million CFA (approximately 568 516 US Dollars).[62] In addition, the estate of the late Ernest Zongo claimed 115 million CFA (approximately 196 926 US Dollars).[63] The beneficiaries of late Blaise Ilboudo claimed 70 million CFA (119 868 US Dollars),[64] while the estate of Abdoulaye Nikiema claimed 155 million CFA (265 422 US Dollars).[65] The Court reiterated the principle that non-material damages may be offered for the moral damages and afflictions accessioned to the applicant indirect victims.[66] It interpreted indirect victims to be persons who needed not be first heirs but close relatives who were inclusive of mothers, children and spouses, brothers and sisters of the victims.[67] It further stated that concerning proof of compensation for non-monetary compensation,

> there is the presumption according to which violations of human rights and a situation of impunity regarding these violations causes grief, anguish and sadness both to the victims and their next of kin and that in such circumstances no proof is required.[68]

From a general perspective, this assertion is a departure from the position in *Mtikila* where one has to prove a connection between the violation and the non-pecuniary loss. This position of the Court portrays the two cardinal findings in *Lucien*. First, that it is the practice

58 *Zongo* (n 56) para 203(3).

59 *Zongo* (n 56) para 203(4).

60 *Zongo* (n 56) paras 20, 21.

61 *Zongo* (n 56) para 33.

62 *Zongo* (n 56) para 36(i). This covered 149 million CFA for 43 beneficiaries, 25 million CFA for the spouse. 1 million CFA for each step mother, 15 million CFA for each child and 2 million CFA for each step sibling.

63 *Zongo* (n 56) para.36(ii). This covered 49 million CFA for 37 beneficiaries, 10 million CFA for the spouse. 1 million CFA for each step mother, and 2 million CFA for each step sibling.

64 *Zongo* (n 56) para.36(iii). This covered 30 million CFA for 7 beneficiaries, 10 million CFA for the father, 10 million CFA for the mother and 2 million CFA for each sibling.

65 *Zongo* (n 56) para 36(iv). This covered 29 million CFA for 4 beneficiaries, 10 million CFA for the mother, and 15 million CFA for the son and 2 million each sister.

66 *Zongo* (n 56) paras 34, 37.

67 *Zongo* (n 56) para 46. This was in line with the UN Basic Principles on Reparations, principle 8

68 *Zongo* (n 56) para 55.

of the Court to presume that a victim is entitled to compensation for non-pecuniary loss; and secondly, the amount to be granted as the compensation has to be calculated on the 'basis of fairness and circumstances of the case.[69] It reiterates the expectations in *Lucien*, thus that the presumption is uniformly applied, and in addition, the compensation granted is based on equity or fairness and the circumstances of the case. While the case represents a departure from *Mtikila*, it confirms the lack of in-depth reasoning on the application of the basis of equity principle and the circumstances of the case in *Lucien*.

It may be argued that the Court contradicts itself and gives no reasons for departing from its position in *Mtikila*. The only plausible explanation that one adduces from the two decisions is, that the exception to this rule applies to the nature of rights that are violated. This is discernible from the reference to civil and political rights in *Zongo*; and the socio-economic rights in *Mtikila*. This poses a dire problem at the Arusha Court as far as it attaches different principles in determining reparations to the cases before it. This creates a bigger problem of the lack of equal protection before the law, especially where decisions are not adequately reasoned.

In respect of the various amounts claimed for moral prejudice, the Court stated that this would be done following an equitable consideration of the circumstances of each case.[70] In comparison, in *Mtikila,* the Court does not bother to consider this position due to the lack of a nexus between the violation and compensation claimed. In *Zongo*, the Court does not give any principles to guide the interpretation and application of the concept of 'equity' or the 'circumstances of the case'. Rather, it considers the suffering that the victims have undergone for many years to qualify the grant of the amounts of non-monetary compensation as equitable and in accordance with the case.[71] The amounts that the court awards following its discretion are 25 million CFA (approximately 42 810 US Dollars) for each spouse, 15 million CFA for each child (approximately 25 686 US Dollars) and 10 million CFA for each parent (approximately 17 124 US Dollars).

A reflection of these figures illustrates two points. First, the Court did not directly substantiate on the use of 'equity' and 'circumstances of the case requirement' before arriving at the rates of compensation. Secondly, although the applicants sought to get reparations for beneficiaries, parents, spouses, children and other relatives; the Court qualified the nature of relatives who could receive compensation. Thus according to the circumstances of the case, the persons who suffered morally in varying degrees were spouses, children, fathers and mothers of the deceased.[72] This is an indication that the Court offered reasons

69 *Zongo* (n 56) para 119. The Court referred to previous jurisprudence of Nobert Zongo, para 62. This principle has also been referred to as the basis of equity principle.

70 *Zongo* (n 56) para 61.

71 *Zongo* (n 56) para. 62.

72 *Zongo* (n 56) para. 50.

for excluding relatives who did not fall in this group, which is a depiction of equity in light of the facts of the case. However, the reasons for the grant of the sums as compensation were not engaged. This is explained by the fact that each amount that the estate claimed, as compensation for a spouse, child, father or mother was granted.[73]

4.3 *Lohe Issa Konate v Burkina Faso*

In the subsequent cases of *Lohe Issa Konate v Burkina Faso*[74] and *Armand Guehi v Tanzania,*[75] the applicants as direct victims sought the grant of compensation for non-pecuniary loss due to human rights violations. In *Konate*, the applicant was tried and convicted for the offences of defamation, public insult and the use of abusive language against judicial officers.[76] He was sentenced to 12 months imprisonment, a fine of 1.5 million CFA (about 3 000 US Dollars), damages of 4.5 million CFA (about 9 000 US Dollars), and costs of 250 000 CFA (about 500 US Dollars). [77] Other actions included the suspension of the weekly newspaper for six months. [78] He brought this application before the African Court seeking orders that the respondent state violated article 9 of the African Charter, article 19 of the ICCPR, and article 66 of the revised ECOWAS Treaty,[79] and an award of reparations.[80] Concerning compensation for non-pecuniary loss, the applicant sought 17 500 000 CFA (approximately 29 967 US Dollars).[81] The court found a violation of all the provisions referred to by the applicant as far as they placed a custodial sentence on defamation in the national laws, the payment of an excessive fine, damages and costs and the suspension of his newspaper for six months.

This case is important because it projects an applicant presenting his case in a detailed manner. As such, this case is peculiar for how the applicant presented his claim for compensation for moral prejudice in great detail.[82] First, he characterised the moral prejudice he was subjected to throughout the trial, conviction and imprisonment. Concerning the trial, the applicant's hearing, and sentence took place the same day without regard to the principles of a fair trial.[83] This was exacerbated by the award of a fine that was beyond his means and the

73 As such the Estate of Nobert Zongo was granted the figures that it applied for as compensation for the spouse, child and parent. As for the estate of Ernest Zongo, Blaise Ilboudo and Abdoulaye Nikiema, they received the figures they applied for, with regard to fathers and mothers of the deceased.

74 *Lohe Issa Konate v Burkina Faso*, Application 004 of 2013 (decided 3 June 2016).

75 *Armand Guehi v Tanzania* Application 001 of 2015 (decided 7 December 2018).

76 *Konate* (n 74) para 2.

77 *Konate* (n 74) para 3.

78 *Konate* (n 74) para 4.

79 *Konate* (n 74) para 6.

80 *Konate* (n 74) para 6.

81 *Konate* (n 74) para 56.

82 *Konate* (n 74) paras 52-59.

83 *Konate* (n 74) paras 52-53.

subsequent imprisonment.[84] Secondly, he explained the poor living conditions in jail and the trauma that his wife went through in trying to provide for the family. [85] Thirdly, he also pointed to the trauma that his children went through as a result of his conviction. [86] Just like in *Zongo*, the Court recognised that 'moral prejudice is assumed by international courts in cases of human rights violations.'[87] However, it did not subject the applicant's evidence to the existence of proof, the onus thereof before arriving at a decision. In the exercise of its discretion, the Court stated that 'the claim is exaggerated and based on equity, decides to reduce the amount to 10 000 000 CFA'.[88]

A reference to two principles and the expectations in *Lucien* is important to guide our evaluation. The Court upholds the presumption that a victim was entitled to compensation for non-pecuniary loss, and the amount to be granted as the compensation had to be calculated on the 'basis of fairness and circumstances of the case.[89] While the expectation of the first principle indicates the uniform application of the presumption, the Court still fails to develop jurisprudence on the use of the basis of equity or fairness and the circumstances of the case. The lack of in-depth reasoning on the application of the basis of equity principle and the circumstances of the case continues to thrive. In this regard, while the Court referred to the basis of equity, it did not add value to the term. Second, the court does not evaluate the facts on a moral prejudice that the applicant presented. Rather it simply referred to the amount as exaggerated. It would have been expected that the Court would relate the facts presented by the Applicant to establish whether they were proved, whether the applicant discharged the burden of proof, such that the court would have a reasoned decision. The referral to the amount as exaggerated without giving reasons was a mistake on the part of the Court. In addition, this is a departure from the trend in *Zongo,* which to a given extent evaluated the context of indirect victims. The case is, however, instructive on the role of the applicant in proving the amount of compensation for the non-monetary loss.

4.4 *Armand Guehi v Tanzania*

A point of departure is evident in *Armand*, where non-pecuniary loss arising out of the violation of civil and political rights does not automatically result in the grant of any compensation for the non-monetary loss.[90] The Court's decision was based on the principle in *Mtikila*, thus where the applicant cannot substantiate a link between

84 *Konate* (n 74) para 54.
85 *Konate* (n 74) para 54.
86 *Konate* (n 74) para 55.
87 *Konate* (n 74) para 58.
88 *Konate* (n 74) para 59.
89 *Zongo* (n 67).
90 *Armand Guehi v Tanzania* Application 001/2015 (decided 7 December 2018) paras 153, 169.

the violation and the loss, then compensation cannot be granted. The court stated as follows:[91]

> The Court notes that the same request for compensation is based on chronic illnesses and poor health due to lack and failure of treatment, physical and psychological abuse, and delayed the trial. The Court further notes that the Applicant does not adduce evidence that the Respondent State denied him medical attention or its agents subjected him to abuse. As the Court found earlier, the actions complained of related to restrictions which are inherent to detention and imprisonment. The related claims are therefore dismissed.

In this regard, while the rights that were violated were civil and political in nature, the court held that the applicant could not prove a link because the violation was according to an order of imprisonment arising from due process.[92] In addition, the Court reiterated the principle that non-pecuniary loss is evaluated on the account of fairness and the circumstances of the case.[93] This case, therefore, extends the nature of the violation to cover instances where the violations are in the exercise of an order of the court. This case represents a different approach from *Mtikila*. In *Mtikila*, the Court summarily denied extending the violation of a right as a presumption of proof of moral prejudice to the applicant. In *Armand*, the Court presumed the existence of moral prejudice and the applicant bore the burden to prove it.[94] The questions that require reflection are, first; how to use the approaches in *Mtikila* and *Armand* to improve the practice of the grant of compensation for non-monetary loss and secondly; following the evaluation of *Zongo* and *Konate*, how one can improve the interpretation of the use of 'equity' and the 'circumstances of the court' in the grant of compensation for the non-monetary loss.

The case of *Armand* offers insights into the application of the principles in *Mtikila* and *Lucien*. First and concerning *Mtikila*, the exception to the presumption that a victim is entitled to compensation for non-pecuniary loss as far as s/he proves a connection between the human rights violation and the compensation is reiterated. However, the expectations flowing from the application of the first principle is affected by the lack of in-depth reasoning in the second expectation.

5 CONCLUSION

The Court's failure to give reasons, before offering a rate of compensation different from the amount prayed for by the victim, is a clog on the application of the rule of law in the adjudication of cases. The retrospective reflection on the decisions before *Lucien* indicates that there has been a lack of consistency in the application of the 'basis of equity and circumstances of the case' principle. This should be interpreted as a missed opportunity at the development of jurisprudence that either defines or guides the basis of equity and

91 *Armand* (n 90) para 179.
92 *Armand* (n 90) para 179.
93 *Armand* (n 90) para 177.
94 *Armand* (n 90) paras 177, 179.

circumstances of the case. This presents a lack of objectivity from the Arusha-based Court; and lends credibility to the position that the decisions at this juncture, are not adequately reasoned. The overall effect is a failed attempt at ensuring the rule of law through reasoned decisions.

The jurisprudence of the African Court has indicated that the violation of a human right is a presumption to the grant of compensation for non-pecuniary loss. The exception to this presumption may be where the violated right is, a social-economic right or as a result of an order of Court that limits the enjoyment of a given right. For this exception to affect the grant of compensation, the applicant should fail to show a link between the violation and the compensation claimed. It is proposed that the existence of this presumption should always be in favour of the applicant to the extent sought. However, the proof of the amounts claimed should shift from the current unclear and discretionary assessment to a discretionary and objective model. This will guide the Court is based on equity and the circumstances of the cases.

To further the proposition above, the Court should use a two-stage approach in dealing with compensation for the non-monetary loss. Concerning the first stage of the application of the principle, once the court finds that the existence of a human rights violation, it should presume that this is sufficient to warrant the award of compensation for non-pecuniary loss. The second stage inquiry should then question the amount the applicant claims. As such, the applicant has to, first; prove the link between the violation and the compensation sought, and secondly; by discharging the onus, prove the link. The Court would then be required to evaluate amounts claimed against informed principles of equity and the circumstances of the case. The effect of the two-stage approach ensures that the sums that the Court awards are as a result of an informed and reasoned judgment. This would tilt the scales to connote the existence of the rule of law through reasoned decisions on compensation in non-pecuniary matters.

This approach retrospectively deals with the facts surrounding the nature of the human rights that were violated in *Mtikila*. It is proposed that if the Court was to be subjected to a case where it would seek to follow the approach in *Mtikila*, it would end up giving a non-reasoned decision that would question its application of the rule of law within its domain. To ensure consistency, following the first stage of the inquiry, the Court would accord the applicant (in a similar case like *Mtikila* or *Armand*) the benefit of the established human rights violations as reason for the presumption of a grant of non-pecuniary loss. Thereafter, the victim, according to the second leg of the inquiry, would then have the onus to prove that the grant of sums applied for is linked to the human rights violation. This would be synonymous with the approach that the applicant used in *Konate* used to substantiate his claims for proof of the amount of compensation for moral prejudice. The Court would then apply the 'principle of equity' and 'the circumstances of the case' and give reasoned answers for its decision. It is argued that this will lead to the organic development of the concepts

of 'equity' and 'the circumstances of the case' within the discretionary and objective bounds of the Court.

L'exigence de l'épuisement des recours internes dans la recevabilité des requêtes des particuliers devant la Cour africaine des droits de l'homme et des peuples à l'aune de l'arrêt *Diakité c. Mali*

*Sango Momo Abasse**

RÉSUMÉ: Parmi les requêtes que la Cour africaine des droits de l'homme et des peuples (Cour africaine) reçoit des particuliers, nombreuses sont celles souvent sujettes aux exceptions d'irrecevabilité soulevées par l'État défendeur. Si de telles exceptions sont généralement motivées par l'inobservation des conditions de recevabilité prévue par l'article 56 de la Charte africaine, il est à noter que celle relative à l'épuisement des recours internes revient de manière récurrente. Dans l'affaire *Diakité*, la Cour était appelée à statuer sur la requête d'un couple malien qui, après avoir été victime de cambriolage, avait porté plainte auprès du Parquet de la République. Déçues par l'immobilisme de l'affaire, les victimes avaient vite adressé une requête à la Cour africaine. Peut-on dire qu'avant l'exercice de ce droit au recours individuel, les requérants avaient épuisé les voies de recours internes? La juridiction a déclaré la requête irrecevable pour non épuisement des recours internes. Quoique l'argument de la Cour soit discutable, sa décision demeure adroite, car elle sanctionne le vice d'une règle capitale de procédure. Cet arrêt atteste de l'implacabilité de la règle de l'épuisement des recours internes même si la Cour est plus encline à l'analyser en faveur de l'accès des individus à la justice internationale.

TITLE AND ABSTRACT IN ENGLISH:

The requirement of exhaustion of domestic remedies in the admissibility of individual applications before the African Court on Human and Peoples' Rights in the light of the *Diakité v Mali* case

Abstract: Many of the petitions that the African Court on Human and Peoples' Rights receives from individuals are subjected to inadmissibility objections raised by the respondent state. Such objections are most frequently raised in respect of the exhaustion of domestic remedies rule. In the *Diakité* case, the Court was called upon to rule on the petition of a Malian couple who, after being the victim of burglary, had filed a complaint with the Public Prosecutor's Office. Disappointed by the slow progress in the case, the victims applied to the African Court. Can it be said that before the exercise of this right to individual petition before the African Court, the applicants had exhausted domestic remedies? The Court declared the application inadmissible for non-exhaustion of domestic remedies. In this judgment, the African Court protects an important procedural guarantee provided for under the African Charter. This judgment attests to the implacability of the rule of exhaustion of domestic remedies even if the Court is more inclined to analyse it in favour of individuals' access to international justice.

MOTS CLÉS: épuisement des recours internes, requête, particuliers, Cour africaine des droits de l'homme et des peuples

* Docteur en Droit privé et Sciences criminelles Université de Dschang, Cameroun; abass_sango@yahoo.com

SM Abasse 'L'exigence de l'épuisement des recours internes dans la recevabilité des requêtes des particuliers devant la Cour africaine des droits de l'homme et des peuples à l'aune de l'arrêt *Diakité c. Mali*' (2021) 5 *Annuaire africain des droits de l'homme* 437-453
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SOMMAIRE:

1 INTRODUCTION

L'activité contentieuse de la Cour africaine des droits de l'homme et des peuples (Cour africaine) commence par l'examen préalable de sa compétence et des conditions de recevabilité des requêtes.[1] En dehors de la Commission africaine des droits de l'homme et des peuples (Commission africaine), des États membres de l'Union africaine et des Organisations intergouvernementales africaines qui sont les justiciables privilégiés de la Cour,[2] sa saisine par des particuliers n'est que l'exception qui confirme la règle eu égard au caractère supranational de cette instance juridictionnelle. En principe, les juridictions à vocation internationale sont conçues pour recevoir devant elles les États et autres organisations interétatiques en tant qu'acteurs primordiaux des relations internationales et ce sur la base de la règle du *pacta sunt servanda*.[3] Toutefois, la Cour africaine, à l'instar d'autres juridictions des droits de l'homme qui l'ont précédées,[4] étant essentiellement dévouée à la protection des droits humains, admet les requêtes émanant des individus et des organisations non gouvernementales (ONG) dirigées contre les États ayant fait au préalable une déclaration d'acceptation de sa compétence. La juridictionnalisation de la protection des droits de l'homme en Afrique serait un leurre si le Protocole relatif 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 (Protocole portant statut de la Cour africaine) n'avait pas envisagé l'examen des requêtes formulées directement par les individus et ONG, victimes des violations des droits de l'homme. L'article 5(3) dudit Protocole dispose que «la Cour peut permettre aux individus ainsi qu'aux ONG dotées du statut d'observateur auprès de la Commission africaine d'introduire des requêtes directement devant elle». Dès lors, la réception des particuliers devant cette Cour participe de la reconnaissance et de

1 Art 39 du Règlement intérieur de la Cour.

2 Art 5(1) et (2) du Protocole portant création de la Cour.

3 C'est-à-dire le respect de la parole donnée, une traduction du principe du consensualisme.

4 La Cour africaine a été créée après la Cour européenne des droits de l'homme (21 janvier 1959) et la Cour interaméricaine des droits de l'homme (22 mai 1979).

l'implication directe des individus à la concrétisation des droits humains.[5] À ce titre, la Cour africaine, dans le concert des cours régionales dotées de cette mission protectrice, s'illustre comme le dernier rempart des droits de l'homme.[6] C'est à cette auguste instance que se vouent les victimes des violations des droits humains quand tous les espoirs sont perdus devant les juridictions nationales. C'est à ce propos qu'un auteur affirme justement que «la naissance d'une Cour africaine ne pouvait être que salutaire».[7] Cependant, la recevabilité des requêtes initiées par des particuliers est assujettie au respect des règles de procédure dont les premiers actes doivent nécessairement être posés au niveau national.

En effet, la procédure devant la Cour africaine est bien définie, mais celle-ci s'avère peu maîtrisée par certains justiciables au regard des décisions d'irrecevabilité sur lesquelles débouchent parfois quelques requêtes. Deux principaux facteurs peuvent provoquer l'irrecevabilité d'une requête lors de son examen préliminaire par la Cour. Il s'agit d'une part, de l'incompétence de la Cour, notamment lorsque l'État défendeur n'a pas fait de déclaration habilitant la Cour à recevoir les requêtes provenant des individus et des ONG[8] et d'autre part, de l'irrespect des conditions de recevabilité de la requête.[9] Pour se prémunir contre un éventuel rejet de la requête, l'abondante jurisprudence de la Cour que la doctrine qualifie de «croissance exponentielle»[10] constitue une source d'information et un outil pédagogique pour les potentiels justiciables. Mais, malgré l'existence de ces précédents jurisprudentiels, force est de constater que de nombreux requérants ne parviennent pas toujours à valider l'épreuve des formalités pour déjouer l'exception d'irrecevabilité soulevée par l'État défendu. Tel a été le cas dans l'affaire *Époux Diakité c. Mali* (Requête 009/2016) qui s'est soldée par l'arrêt de rejet du

5 NE Nguema 'Recevabilité des communications par la Commission africaine des droits de l'homme et des peuples' (2014) 5 *Revue des droits de l'homme* 2 http://journals.openedition.org/revdh/803 (consulté le 10 mai 2021).

6 P Badugue 'La Cour africaine des droits de l'homme et des peuples dans le Forum permanent des cours régionales des droits de l'homme' (2020) 4 *Annuaire africain des droits de l'homme* 46.

7 A-K Diop 'La Cour africaine des droits de l'homme et des peuples ou le miroir stendhalien du système africain de protection des droits de l'homme' (2014) 55 *Les Cahiers de droit* 534.

8 *Michelot Yogogombaye c. Sénégal* (compétence) (2009) 1 RJCA 1, para 37. Voir aussi l'arrêt *Soufiane Ababou c. Algérie* (compétence) (2011) 1 RJCA 25, para 11; *Daniel Amare et Mulugeta Amare c. Mozambique et Mozambique Airlines* (compétence) (2011) 1 RJCA 27, para 8; *Convention Nationale du Syndicat des Enseignants c. Gabon* (compétence) (2011) 1 RJCA 103, para 10; *Delta International Investments SA, M. AGL de Lange et Mme M. de Lange c. Afrique du Sud* (compétence) (2012) 1 RJCA 106, para 8; *Emmanuel Joseph Uko et autres c. Afrique du Sud* (2012) 1 RJCA 110, para 11; *Amir Adam Timan c. Soudan* (compétence) (2012) 1 RJCA 114, para 7; *Baghdadi Ali Mahmoudi c. Tunisie* (compétence) (2012) 1 RJCA 117, para 10.

9 Lire à ce propos B Tchikaya 'La première décision au fond de la Cour africaine des droits de l'homme et des peuples: l'affaire *Yogogombaye c. Sénégal* (15 décembre 2009)' (2018) 2 *Annuaire africain des droits de l'homme* 509-521.

10 L Burgorgue-Larsen & G-F Ntwari 'Chronique de jurisprudence de la Cour africaine des droits de l'homme et des peuples (2017)' (2018) 116 *Revue trimestrielle des droits de l'homme* 912.

28 septembre 2017 de la Cour africaine, objet du présent commentaire. Cette décision d'irrecevabilité de la requête est digne d'être commentée non seulement parce qu'elle est relative à l'épuisement des recours internes pour lequel les requérants s'étaient bornés au dépôt d'une plainte, mais également par rapport au fond du litige à tel point que l'on se demande si la Cour n'aurait pas dû raisonner autrement compte tenu des violations des droits de l'homme alléguées. En effet, l'épuisement des recours internes peut être entendu comme une règle qui «suppose qu'une affaire concernant la violation d'un droit de l'homme doit passer par tous les niveaux de juridiction nationaux avant de pouvoir être portée devant la Cour».[11] Autrement dit «le juge international sera tenu de surseoir tant que le juge interne ne se sera pas définitivement prononcé. Mais le cas échéant il ne sera aucunement lié par le jugement d'ordre interne».[12] Cet arrêt recèle un intérêt certain du point de vue de la sécurité judiciaire des justiciables. Un avis partagé par certains auteurs qui estiment que «l'affaire malienne des Époux Diakité est singulière sur la question en ce qu'elle permet d'identifier, cette fois-ci, un recours pertinent».[13]

Pour mieux cerner l'arrêt dans tous ses contours juridiques, il sied de passer en revue les conditions de recevabilité des requêtes prévues par la Charte (partie 2). C'est sous le prisme de la confrontation desdites conditions avec les faits et la procédure (partie 3) que l'on pourra pertinemment examiner la portée de la décision des juges (partie 4) afin de relever sa démarcation avec la jurisprudence constante de la Cour (partie 5).

2 TOUR D'HORIZON DE L'HISTORIQUE DE L'ÉPUISEMENT DES RECOURS INTERNES DEVANT LES JURIDICTIONS INTERNATIONALES

Avant d'épiloguer sur l'appréciation qui a été faite de l'épuisement des recours internes dans l'affaire *Diakité*, il importe de mentionner *prima facie* que l'on est en face d'une règle de droit international coutumier.[14] En effet, l'épuisement des recours internes est une exigence procédurale classique consacrée en droit international des droits de l'homme. Il s'agit à l'origine d'une règle de protection des droits de l'homme reconnue aux États au plan diplomatique qui leur permet de

11 Fidh *La Cour africaine des droits de l'homme et des peoples: vers la Cour de justice et des droits de l'homme?* (2010) 84 https://www.fidh.org/IMG/pdf/GuideCourAfricaine.pdf (consulté le 22 décembre 2021).

12 C Ténékidès 'L'épuisement des voies de recours internes' (1953) *Revue de droit international* 515.

13 Burgorgue & Ntwari (n 10) 929.

14 AK 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* 4.

protéger leurs ressortissants à l'étranger.[15] Une condition indispensable de l'accès des particuliers et même de l'État[16] aux juridictions internationales orientées vers la protection des droits humains et en matière d'arbitrage.[17] Elle fut entérinée par la décision de la Cour internationale de justice (CIJ) dans l'affaire Interhandel: «la règle selon laquelle les recours internes doivent être épuisés avant qu'une procédure internationale puisse être engagée (…) a été généralement observée dans les cas où un État prend fait et cause pour son ressortissant dont les droits auraient été lésés dans un autre État en violation du droit international».[18] Cette règle fait l'objet de consécration par la quasi-totalité des instruments internationaux protecteurs des droits de l'homme. L'on peut citer entre autres la Convention européenne des droits de l'homme qui dispose en son article 26: «la Commission ne peut être saisie qu'après l'épuisement des voies de recours internes, tel qu'il est entendu selon les principes de droit international généralement reconnus …». Mais, cette disposition existait déjà en 1949 dans les travaux préparatoires de ladite Convention: «avant qu'une requête puisse être examinée, les voies de recours internes de l'Etat intéressé devront avoir été épuisées, à condition qu'elles fonctionnent sans délai excessif». L'obligation d'épuiser les recours internes figure à l'article 41 du Pacte international relatif aux droits civils et politiques. Elle est prévue à l'article 46 de la Convention interaméricaine des droits de l'homme.

Pour ce qui est du système africain de protection des droits de l'homme, il faut noter que l'adoption de la règle de l'épuisement des voies de recours internes s'est faite en deux séquences. Il y a d'abord l'ère de la Commission africaine qui est l'organe régional pionnier dans la protection des droits de l'homme.[19] Celle-ci recevait non pas des plaintes, mais des communications relatives aux violations des droits de l'homme conformément à l'article 56 de la Charte africaine qui dispose que «pour être examinées, les requêtes doivent (…) être postérieures à l'épuisement des recours internes s'ils existent, à moins qu'il ne soit manifeste à la Cour que la procédure de ces recours se prolonge de façon anormale». Par la suite, la même règle a été reconduite par l'article 6(2) du Protocole portant création de la Cour africaine ainsi que l'article 40 de son Règlement intérieur. Avant l'examen au fond d'une requête, la Cour procède à un examen préliminaire des conditions de recevabilité[20] conformément à l'article

15 J Guinand 'La règle de l'épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l'homme' 471 http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201968/RBDI%201968%20-%202/Etudes/RBDI%201968.2%20-%20pp.%20471%20à%20484%20-%20Jean%20Guinand.pdf (consulté le 22 décembre 2021).

16 Guinand (n 15) 472.

17 Voir Art 3 du Traité conclu le 20 mai 1926 entre l'Allemagne et les Pays-Bas (Recueil des Traités, SDN, Vol LXVI, 1927-28, 120).

18 CIJ, Arrêt du 21 mars 1959, Affaire de l'*Interhandel* (*Suisse c. États Unis d'Amérique*), Rec 1959, p. 27.

19 Elle a été instituée à travers la Charte africaine des droits de l'homme et des peuples.

20 Art 39 du Règlement intérieur de la Cour.

6(2) du Protocole qui énonce que «la Cour statue sur la recevabilité des requêtes en tenant compte des dispositions énoncées à l'article 56 de la Charte». La conformité de toute requête à ces règles est une étape primordiale dans l'évacuation de l'exception d'irrecevabilité soulevée par l'État défendeur et partant, l'examen des allégations de violation des droits de l'homme portées à l'attention de la Cour.

Mais, il faut noter que le respect desdites conditions semble ne pas être une sinécure, notamment pour les individus et les ONG. Avant l'arrêt *Diakité*, la Cour a eu à déclarer irrecevables certaines requêtes pour inobservation des conditions requises. Par exemple, dans l'affaire *Jean-Claude Roger Gombert c. Côte d'Ivoire*, la Cour avait retenu l'exception d'irrecevabilité de la requête au motif que le différend avait déjà fait l'objet d'un règlement antérieur par la Cour de justice de la CEDEAO.[21] Dans le cas *Efoua Mbozo'o Samuel c. Parlement panafricain*, la Cour avait rejeté la requête en raison de son objet et du fait qu'elle avait été introduite contre une entité non étatique.[22]

Bien que toutes les conditions de recevabilité des requêtes soient cumulatives[23] parce qu'elles sont *a priori* d'égale valeur, il y a lieu de relever que celle relative à l'épuisement des recours internes s'illustre par son caractère éminemment pertinent. Un auteur affirme que l'épuisement des voies de recours internes est la condition de recevabilité la plus examinée devant les mécanismes internationaux de protection des droits de l'homme.[24] Ce n'est donc pas par hasard que cette condition se présente comme le talon d'Achille des justiciables. Un tel constat se justifie par la difficulté à cerner la notion de «recours interne» dans tous ses contours par rapport au système judiciaire en vigueur dans l'État défendeur. En réalité, il n'est pas toujours aisé d'identifier les recours internes qui doivent être épuisés avant la saisine de la Cour africaine, surtout que ni la Charte ni le Règlement intérieur de la Cour apporte des précisions à ce sujet. Des clarifications ont été données par la Cour et la doctrine. Pour la Cour, il faut entendre par recours internes, les voies de recours d'ordre judiciaire comme cela a été affirmé dans l'affaire *Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R. Mtikila c. Tanzanie*.[25] L'opinion doctrinale est encore plus pointue lorsqu'elle postule que «les seules voies de recours qui doivent être prises en compte dans l'optique de l'épuisement sont les recours librement

21 *Gombert c. Côte d'Ivoire* (compétence et recevabilité) (2018) 2 RJCA 280, para 61.

22 *Efoua Mbozo'o Samuel c. Parlement panafricain* (compétence) (2011) 1 RJCA 98, para 6.

23 *Rutabingwa Chrysanthe c. Rwanda* (compétence et recevabilité) (2018) 2 RJCA 373, para 48. 'La Cour note qu'aux termes des dispositions de l'article 56 de la Charte, les conditions de recevabilité sont cumulatives de sorte que lorsque l'une d'entre elle n'est pas remplie, c'est la requête dans son intégralité qui ne peut être recevable'.

24 AD Olinga 'La première décision au fond de la Cour africaine des droits de l'homme et des peuples' (2014) 5 *Revue des droits de l'homme* 2.

25 (fond) (2013) 1 RJCA 34, para 82.

accessibles, justes et impartiaux».[26] En d'autres termes, il s'agit des seuls recours fondés sur l'exercice du droit et non simplement sur des «bases discrétionnaires de nature non-judiciaire».[27] Face à ce clair-obscur de l'article 56 de la Charte notamment dans la saisine de la Commission africaine, une doctrine affirme:

> Cet article, d'ordre réglementaire, pose néanmoins des difficultés à la Commission africaine. Cette dernière est confrontée à un double problème: l'interprétation parfois erronée des dispositions de cet article par les États et les difficultés pour les citoyens et ONG d'honorer certaines conditions avant de saisir la Commission. Cette difficulté découle de la Commission africaine qui s'est limitée à exposer un certain nombre de conditions sans en préciser la portée, les limites et les exceptions. Cette lacune a donné lieu à un conflit d'interprétation de l'article 56 entres les États et les citoyens.[28]

L'exception d'irrecevabilité fondée sur le non épuisement des recours internes revient quasi-constamment devant la Cour africaine. C'est une condition qui a un caractère d'ordre public que la Cour se devrait d'examiner d'office d'après l'avis du juge Ougergouz dans l'affaire *Actions pour la protection des droits de l'homme (APDH) c. Côte d'Ivoire*.[29] Par ailleurs, un tel recours doit obéir aux critères de disponibilité, efficacité et suffisance[30] afin que l'État défendeur ne puisse pas être considéré comme ayant failli à ses obligations en matière de protection des droits de l'homme. Dans le cas contraire, le requérant aurait de bonnes raisons de saisir la juridiction internationale.[31] Il faut signaler que l'ensemble des conditions de recevabilité des requêtes énumérées à l'article 56 de la Charte n'ont pas fait l'objet de discussions dans l'affaire *Diakité*. Seul l'épuisement des recours internes était en cause.[32] Dans l'analyse de cette règle, écrit un auteur, la Cour africaine adopte une double approche qui concilie la souveraineté des États et l'accès à la justice internationale par les particuliers.[33] Pour mieux comprendre en quoi les requérants n'avaient pas épuisé les recours internes, il convient de s'imprégner des péripéties des faits et de la procédure à l'échelle nationale.

26 Fidh *Plaintes et admissibilité devant la Cour africaine: Guide pratique* (2016) 39 https://www.fidh.org/IMG/pdf/plaintes_et_admissibilite_devant_la_cour_africaine_juin_2016_fr_web.pdf (consulté le 22 décembre 2021).

27 Fidh (n 26) 39.

28 Nguema (n 5) 2.

29 *Actions pour la protection des droits de l'homme c. Côte d'Ivoire* (fond) (2016) 1 RJCA 697, para 4.

30 CEDH, affaire *Akdivar et autres c. Turquie*, requête no 21893/93, jugement du 16 septembre 1996.

31 Nations Unies 'Procédures d'examen des requêtes soumises par des particuliers en vertu des instruments des Nations Unies relatifs aux droits de l'homme' Fiche d'information 7/Rev.2, New York et Genève, 2013, p. 9

32 *Diakité c. Mali* (compétence et recevabilité) (2017) 2 RJCA 122, paras 28 et 29.

33 Diop (n 14) 18.

3 L'ÉCONOMIE DES FAITS ET DE LA PROCÉDURE

Dans l'affaire *Diakité c. Mali*, les faits de la cause concernent les sieur et dame *Diakité*, un couple malien qui soutient qu'en date du 14 novembre 2012 leur domicile à Bamako avait été cambriolé et vandalisé par des individus non identifiés. Que les malfrats avaient emporté avec eux un ordinateur portable de marque HP, des appareils médicaux, des clés USB, des livres, une lettre d'attribution d'un terrain et des copies de diplômes. Les faits allégués par les requérants sont bel et bien incriminés par la Loi No. 01-079 du 20 aout 2001 portant Code pénal malien sous la qualification de vol. En effet, aux termes de l'article 254 dudit texte, «sera puni de la réclusion à perpétuité tout individu coupable d'un vol commis la nuit, avec l'une des circonstances suivantes: dans une maison habitée, à l'aide d'effraction, d'escalade ou de fausses clés, par deux personnes au moins». L'article 255 du même texte pour sa part dispose: «sera puni de cinq à 10 ans de réclusion criminelle et facultativement d'un à dix ans d'interdiction de séjour, tout individu coupable d'un vol commis la nuit». N'ayant pas réussi à mettre la main sur leurs agresseurs, les époux *Diakité* avaient déposé une plainte[34] contre inconnu le même jour auprès du Parquet de la République du District de Bamako afin de poursuivre l'auteur de l'infraction dont ils étaient victimes. Quinze jours après la commission des faits, un suspect du nom de sieur Omar Maré fut appréhendé et gardé à vue dans les locaux du Commissariat de police du 12ème Arrondissement de Bamako où les plaignants avaient été auditionnés ainsi que les témoins. Seulement, au terme de cinq jours de garde à vue, le présumé auteur fut remis en liberté sans que les poursuites furent engagées véritablement malgré les pressions des requérants sur le Commissaire principal de l'Unité de police concernée, le Procureur de la République et le Procureur Général de Bamako.

Face à la non prospérité de leur plainte, les plaignants avaient pris leur mal en patience jusqu'au 19 février 2016, date à laquelle ils décidèrent de saisir la Cour africaine des droits de l'homme et des peuples au moyen d'une requête. Dans leurs prétentions, les requérants estimaient que les autorités de la police du 12ème Arrondissement de Bamako s'étaient montrées laxistes en occasionnant l'impunité de l'auteur des actes perpétrés à leur encontre, ce qui constituaient, d'après eux, une violation de leurs droits fondamentaux notamment le droit d'accès à la justice; le droit à l'égalité devant la loi et à une égale protection de la loi; le droit à la paix; et le droit à la propriété respectivement garantis par les articles 7, 3, 23 et 14 de la Charte africaine. Dès lors, les requérants demandaient à la Cour de déclarer leur requête recevable, la déclarant fondée, de retenir la responsabilité de l'État du Mali et le condamner à leur verser 32 867 000 FCFA[35] à titre de dommages-intérêts pour le préjudice subi. À l'opposé, l'État

34 Conformément aux dispositions à l'article 60 et du Code de procédure pénale malien.

35 Somme des dommages-intérêts tels que ventilés dans l'arrêt de la Cour (para 18).

défendeur quant à lui avait soulevé l'exception d'irrecevabilité de ladite requête en excipant que les requérants n'avaient pas épuisé les voies de recours internes. Comme il est de règle pour les requêtes émanant des entités non étatiques, la Cour devait se prononcer au préalable sur la recevabilité de la requête relativement à l'observation ou non des conditions de sa saisine par les requérants. À cette préoccupation, la Cour avait décidé à l'unanimité qu'elle «déclare fondée l'exception d'irrecevabilité de la requête tirée du non-épuisement des voies de recours internes».[36] La pertinence de la solution donnée par les juges mérite d'être décryptée à la lumière non seulement du droit processuel applicable devant cette auguste Cour, mais également de la procédure pénale malienne.

4 LA PORTÉE DE LA DÉCISION DE LA COUR AFRICAINE DANS L'AFFAIRE *DIAKITÉ C. MALI*

Comme il a été mentionné plus haut, après la réception de toute requête, la Cour procède préalablement à l'examen de sa compétence et des conditions de recevabilité avant de statuer sur le fond de l'affaire. Si la compétence de la Cour ne souffrait d'aucune contestation dans le cas *Diakité c. Mali*, c'est plutôt l'exception d'irrecevabilité relative à l'épuisement des voies de recours internes qui était le point d'achoppement entre les parties. Dans son appréciation, la Cour a estimé que le critérium de recevabilité relative à l'épuisement des recours internes n'avait pas été respecté par les requérants, ce qui l'avait amenée à rejeter la requête en question.

4.1 L'appréciation du non-épuisement des recours internes par la Cour

Prévu à l'article 56(5) de la Charte, l'épuisement des voies de recours internes signifie qu'une affaire doit parcourir tous les degrés de juridiction du système national sans succès avant d'être soumise à la Cour. Des tribunaux inférieurs jusqu'au pourvoi en cassation en passant par l'appel, selon le cas. L'affaire doit avoir été portée devant la juridiction nationale située au sommet de la pyramide judiciaire jusqu'à ce qu'elle connaisse une décision définitive. En revanche, aucune requête ne peut donc être adressée à la Cour tant que l'affaire est encore pendante devant les juridictions nationales. C'est au requérant qu'incombe la charge de la preuve initiale d'un tel épuisement, c'est-à-dire qu'il doit mettre à la disposition de la Cour les informations nécessaires pour prouver que les voies de recours internes ont été épuisées.[37] Cette condition est «fondée sur le principe qu'un

36 *Diakité c. Mali* (compétence et recevabilité) (2017) 2 RJCA 122, para 58.

37 FIDH *La Cour africaine des droits de l'homme et des peoples. Vers la cour de justice et des droits de l'homme?* (2010) 86.

gouvernement devrait être informé des violations des droits de l'homme afin d'avoir l'opportunité d'y remédier avant d'être appelé devant une instance internationale».[38] Pareil pour la Commission européenne qui déclare que «la règle selon laquelle il faut épuiser les recours internes avant de présenter une requête internationale est fondée sur le principe que l'Etat défendeur doit pouvoir d'abord redresser le grief allégué par ses propres moyens dans le cadre de son ordre juridique interne».[39] Elle permet par ailleurs d'éviter d'encombrer les juridictions internationales avec des plaintes qui pourraient être réglées sur le plan national.[40]

S'il est vrai que l'examen de l'exception d'irrecevabilité par la Cour se fait sous le prisme des dispositions de l'article 56 de la Charte, il ne faudrait pas perdre de vue que cet exercice nécessite une prise en compte de la typologie de la procédure. En effet, dans l'appréciation de l'épuisement des voies de recours internes, la Cour considère exclusivement les recours ordinaires comme dans son tout premier arrêt au fond,[41] et s'assure de leur disponibilité, leur efficacité et leur suffisance.[42] L'épuisement des recours internes dépend donc du système judiciaire de l'État défendeur et aussi de la nature du litige. Dans l'espèce, les faits indiquent que l'on est en matière criminelle et donc dans le champ de la procédure pénale conformément à l'ordre judiciaire malien.

En effet, les époux *Diakité* ayant été victimes de cambriolage dans leur domicile, avaient aussitôt saisi le Parquet de la République du District de Bamako au moyen d'une plainte. À travers cet acte, ils venaient d'enclencher les poursuites judiciaires contre les présumés auteurs desdits agissements. En procédure pénale malienne, toute personne victime d'une infraction peut mettre en mouvement l'action publique. Il convient de signaler que la loi lui offre essentiellement deux possibilités pour le faire. La victime peut saisir le Procureur de la République ou le juge d'instruction compétent. Cette précision vaut la peine dans la mesure où c'est à ce niveau que se cristallise tout le débat sur le défaut d'épuisement des recours internes dans le cas *Diakité*. Dans leur quête de justice, les requérants avaient opté pour la saisine du Parquet de la République et donc du Procureur de la République qui, dans le système judiciaire malien est l'autorité garante des poursuites pénales puisqu'elle reçoit les plaintes et les dénonciations.[43] Acteur clé dans le procès pénal, le Procureur de la République a pour mission de

38 FIDH (n 11) 84.

39 Décision du 2 septembre 1959 sur la recevabilité de la Requête 343/57, 2 *Annuaire* 413.

40 M Khamis 'La Cour africaine des droits de l'homme: Quelles restrictions à l'accès à la justice?' Mémoire de Maîtrise, Droit international public, Université de Montréal, 2018, 70.

41 *Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R. Mtikila c. Tanzanie* (fond) (2013) 1 RJCA 34, para 82.

42 *Diakité c. Mali* (compétence et recevabilité) (2017) 2 RJCA 122, para 42.

43 Art 52 CPP malien.

procéder ou de faire procéder à tous les actes nécessaires à la recherche et à la poursuite des infractions à la loi pénale.[44] Étant donné qu'en portant plainte devant la juridiction répressive la victime de l'infraction recherche la réparation des atteintes causées à ses droits et non simplement le prononcé d'une peine à l'encontre de l'auteur, la loi exige qu'elle se constitue partie civile. Or, dans l'affaire des époux *Diakité* il n'est nullement indiqué qu'ils s'étaient constitués partie civile. Est-ce un manquement qui aurait amené les juges de la Cour à conclure que les requérants pouvaient encore saisir le juge d'instruction? Si oui, ne pouvaient-ils pas simplement présumer qu'il s'agissait d'une plainte avec constitution de partie civile? Pourtant, les dispositions de la procédure pénale malienne écartent une telle équivoque. En effet, lorsque que le Code de procédure pénale prévoit que l'action publique peut aussi être mise en mouvement par la partie lésée,[45] il dit à même temps que l'action civile en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction.[46] Il ressort de ces deux textes que les époux *Diakité*, en saisissant le Parquet de la République, visaient de façon ultime la réparation de leurs droits et ne pouvaient ne pas se constituer partie civile outre mesure. L'article 60(1) du même Code est davantage édifiant sur ce point: «les plaignants seront réputés partie civile s'ils le déclarent soit par une plainte, soit dans un procès-verbal d'enquête préliminaire, soit par acte subséquent ou s'ils prennent des conclusions en dommages-intérêts». Ils pourront se porter partie civile en tout état de cause jusqu'à la clôture des débats.[47]

Mais l'exercice de l'action publique par le Ministère public au Mali à la suite d'une plainte est dénoué de toute automaticité. Le principe de l'opportunité des poursuites confère au Procureur de la République un pouvoir d'appréciation qui lui permet de décider de la suite à donner aux plaintes.[48] Face à la plainte des *Diakité*, le Procureur de la République n'avait peut-être pas jugé opportun d'engager les poursuites et aurait classé l'affaire sans suite plongeant ainsi les victimes dans l'attentisme. À ce stade, il appartenait aux victimes de prendre le contre-pied du parquet en se référant au juge d'instruction comme l'avaient estimé les juges de la Cour. Mais la saisine du Procureur de la République n'était-elle pas suffisante? Le juge d'instruction n'est-il pas au même degré sinon à la même étape de la procédure que le Procureur de la République? C'est sans doute l'article 62 du Code de procédure pénale malien qui a inspiré la décision de la Cour. Ce texte dispose que «toute personne qui se prétend lésée par un crime ou un délit, peut en portant plainte se constituer partie civile devant le juge d'instruction compétent». Mais, si l'on a déjà porté plainte devant le Procureur de la République, il n'est plus besoin de le faire devant le juge d'instruction pour les mêmes faits. Dans le

44 Art 53 CPP malien.
45 Art 3 CPP malien.
46 Art 4 CPP malien.
47 Art 60(2) CPP malien.
48 Art 52 CPP malien.

raisonnement de la Cour[49] on a l'impression que la juridiction d'instruction au Mali se situe à un degré supérieur par rapport au Parquet que les victimes avaient initialement saisi. C'est pourquoi elle est arrivée à la conclusion selon laquelle «la saisine du Juge d'instruction est, dans le système judiciaire de l'État défendeur, un recours efficace et satisfaisant que les requérants pouvaient exercer pour obtenir ou au moins tenter d'obtenir que leur plainte soit examinée».[50] Alors qu'il s'agit de deux organes d'une même juridiction inférieure. Le juge d'instruction est seulement chargé de procéder aux informations.[51] Et «il ne peut informer qu'après avoir été désigné à cet effet par le Président du tribunal auquel le réquisitoire du Procureur de la République sera adressé ou sur une plainte avec constitution de partie civile».[52] On déduit donc qu'en procédure pénale malienne, la saisine du juge d'instruction n'est pas logiquement une voie de recours différente de celle du Parquet de la République, contrairement à la position de la Cour. Les requérants avaient pourtant avancé cet argument dans leur mémoire en réplique[53] puisque le juge d'instruction n'est qu'un organe auxiliaire que l'on retrouve au sein d'une même instance juridictionnelle.

Dans la motivation de sa décision, la Cour de céans fait une interprétation stricte et restrictive de l'article 62 susvisé pour déduire que les requérant n'avaient pas épuisé les voies de recours internes. D'après les juges, la saisine du juge d'instruction était une voie de recours nécessaire à la portée des requérants. Or, au regard de la lettre et de l'esprit de cette disposition, la saisine du juge d'instruction n'est qu'une voie parallèle ou alternative au choix. Les requérants avaient opté pour la voie du Ministère public. La Cour aurait dû prendre leur choix en considération et tabler plutôt sur une éventuelle prolongation anormale de la procédure. Dans cette hypothèse on aurait plutôt reproché aux requérants le non exercice du droit au double degré de juridiction. Dans tous les cas, il est évident que les requérants n'ayant pas franchi tous les degrés du système judiciaire malien, leur requête s'exposait fatalement à l'irrecevabilité.

4.2 Le rejet de la requête en raison de l'inobservation d'une règle d'or de saisine de la Cour

À la lecture de l'arrêt *Diakité*, on peut affirmer sans risque de se méprendre que les juges font une appréciation froide des faits et en tirent les conclusions. Après avoir constaté que les requérants s'étaient limités au parquet, la Cour «conclut que les requérants ne se sont pas conformés à l'exigence d'épuisement des voies de recours internes,

49 *Diakité*, paras 45 à 50.
50 *Diakité*, para 51.
51 Art 55(1) CPP malien.
52 Art 55(2) CPP malien.
53 *Diakité*, para 38.

prévue par l'article 56(5) de la Charte et qu'en conséquence, leur requête est irrecevable».[54] Comme il a été mentionné précédemment, l'exception d'irrecevabilité est très récurrente dans les litiges soumis à la Cour africaine. Cet état de chose dénote le caractère d'ordre public de cette règle de procédure. La Cour est particulièrement regardante sur cette condition et ne transige souvent sur la question que dans l'intérêt d'une bonne administration de la justice. Comme dans ses précédents arrêts, la Cour a encore martelé à l'occasion de l'affaire *Diakité* que

> l'épuisement des voies de recours internes est une exigence du droit international et non une question de choix et qu'il appartient au plaignant d'entreprendre toutes les démarches nécessaires pour épuiser ou au moins essayer d'épuiser les recours internes; qu'il ne suffit pas que le plaignant mette en doute l'efficacité des recours internes de l'État du fait d'incidences isolées.[55]

C'est malheureusement à ce jeu que se sont livrés les époux *Diakité*. Ayant intenté une action judiciaire et face aux atermoiements de leur plainte, ils ont cru à une supposée inertie de la justice au lieu d'actionner d'autres voies de recours. En se comportant de la sorte, ils sont allés vite en besogne en décidant de saisir la Cour africaine. La Cour a donc perçu cette façon d'agir comme une violation flagrante de la règle de l'épuisement des voies de recours internes et l'a sanctionnée par le rejet pur et simple de la requête. Il faut signaler au passage que cette décision d'irrecevabilité n'est pas une grande première dans l'histoire de la Cour. Elle fait suite aux cas qui ont été antérieurement tranchés dans le même sens.

Il ne suffit pas d'affirmer que l'on a épuisé toutes les voies de recours internes, il faut encore être en mesure de le prouver. Dans le cas contraire, cela équivaudrait au non épuisement des recours internes comme dans l'affaire *Fidèle Mulindahabi c. Rwanda*.[56] Dans l'affaire *Diakité*, on ne saurait non plus parler d'une prolongation anormale de la procédure devant les instances nationales en ce sens que le sieur Omar Maré qui avait été appréhendé dans le cadre des enquêtes n'était pas révélé comme étant le présumé auteur du cambriolage perpétré chez les époux *Diakité*. Par conséquent, la justice ne pouvait pas se mettre en branle. C'est pour cette raison que la Cour ne pouvait pas recevoir la requête sous prétexte que les autorités judiciaires maliennes avaient créé un dilatoire. Par ailleurs, la prolongation anormale de la procédure, pour être admise, ne doit pas être le fait des requérants auquel cas on aboutirait toujours au rejet de la requête. Cette position a été adoptée par la Cour dans l'affaire *Kouma et Diabaté c. Mali*.[57] Quel que soit le temps que la procédure peut prendre au niveau national, le requérant devra toujours épuiser tous les degrés de juridiction, même s'il n'existe plus qu'une dernière étape comme la Cour suprême qui statue en dernier ressort.[58] À titre d'illustration, la requête de *Rutabingwa* avait été déclarée irrecevable au motif que le requérant

54 *Diakité*, para 54.

55 *Diakité*, para 53. Voir aussi *Peter Joseph Chacha c. Tanzanie* (recevabilité) (2014) 1 RJCA 413, paras 142, 143 et 144.

56 (compétence et recevabilité) (2017) 2 RJCA 151, para 21.

57 (fond) (2018) 2 RJCA 246, paras 51, 52, 53 et 54.

58 Cf. CEDH, affaire *Van Oosterwijck*, arrêt du 6 novembre 1980.

n'avait pas saisi la Cour Suprême et n'avait donné aucune justification.[59] Les recours internes sont considérés épuisés seulement lorsque la juridiction qui doit statuer en dernier ressort a rendu une décision définitive. Si l'affaire demeure pendante, il n'y a pas épuisement des voies de recours internes comme on l'a vu dans le cas *Urban Mkandawire c. Malawi*. La requête avait été rejetée pour non épuisement des voies de recours internes malgré qu'il avait saisi la Cour suprême et la Haute cour de son pays.[60]

De ce qui précède, il faut noter que, en dépit des motifs discutables de l'exception d'irrecevabilité soulevée par l'État défendeur dans l'affaire *Diakité*, la décision de la Cour n'est pas moins conforme au droit. Mais, c'est tout de même un arrêt qui tranche avec l'hospitalité légendaire qu'offre cette Cour aux requêtes qui lui sont adressées.

5 UN ARRÊT DÉROGEANT À LA TENDANCE RECEVABILISTE DE LA COUR AFRICAINE

L'arrêt *Diakité* déroge à la tradition réceptionniste de la Cour. Depuis sa première décision jusqu'à nos jours, la Cour africaine a toujours réservé «un traitement prometteur des questions de procédure»[61] dans un sens favorable à la concrétisation du droit à l'accès à la justice. Car, il ne faut pas oublier que la majorité des particuliers qui vont quérir la justice à la Cour africaine sont profanes des droits consacrés par le système africain. En effet, La Cour se positionne comme le dernier rempart dans la protection juridictionnelle des droits de l'homme à l'échelle régionale. Pour ce faire, les requêtes qu'elle reçoit doivent être conformes autant que faire se peut aux conditions de recevabilité de l'article 56 de la Charte. Une fois que le contrôle de conformité du formalisme est satisfaisant, il ne reste plus qu'à la Cour d'examiner le fond de la requête, quel que soit l'objet des violations alléguées. Cependant, compte tenu de la délicatesse de la règle de l'épuisement des recours internes, son examen devrait se faire avec beaucoup de minutie, ce d'autant plus qu'elle admet quelques exceptions. Ainsi, une requête peut toujours être recevable lorsque les violations sont gravissimes et massives,[62] les recours internes sont inefficaces ou inaccessibles, ou encore si les procédures internes sont anormalement prolongées.[63] La Cour européenne des droits de l'homme attire l'attention sur la complexité à appliquer la règle de l'épuisement des voies de recours internes en ces termes:[64]

59 *Chrysanthe c. Rwanda* (compétence et recevabilité) (2018) 2 RJCA 373, paras 46 et 47.

60 *Urban Mkandawire c. Malawi* (recevabilité) (2013) 1 RJCA 291, para 40.1 et 40.2. Voir aussi *Frank David Omary et autres c. Tanzanie* (recevabilité) (2014) 1 RJCA 371, paras 122, 123, 124,125 et 127.

61 Olinga (n 25) 6.

62 FIDH (n 11) 86.

63 Voir CIDH, affaire *Gomes Lund et autres ('Guerrilha do Araguaia') c. Brésil* arrêt du 24 novembre 2010.

64 Voir *Aksoy c. Turquie*, App 21987/93, Cour européenne (18 décembre 1996).

> L'application de cette règle doit être clairement comprise dans un contexte de protection des droits humains … Par conséquent, il est entendu que cette règle doit s'appliquer avec un certain degré de flexibilité et sans excès de formalisme … La règle de l'épuisement n'est ni absolue, ni applicable de manière automatique. Il apparaît essentiel, dans l'application de cette règle, de tenir compte des circonstances particulières intrinsèques de chaque cas. Ceci signifie qu'il faut, entre autres, s'attacher, avec réalisme, à déterminer l'existence ou non de voies de recours formelles au sein du système judiciaire du pays dont le requérant est ressortissant, et à évaluer le contexte politique et législatif général, ainsi que les circonstances personnelles du plaignant …

Cette situation invitant à la pondération dans l'appréciation de la règle de l'épuisement des voies de recours internes n'échappe pas à l'attention de la Cour africaine. Dans les affaires antérieures, la Cour a toujours fait montre d'une grande souplesse qui se matérialise par son indifférence vis-à-vis des conditions qui n'ont pas été évoquées par l'État défendeur. Ce faisant, la Cour[65]

> se concentre en priorité sur les exceptions soulevées par les États défendeurs et se contente d'opérer un examen global à l'égard des autres conditions de recevabilité qui ne sont pas [en discussion entre les parties]. Étant donné que cette flexibilité n'a aucune influence néfaste sur le fonctionnement de la Cour ou sur la manière d'appréhender les exceptions préliminaires, il faut s'en féliciter.

La magnanimité de la Cour est perceptible dans la qualification de l'admission des seuls recours judiciaires ordinaires à l'exclusion des recours extraordinaires dont la prise en compte rendrait nombre de requêtes irrecevables. Ainsi, l'éviction des recours extraordinaires ou exceptionnels à l'instar du recours en inconstitutionnalité et le recours en révision dans l'ordre juridique tanzanien permet de réceptionner des requêtes qui auraient pu être rejetés si les requérants étaient contraints de les épuiser avant de saisir la Cour. Ainsi, dans l'affaire *Alex Thomas c. Tanzanie,* la Cour africaine avait rejeté l'exception d'irrecevabilité arguant que le recours en révision étant un recours peu efficace et extraordinaire, le requérant n'était pas obligé de l'engager. Que la Cour d'appel de Tanzanie ayant rejeté le recours en appel introduit par le requérant, celui-ci avait donc épuisé toutes les voies de recours internes.[66] Cet arrêt s'inscrivait dans le même sillage que celui des *Ayants droit de feus Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo et Blaise Ilboudo et Mouvement Burkinabé des droits de l'homme et des peuples c. Burkina Faso*. Dans cette affaire, les requérant n'avaient pas judicieusement épuisé toutes les voies de recours internes et s'étaient abstenus de se pourvoir en cassation qui est la juridiction suprême du pays. Une défaillance qui aurait pu entraîner l'irrecevabilité de leur requête. Mais, malgré le fait que la Cour avait reconnu que «le pourvoi en cassation prévu par le système juridique burkinabé est un recours efficace», elle avait déclaré la requête recevable[67] à la grande satisfaction des requérants. On sait bien que la Cour de cassation est le sommet de l'ordre juridictionnel dans les

65 Burgorgue & Ntwari (n 10) 928.

66 *Alex Thomas c. Tanzanie* (fond) (2015) 1 RJCA 482, para 65. Voir aussi *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) c. Tanzanie* (fond) (2018) 2 RJCA 297, para 51 et 52.

67 *Ayants droit de feus Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo et Blaise Ilboudo et Mouvement Burkinabé des droits de l'homme et des peuples c. Burkina Faso* (fond) (2014) 1 RJCA 226, paras 70 et 113.

systèmes juridiques d'inspiration romano-germanique comme le Burkina Faso. Avant de bénéficier d'une pareille faveur, le requérant doit manifestement fournir des efforts tendant à épuiser les voies de recours internes. C'est ce que la Cour attendait des époux *Diakité*.

6 CONSIDÉRATIONS CONCLUSIVES

L'arrêt *Diakité* est une véritable curiosité dont le commentaire vaut son pesant d'or à plus d'un titre. Curiosité d'abord parce qu'il s'agit d'un arrêt sur les formalités relatives à la saisine de la Cour africaine. Mais curiosité surtout de par la qualité du débat que cela suscite au sujet d'une condition cardinale de recevabilité des requêtes émanant des individus et des ONG, en l'occurrence l'épuisement des voies de recours internes. Victimes du cambriolage à leur domicile, les requérants sollicitaient de la Cour la réparation des violations de leurs droits fondamentaux qu'ils n'ont pas pu obtenir auprès des instances nationales. Comme c'est le cas en matière pénale, la répression des infractions obéit à une procédure qui va de la mise en mouvement de l'action publique jusqu'à la déclaration de culpabilité en passant par l'appréhension de l'auteur. Avant de venir à la Cour, les requérants avaient déposé une plainte auprès du Parquet de la République qui n'avait pas prospéré. La Cour va d'abord procéder à l'examen préliminaire des conditions de recevabilité des requêtes prévues à l'article 56 de la Charte de Banjul.

Dans sa démarche, la Cour note que les requérants en se fiant uniquement au Procureur de la République n'avaient pas épuisé toutes les voies de recours puisque selon elle, ceux-ci auraient dû saisir le juge d'instruction en se constituant partie civile. Sur cette base, la Cour a déclaré la requête irrecevable pour non-épuisement des recours internes; comme si, au moment de décider, elle avait la certitude que la plainte introduite par les requérants ne faisait pas mention de la constitution de partie civile. À travers cette appréciation, la Cour a érigé la saisine du juge d'instruction en une voie de recours internes dans le système pénal malien. Une posture qui cadre mal avec les dispositions du Code de procédure pénale du Mali. Alors que la saisine du Ministère public était suffisante pour enclencher les poursuites. Ainsi, face à des zones d'ombre dans le parcours judiciaire national, la Cour aurait dû faire profiter le doute au requérant.

Le reproche que l'on peut faire aux requérant est celui d'avoir brûlé les étapes en accourant vers la Cour, sachant que l'administration de la justice dans ce cas précis était conditionnée par l'arrestation du présumé auteur des faits. En tout état de cause, la décision de la Cour ne souffre d'aucune hérésie. Cet arrêt fera date si tant est qu'il remet au goût du jour la controverse au sujet de la nature des recours internes qui rentre en ligne de mire. En réitérant que seuls les recours judiciaires ordinaires doivent être visés, la Cour confirme l'idée que leur épuisement ne doit pas être simplement supposé, il doit être réel et donc susceptible de preuve. Au total, le message perceptible à travers l'arrêt *Diakité* est que la sécurité juridique est tributaire de l'accès au prétoire des droits de l'homme, dans une synergie d'efforts des victimes

et de la Cour. C'est à ce prix que les requêtes individuelles seront bien accueillies.

Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria: two decades on – questioning the continued implementation gap

*Stefaan Smis**
https://orcid.org/0000-0001-7227-7007

*Olalekan Bello***
https://orcid.org/0000-0002-0876-3673

ABSTRACT: Nearly two decades after the landmark decision in *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*, in which the African Commission on Human and Peoples' Rights found that Nigeria had breached its obligations to protect, promote, and fulfil the rights of the Ogoni people in the country's Niger Delta region, it is relevant to enquire how the decision has been implemented and whether it has significantly improved the situation of the Ogoni people. After the announcement of the Commission's decision and the return to democratic rule in Nigeria, the general expectation was that Nigeria would without further delay implement the Commission's recommendations. However, 20 years after the decision the Ogoni people are still demanding for their basic rights to be respected. This article, which mainly looks at the Commission's decision from the perspective of the victims and through a socio-legal perspective, exposes this implementation gap. By doing so, it also points to the ineffectiveness of the monitoring mechanism of compliance with the Commission's recommendations.

TITRE ET RÉSUMÉ EN FRANCAIS:

***Social and Economic Rights Action Centre (SERAC) et Centre for Economic and Social Rights (CESR) c. Nigeria* après deux décennies: questionnement au tour du déficit persistant de mise en œuvre**

RÉSUMÉ: Près de deux décennies après la décision historique rendue dans l'affaire *Social and Economic Rights Action Centre (SERAC) et Centre for Economic and Social Rights (CESR) c. Nigeria*, dans laquelle la Commission africaine des droits de l'homme et des peuples a estimé que le Nigeria avait violé ses obligations de protéger, promouvoir et réaliser les droits du peuple Ogoni dans la région du delta du Niger, il est important de s'interroger sur la manière dont la décision a été mise en œuvre et si elle a amélioré de manière significative la situation du peuple Ogoni. Après l'annonce de la décision de la Commission et le retour à un régime démocratique au Nigeria, on s'attendait généralement à ce que le pays applique sans plus tarder les recommandations de la Commission. Cependant, 20 ans après la décision, le peuple

* Stefaan Smis is Professor of international and human rights law at the Vrije Universiteit Brussels and Reader in international law at the School of Law of the University of Westminster; Stefaan.Smis@vub.be

** Olalekan Bello is a post-doctoral researcher at the School of Law of the University of Westminster; O.Bello@westminster.ac.uk

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Ogoni continue de réclamer le respect de ses droits fondamentaux. Cet article, qui examine principalement la décision de la Commission du point de vue des victimes et dans une perspective socio-juridique, met en évidence ce manque de mise en œuvre. Ce faisant, il met également en évidence l'inefficacité du mécanisme de suivi de mise œuvre des recommandations de la Commission.

KEY WORDS: African human rights system, environmental degradation, *Ogoni* case, Niger Delta, Ogoniland, implementation gap

CONTENT:

1 INTRODUCTION

The aim of this article is to focus on the implementation side of decisions of the African Commission on Human and Peoples' Rights (African Commission). To secure compliance with the African Charter, the founding fathers opted for a quasi-judicial organ with broad competences including to promote, interpret and ensure the rights recognised under the African Charter on Human and Peoples' Rights (African Charter or Banjul Charter).[1] As a quasi-judicial organ the African Commission has the power to issue decisions which are of a recommendatory nature. As with the universal human rights system, also in Africa there is a tendency in human rights practice to go beyond what the drafters of human rights treaties envisaged and attribute a certain legal value to the findings of human rights treaty bodies.[2] The African Commission has similarly defended the idea that their findings, as a sort of authoritative interpretations of the African Charter, must possess the legal value proper to that instrument.[3] While these issues certainly bear upon the question of compliance with the African Charter and affect the implementation of the

1 Article 54 African Charter on Human and Peoples' Rights.

2 International Law Association Committee on International Human Rights Law and Practice 'Final report on the impact of the work of the United Nations treaty bodies on national courts and tribunals' (adopted at the 2004 Berlin Conference).

3 Communication 137/94-139/94-154/96-161/97; a related issue that has been discussed in legal doctrine is the *res interpretata* value of pronouncements of human rights supervisory bodies. See eg O Jonas '*Res interpretata* principle: giving domestic effect to the judgments of the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 736-755; OM Arnadottir '*Res interpretata*, *erga omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights' (2017) 28(3) *European Journal of International Law* 819-843; C Giannopoulos 'The Reception by Domestic Courts of the *res interpretata* effect of jurisprudence of the European Court of Human Rights' (2019) 19(3) *Human Rights Law Review* 537-559. The *res interpretata* principle is mainly used as an argument to convince domestic courts and non-parties to a dispute to nevertheless follow the body of human rights pronouncements. For parties to a dispute, as is the case addressed in this contribution, it is less relevant because there are other legal means to push them to respect the human rights pronouncement in question.

Commission's findings, it is not the focus of our article. What we want to analyse, however, is how state parties to the African Charter react to a Commission's pronouncement stating that they have violated the Charter and what effect it has on the claimants. This, we contextualise through the first order (civil and political rights) and second order (socio-economic rights) compliance mechanisms which for Viljoen, impose different kinds of obligations on states.[4] In both contexts, compliance is shaped by a process of norm diffusion, social learning and norm internalisation, and the important role of institutions and norms in the construction of identities, which all drive societal forces to put pressure on decision makers to conform to rules and norms of the African Charter.[5] Even though the African Commission has developed a whole system to monitor the implementation of its findings,[6] the question of implementation remains an under-researched topic. Little attention is indeed given in legal doctrine to the ways African states are addressing decisions of the African human rights supervisory bodies with the consequence that little is known on what happens in practice with Commission's decisions and even less about the question whether the plight of victims have been addressed.

This contribution has the objective to shed some light in this domain by focusing on one specific case and querying whether and how victims of the violations have seen their situation change in the post-decision phase. For this purpose, we took one of the emblematic cases decided by the African Commission 20 years ago with the idea that this lapse of time gives us sufficient distance to evaluate what happened on the ground. Two decades ago, the African Commission concluded in *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* (*Ogoni* case) that Nigeria had breached its obligations to protect, promote, and fulfil the rights of the Ogoni people. The importance of the case cannot be underestimated. Wachira for example, acknowledged the case as one of

4 F Viljoen 'The African human rights system and domestic enforcement' in M Langford C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2017) 351-398.

5 V Carraro 'Promoting compliance with human rights: the performance of the United Nations' Universal Periodic Review and treaty bodies' (2019) 63 *International Studies Quarterly* 1079 at 1093.

6 The African Charter is very vague on the question how decisions of the African Commission needs to be implemented. The Rules of Procedure of the African Commission partly give some guidance with this regard. Adopted in 1988 and revised in 1995, they were replaced by new Rules of Procedure in 2010 to respond to the creation of the African Court on Human and Peoples' Rights. Rule 98(4) requests the state parties to report to the African Commission on the measures taken to implement provisional measures. Rule 112 details the steps, timing and organs involved in the follow-up of the recommendations of the Commission. If the state party has refrained to implement the Commission's findings or has not complied with the provisional measures requested within the timeframe defined in Rule 112 the Commission can seize the Africa Court on Human and Peoples' Rights. The Court will then address the case even if the state party has not recognised the competence of the Court to handle individual complaints. Finally, Rule 125 allows the Commission to request the AU Assembly of Heads of State and Government, when it submits its activity report, 'to take necessary measures to implement its decisions' and/or to 'bring all its recommendations to the attention of the Sub-Committee on the implementation of the decisions of the African Union Permanent Representatives Committee'.

the most important jurisprudential contributions of the African Commission with regards to the protection of minority peoples' rights in Africa.[7] To Nwobike, it was a giant stride towards the protection and promotion of economic, social and cultural rights of Africans.[8] And for Dina Shelton, the African Commission's initiative in getting justice for indigenous people was important because the Commission went head-on to determine a contentious case involving violations of the majority of human rights yet focusing specifically on the right to a general satisfactory environment[9] and articulated the duties of governments in Africa to monitor and control the activities of multinational corporations.[10] As known, the case was linked to the 'irresponsible' oil exploitation in Nigeria leading to the use of violence, accompanied by significant environmental degradation in the Niger River Delta region and causing important health problems to the Ogoni inhabitants of the region. The case itself addressed a wide variety of rights recognised under the African Charter and established principles that would resonate as precedents in many cases decided afterwards.[11] The case was also relevant for recognising the peoples' rights protected under the African Charter and the possibility of a group to seek the protection and enforcement of these rights.[12] Following the decision and the return to democratic rule in Nigeria, the general expectation was that Nigeria would quickly implement the Commission's recommendations. However, nearly 20 years after the decision, the Ogoni people are still claiming from their basic rights to be respected.

This article mainly looks at the Commission's decision from the perspective of the Ogoni people and seeks to expose, from a sociolegal perspective, the implementation gap while also pointing to the ineffectiveness of the monitoring mechanism of compliance with the Commission's recommendations. Our view here is that in the context of the Niger Delta, an existential contestation is framing out among the forces of the state, corporate capital and local communities, culminating in what Debord describes in his *Society of Spectacle* as commodity enjoying fetishist status and dominating society.[13] The

7 GM Wachira *African Court on Human and Peoples' Rights: ten years on and still no justice* (2008) 9.

8 JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 1(2) *African Journal of Legal Studies* 129-146.

9 D Shelton 'Decision regarding communication 155/96 (*Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria*) Case ACHPR/COMM/A044/1' (2002) 96(4) *American Journal of International Law* 941. See also C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27-57.

10 Shelton (n 9).

11 Nwobike (n 8) 139-141.

12 G Lynch 'Becoming indigenous in the pursuit of justice: the African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs* 37.

13 G Debord *The society of the spectacle* (translated and annotated by Ken Knabb) (2014) 13.

sociolegal perspective will require posing several questions including how far Nigeria has gone to ameliorate the lives of the victims but also how the Ogoni people have reacted to the measures taken by the government. Through the voices emerging from the Ogoni and other Niger Delta communities, the article assesses, beyond the traditional legal analysis, what the decision meant for the Ogoni and takes stock of the current state of affairs. This is done with a view to contribute to the debate on the post-decision phase and give more weight to the victims' side of the story. However, because the article uses a sociolegal approach and that this is not very common in the classical legal literature we start with a short methodological note.

2 METHODOLOGICAL NOTE

The article will besides the classical approach drawing information from written sources also use a sociolegal approach based on the narrative inquiry methodology. This methodology will allow us to engage with the voices of the local oil-bearing communities in Ogoniland and the broader Niger Delta region. The methodology brings to life personal accounts by creating fictional, non-identifiable characters who narrate their experiences. What we seek to achieve is a process of narrating data[14] with all identifying information removed. Through this, we can show how Niger Delta communities have developed coping strategies to mitigate the effects of their human, social and environmental rights violations originating in the oil exploitation. We are conscious of some of the criticism against this methodology: its propensity to overextend its reach without specificity; its perceived transience as an 'intellectual fad' likely to disappear at any moment and its tendency to 'undermine the very efforts it was thought to support'.[15] However, following Freeman and Ricoeur, we find value in the narrative inquiry methodology because of its capacity to strike a balance among methodology, theory and practice.[16] This shows in through the relationship between time and the oil communities' narrative, focusing on the 'phenomenon of hindsight, the process of looking backward over the terrain of the personal past'.[17] Through this,

14 A Knight 'Research methodologies employed by writers of fiction' (2011) *Ethical imaginations: Refereed conference papers of the 16th annual AAWP conference* 6. For a detailed engagement with this approach, see also O Bello *The dynamics of Nigeria's oil and gas industry's environmental regulation: Revealing/storying neglected voices and excluded lives of environmental encounters and affects*, PhD thesis awarded in 2021 by the University of Westminster http://www.westminster.ac.uk/westminsterresearch (accessed 7 February 2022).

15 M Freeman 'Narrative as a mode of understanding: method, theory, praxis' in A De Fina & A Georgakopoulou (eds) *The handbook of narrative analysis* (2015) 21.

16 P Ricoeur *Time and narrative* (1984) *1*; P Ricoeur *Time and narrative* (1985) 2; P Ricoeur *Time and narrative* (1988) *3*; P Ricoeur 'Life in quest of narrative' in D Wood (ed) *On Paul Ricoeur: narrative and interpretation* (1991) 20-33.

17 Freeman (n 15) 22.

the 'myriad ways' in which the oil communities' narrative is 'woven into the fabric of life itself'[18] become more discernible.

It is important to stress that our choice of the narrative inquiry methodology is not borne out of any desire to dismiss the salience of the established quantitative and qualitative methodology forms. Rather, following Webster and Mertova, we desire to retell the 'whole story' as captured and told by the local Niger Delta communities. We also find justification for this in quantitative and qualitative methodology's inherent drawbacks of omitting important 'intervening' stages[19] of the critical events as they unfold. The narrative inquiry method allows for documentation of valuable critical life events in 'illuminating detail', revealing 'holistic views and qualities that give stories valuable potential for (further) research'.[20]

3 THE *OGONI* CASE AND ITS AFTERMATH

It is not our objective in this article to analyse the *Ogoni* case in detail. Others have done it before.[21] What we will do in turn is start by recalling the context of oil exploitation in the region and how it lead to massive human rights violations in the Niger Delta region to then point to the findings of the case while also enumerating the recommendations made by the African Commission. This is done with the aim to have a clear view of what the Commission requested from Nigeria when it entrusted the state party to bring the situation in conformity with the African human rights standards. Analysing Nigeria's reactions to these recommendations will show that very little has been done to conform to the recommendations and that this is confirmed by the narratives of those living in Ogoniland and the broader Niger Delta region.

Oil was discovered in Nigeria in the 1950s and the exploitation, extraction and production of it have consistently been the source of controversies, ambiguities and social tensions.[22] In the Niger River Delta, where most of Nigeria's oil production is concentrated, the operation of the NNPC-SPDC joint venture caused extreme environmental problems and social unrest, a result of irresponsible operations and a lack of adequate production infrastructure: excessive oil spills, water contamination and natural gas flaring were sadly quite

18 Freeman (n 15) 22.

19 Freeman (n 15) 4.

20 Freeman (n 15) 13.

21 F Coomans 'The *Ogoni case* before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749-760; CI Obi 'Globalisation and local resistance: the case of the *Ogoni versus Shell*' (1997) *New Political Economy* 137-148; JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 1(2) *African Journal of Legal Studies* 129-146

22 T Lambooy & M-E Rancourt 'Shell in Nigeria: from human rights abuse to corporate social responsibility' (2008) 2 *Human Rights & International Legal Discourse* 229-235.

common.[23] The local Ogoni population, who saw its health affected, its fishing grounds depleted and its agricultural lands confiscated or destroyed to serve oil exploitation, reacted against this dire situation. In 1970, several Ogoni chiefs petitioned the Military Governor of the Rivers state to request the assistance of the Government in alleviating the suffering of the people of the Ogoni division by revising the petroleum and land laws as well as demanding compensation from the oil companies for the damages caused and the threats to their well-being, and even their very lives. Unfortunately, the Government did not respond to the demand. Moreover, the Government did not take any concrete measures to address the concerns that were raised.

Confronted with increased violence, and seeing no serious attempts to respond to their demands, Ogoni elders tabled an *Ogoni Bill of Rights*, which called for Ogoni political and economic self-determination by demanding 'political control of Ogoni affairs by Ogoni people, control and use of Ogoni economic resources for Ogoni development, adequate and direct representation as a right for Ogoni people in all Nigerian national institutions and the right to protect the Ogoni environment and ecology from further degradation'.[24] At the same time, the Movement for the Survival of the Ogoni People (MOSOP) was created to put into effect the objectives set forth in the *Ogoni Bill of Rights*.[25] As the number of demonstrations increased more brutal and extreme force was used in response, bringing the region into a quasi-civil war situation.

Oil installations were sabotaged and, on the other hand, houses and properties were destroyed.[26] According to various reports, at the height of the confrontation in November 1995, 27 villages were razed, 800 000 Ogonis were displaced and 2 000 were killed.[27] International NGOs echoed the demands of the Ogoni and campaigned against Shell in their home countries. The Nigerian government, led at the time by Sani Abacha, responded by implementing measures to ban public gatherings, severely punishing those hindering oil production or those calling for self-determination.[28] Shell lost control over many of its production facilities when strikes broke out and their staff was physically threatened. Following the numerous actions in and outside Nigeria, Shell reevaluated its strategies and temporarily pulled out of the region to concentrate its activities in other parts of the country.[29]

23 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 156-159.

24 CR Ezetah 'International law of self-determination and the Ogoni question: mirroring Africa's post-colonial dilemma (1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 817-818. See also Lambooy & Rancourt (n 22) 236.

25 Ezetah (n 24) 236.

26 RT Ako & P Okonmah 'Minority rights issues in Nigeria: a theoretical analysis of historical and contemporary conflicts in the oil-rich Niger Delta region' (2009) 16 *International Journal on Minority and Group Rights* 58.

27 SI Skogly 'Complexities in human rights protection: actors and rights involved in the Ogoni conflict in Nigeria' (1997) 15 *Netherlands Quarterly of Human Rights* 48 (referring to *The Guardian*, 8 November 1995, 26).

28 Ezetah (n 24) 819-821.

Tensions culminated in the arrest of Ken Saro-Wiwa, the renowned playwright and MOSOP chairman, and eight of his companions for incitement to murder of four pro-governmental Ogoni chiefs.[30] José Ayala-Lasso, the UN High Commissioner for Human Rights at the time, as well as various Rapporteurs for the UN Commission on Human Rights, repeatedly intervened on their behalf before the Nigerian government.[31] All efforts produced little effect and, at the beginning of November 1995, the nine activists were convicted by a military-appointed tribunal and quickly killed thereafter. International human rights NGOs, such as Amnesty International, have qualified the trial as politically motivated and not meeting the internationally recognised fair trial standards.[32]

Drawing from this background, the communication submitted to the African Commission in 1996 by the Nigerian NGO Social and Economic Rights Action Centre (SERAC) and its American counterpart the Centre for Economic and Social Rights (CESR) argued that the military government of Nigeria was responsible for the situation as it was directly involved in oil production as a majority shareholder in the NNPC-SPDC consortium. As it was alleged in the communication, that the consortium

> has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short- and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems.[33]

The communication further referred to the fact that the Nigerian government condoned and facilitated these violations by placing the legal and military powers of the state at the oil companies' disposal.[34] Also, no free, prior and informed consent was given or even envisaged as the Ogoni were not involved in the decision-making process about

29 KSA Carew 'David and Goliath: giving the indigenous people of the Niger Delta a smooth pebble-environmental law, human rights and re-defining the value of life' (2002) 7 *Drake Journal of Agricultural Law* 515.

30 Lambooy & Rancourt (n 22) 238.

31 Skogly (n 27) 50.

32 Amnesty International news service 'Nigeria: Amnesty International condemns death sentences imposed on Ken Saro-Wiwa and other Ogoni detainees after blatantly unfair trials' (1 November 1995) https://www.amnesty.org/download/Documents/172000/afr440261995en.pdf (accessed 7 February 2022); for a detailed summary see generally PD Okonmah 'The 'judicial' murder of nine environmental and human rights activists in Nigeria and the implications for the enjoyment of human rights in Nigeria' (1998-1999) 7 *Tilburg Foreign Law Review* 393-428.

33 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* African Commission on Human and Peoples' Rights, Communication 155/96 [*Ogoni*] at para 2 *African Human Rights Law Reports* (2001).

34 *SERAC v Nigeria* (n 33) para 3.

the development of their land by either the government or the oil companies.[35] The Ogoni were not informed of the potential dangers posed by oil exploration in the area and independent scientists and environmental organisations were even prevented from carrying out environmental impact assessment studies.[36] Finally, the government had also ignored the concerns of Ogoni communities regarding oil development while the non-violent campaigns by the MOSOP were met with violent reprisals on villages by security personnel and security forces who created a state of terror and insecurity leading to the executions of Ogoni leaders and the killing of civilians and the destruction of houses, farmland, crops and animals.[37] The complainants therefore, alleged that the government of Nigeria had violated Articles 2 (non-discrimination in the enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment) of the African Charter.

Soon after receiving the communication, a decision on the admissibility was reached by the African Commission in October 1996 but it took the Commission until October 2001 before being able to pronounce its final decision on the merits as the lack of cooperation by the Abacha military regime hampered the process. The African Commission followed the complainants on most of their arguments and found that Nigeria had violated a large spectrum of human rights recognised under the African Charter including the right not to be discriminated in the enjoyment of rights, the right to life, the right to property), the right to health, family rights, the right of peoples to freely dispose of their wealth and natural resources and finally the right of peoples to a satisfactory environment.[38] Five concrete recommendations were given to Nigeria with the aim to guide its government in bringing the situation back in conformity with the human rights continental standards. Nigeria was asked to (1) stop all attacks on Ogoni communities and leaders by the Rivers state internal security task force and permit citizens and independent investigators free access to the territory; (2) conduct an investigation into the human rights violations described above and prosecute officials of the security forces, NNPC and relevant agencies involved in human rights violations; (3) ensure adequate compensation to victims of the human rights violations, including relief and resettlement-assistance to victims of government sponsored raids, and undertake a comprehensive cleanup of lands and rivers damaged by oil operations; (4) ensure that appropriate environmental and social impact assessments were prepared for any further oil development and that the safe operation of any further oil development be guaranteed through effective and independent oversight bodies for the petroleum industry; and (5) provide information on health and environmental risks and

35 *SERAC v Nigeria* (n 33) paras 4-6.
36 *SERAC v Nigeria* (n 33) para 5.
37 *SERAC v Nigeria* (n 33) paras 7-9.
38 *SERAC v Nigeria* (n 33) para 70.

meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.[39] We will first explain how these recommendations were received by Nigeria and how it responded to them to then answer the question whether they significantly improved the situation of the victims referred to in the Commission's decision?

Research has shown that the levels of compliance with the rulings of the African Commission are far from satisfactory.[40] When questioning why African states fail to implement the decisions of the Commission's recommendations and decisions, Okolosie explains that the Commission has over time discharged its mandate judiciously and has steadily 'evolved as an apparatus for entrenching human rights and democratisation in Africa'.[41] However, a combination of factors has hampered the Commission's enforcement capability. These include the constant friction between the Commission's responsibility as a monitor and the 'obligation of states as primary implementers of human and peoples' rights'.[42] Also, the Commission is only a quasi-judicial body, hence has no legal status comparable to the African Court as a continental court of law.[43] This, for Okolosie, arguably accounts for why its decisions and recommendations often are considered as non-binding on state parties.[44] In a very comprehensive study, Viljoen and Louw also analysed the reasons for (non-)compliance with the decisions of the African Commission. They pointed to a wide variety of factors accounting to noncompliance some of them relating to the African Commission (maturity of the African system, the time needed to handle the communication, state involvement in the procedure, in-depth reasoning supporting the findings, formulation of the remedy and follow-up by the Commission), other related to the nature of the communication (nature of the rights involved, nature of the state obligation, scale of the violation and the remedial action required), the complainant and the respondent state (corruption, type of government, change of government after the finding and level of stability of the

39 *SERAC v Nigeria* (n 33) para 71.

40 F Viljoen & L Louw 'The status of the findings of the African Commission: from moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1-22; GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy' (2006) 6 *African Human Rights Law Journal* 465-492; 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* 1-34; R Murray, D Long, V Ayeni & A Somé 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150-166; D Inman, S Smis, E Amani Cirimwami & C Bahati Bahalaokwibuye 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *African Human Rights Yearbook* 400-426.

41 C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 8 *African Human Rights Law Journal* 31.

42 Okoloise (n 41) 31.

43 Okoloise (n 41) 31.

44 Okoloise (n 41) 31.

country), or even the involvement of civil society, the media and international pressure. They, however, concluded that the most important factors influencing compliance are political rather than legal.[45] The manner in which Nigeria has responded to the Commission's findings and recommendations shows the pertinence of the factors suggested by Okolosie, Viljoen and Louw.

Between 1996 and 2000 the Nigerian government did not respond officially to the communication.[46] Under the Sanni Abacha military regime, the government had indeed cut off relations with most international human rights institutions. After the return to democratic rule in November 2000, the Obasanjo government eventually sent a response via a *note verbale*, admitting the violations alleged by the claimants in the case[47] and acknowledged that 'a lot of atrocities were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area'.[48] While the government maintained that it was taking remedial measures[49] regarding the rights that have been violated at the same time it delivered an opposite message by reforming the country's Constitution[50] to limit the justiciability of claims of violations socio-economic rights beyond the domestic courts.[51] In *Socio Economic Rights and Accountability Project v Nigeria*,[52] for instance, Nigeria could then submit that the rights alleged to have been violated are not justiciable under the Nigerian Constitution of 1999.[53] Nigeria has in other words put in place a nuanced process to water down the efficacy of the Commission's terms of reference and the African human rights system with the consequence that two decades after the decision, the Nigerian government, after

45 Viljoen & Louw (n 40) 32.

46 Shelton (n 9) 938.

47 Shelton (n 9) 938.

48 Decision Regarding Communication 155/96 *(Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria*) Case ACHPR/COMM/A044/1, *Note verbale*, Reference 127/2000 para 42; Shelton (n 9) 938.

49 Shelton (n 9) 938.

50 Sec 6(6)(c) Constitution of the Federal Republic of Nigeria (as amended) provides: 'The judicial powers vested in accordance with the foregoing provisions of this section- (c) Shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental objectives and directives principles of state policy set out in Chapter II of this Constitution'.

51 This has been discussed in several papers, including U Edih & B Ganagana 'Justiciable or non-justiciable rights: a debate on socio-economic and political rights in Nigeria' (2020) 8(4) *Global Journal of Politics and Law Research* 78-85; OVC Ikpeze 'Non-justiciability of chapter II of the Nigerian Constitution as an impediment to economic rights and development' (2015) 5(18) *Developing Country Studies* 48-56.

52 Communication 300/05: *Socio Economic Rights and Accountability Project v Nigeria* (2005).

53 *SERAC v Nigeria* (n 52) para 51.

repeated calls for the implementation of the Commission's recommendations, has to a great extend remained deaf[54] or at best has paid lip service to the decision. Some of the numerous appeals to successive Nigerian governments testify this. For example, on 12 April 2005, during an oral submission to the UN Commission on Human Rights, an Ogoni representative complaint that, years after the Commission's decision, the Nigerian government continued to disregard the decision and failed to institute a comprehensive action plan for the remediation of Ogoniland and the Niger Delta region in general.[55] For him, it became necessary to 'further petition the African Commission to refer the Ogoni decision for certification by the newly established African Court on Human and People's Rights'.[56] It is also instructive to invoke the UN Environment Programme's (UNEP) assessment of Ogoniland in 2011 which concluded with similar recommendations to those of the African Commission.[57] It is revealing that by 2014, more than a decade after the *Ogoni* case, the Centre for Economic and Social Rights, one of the original plaintiffs in the action before the African Commission, claimed that there had not been any action on the part of Nigeria.[58] Contrasting with these appeals in its 2015 Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights, the African Commission acknowledged the significant steps that were taken by the government of Nigeria to promote and protect human rights in general and in particular 'commended Nigeria's interventions in the Niger Delta Region, in order to fulfil its human rights obligations vis-à-vis the people living in that part of the country who have specific needs due to the oil exploitation and conflicts'.[59] At the same time it remained concerned about the 'allegations of lack of an acceptable level of transparency in the exploitation of natural resources such as oil, and lack of respect for environmental standards'.[60]

54 See UNPO 'Ogoni representative calls for human rights implementation in Delta region' (12 April 2005) https://www.unpo.org/article/2311 (accessed 7 February 2022).

55 UNPO 'Ogoni representative calls for human rights implementation in delta region - Transcript of the oral statement delivered by the anti-racism information service before the 61st Session of the UN Commission on Human Rights oral submission by Mr Legborsi Saro Pyagbara' (12 April 2005) Anti-racism information service http://www.unpo.org/article/2311 (accessed 10 May 2021).

56 FC Morka *'The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* – matters arising' (2005) http://www.crin.org/docs/FileManager/felix.doc accessed 10 May 2021).

57 UNEP (2011) *Environmental assessment of Ogoniland* (2011).

58 ESCR-Net (2014) *'Update: Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria* (Communication 155/96)' (2004) International Network for Economic, Social & Cultural Rights https://www.escr-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria (accessed 7 February 2022).

59 African Commission on Human and Peoples' Right 'Concluding observations and recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011- 2014)' para 51.

60 Concluding Observations (n 60) para 84.

The Nigerian government maintains today that it has started to unroll a process of remediation of Ogoniland devastated by oil spills and for that purpose often invokes its Hydrocarbon Pollution Remediation Project (HYPREP).[61] However, that exercise ameliorating the human and environmental rights of the inhabitants of the region, has in reality little bearing with the African Commission's recommendations but more with the involvement of UNEP. When it inspected Ogoniland in 2011, UNEP evidenced high scales of contamination of water in the creeks, coastal and mangrove vegetation and therefore recommended immediate remediation of the damage observed.[62] UNEP's recommendations lead to the establishment of HYPREP as a unit of the Ministry of Petroleum Resources in 2016. This was followed by a 1 billion US Dollar clean-up and restoration program of Ogoniland, set in motion in August 2017.[63] By 2018, HYPREP had embarked on the construction of an Integrated Contaminated Soil Management Centre in Bori New City.[64] It also claimed that it successfully completed clean-up work on five out of the 21 polluted sites it started in January 2019.[65] While these remain small steps, they admittedly contributed to set in motion a process that eventually might lead to the realisation of some of the Commission's recommendations. In terms of monitoring, several NGOs and civil society organisations (including Stakeholder Democracy Network and the Centre for Environment, Human Rights and Development)[66] have also teamed up to build the capacity of civil society (as well as the government) to carry out an effective, independent assessment of the Ogoniland clean-up, create a database of technical samples and other data from impacted communities and document and analyse the progress made.[67] This might also have a bearing on the recommendations made by the African Commission. However, there have been claims and counterclaims about the issues of lack of transparency on the part of HYPREP.[68]

Given the uncertainties and conflict among the bodies tasked with the remediation process, the conclusion we draw is that the reality of achieving

61 HYREP 'Remediation works: Report of HYPREP activities in the month of March 2021' https://hyprep.gov.ng/remediation-work (accessed 7 February 2022).

62 UNEP (n 57).

63 UNEP 'Nigeria launches $1 billion Ogoniland clean-up and restoration programme' (7 Aug 2017), https://www.unep.org/news-and-stories/story/nigeria-launches-1-billion-ogoniland-clean-and-restoration-programme (accessed 7 February 2022).

64 UNEP (n 63).

65 D Iheamnachor 'Ogoni clean up: HYPREP, ERA disagree over remediation on 5 Sites' (10 August 2020) *Vanguard* https://www.vanguardngr.com/2020/08/ogoni-clean-up-hyprep-era-disagree-over-remediation-on-5-sites/ (accessed 7 February 2022).

66 Stakeholders democracy network 'Monitoring the Ogoni clean-up, 2020-2025' (2019) https://www.stakeholderdemocracy.org/projects/monitoring-the-ogoni-oil-spill-clean-up-niger-delta/(accessed 7 February 2022).

67 Democracy network (n 66).

68 For instance, Environmental Rights Action Nigeria (ERA) has disputed HYPREP's project coordinator, Dr Marvin Dekil's claims that it had completed the cleanup of the five sites cited above and was 'waiting for internal and external verification of samples collected from the said sites, as well as the final results from statutory environmental regulatory bodies in the country'. ERA's executive director, Dr Uyi Ojo, alleged that the sites claimed to have been cleaned by HYPREP were done

the remediation of Ogoniland, and the rest of the Niger Delta, is very meagre. This probably explains the reasons for the plethora of recent private and local community litigation against Shell and other oil multinationals in their home jurisdictions in Europe and the USA. Good illustrations are the recent landmark decisions in *Okpabi and others v Royal Dutch Shell Plc and another* (*Okpabi v Shell)* and *Four Nigerian Farmers and Milieudefensie v Nigeria (Four Nigerian Farmers v Nigeria).* In *Okpabi v Shell* 40 000 inhabitants of the Niger Delta region initiated court proceedings in the United Kingdom against Royal Dutch Shell (RDS) and one of its Nigerian subsidiaries Shell Petroleum Development Company of Nigeria Ltd (SPDC) alleging that pollution linked to oil exploitation by SPDC caused extreme environmental damage to the region affecting their drinking water, fishing grounds and agricultural lands. According to the claimants, RDS is directly responsible for the damage caused by its subsidiary because RDS' duty of care had been breached as it failed to prevent or remedy the extensive damage encountered by the claimants and exerted significant control over SPDC and its operations. The case is not yet in its merits phase but an important step has nevertheless been taken on the issue of jurisdiction with the consequence that the British courts can now hear the case. In a unanimous decision on 12 February 2021, the Supreme Court of the UK reversed the earlier decision of the Court of Appeal and basing itself on the recent *Vedanta Resources Plc & another v Lungowe and others*[69] case concluded that on the basis of the degree of control and de facto management, the parent company owed a duty of care to the claimant Nigerian citizens in respect of alleged environmental damage and human rights abuses by Shell's Nigerian subsidiary.[70] *Four Nigerian Farmers v Nigeria* is quite similar to Okpabi for the facts are related but also the Dutch judges borrowed heavily from their British counterparts in order to apply the common law principles, the duty of care. This time, it was four farmers who, confronted with oil-spillage in their villages in the Niger Delta and who decided to circumvent the Nigerian judiciary, used Dutch courts to proceed against RDS and SPDC. In a historic judgment pronounced on 29 January 2021, The Hague Court of Appeals decided for the first time that a parent company is liable for breach of the duty of care regarding abuses committed abroad by its foreign subsidiary company.[71] As Tiruneh has observed, applicants can now 'circumvent the principle of limited liability and claim redress from parent companies'.[72]

Thus while Nigeria's responses to the findings and recommendations of the African Commission are far from satisfactory,

'below set standards and had no certification from NOSDRA. On his part, Nyesom Wike, the Governor of the host state, accused the federal government of not engaging with the remediation program with sincerity of purpose; rather it has been carried out only when it is politically expedient for the federal government.

69 *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

70 *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

71 *Four Nigerian Farmers and Milieudefensie v Shell* ECLI:NL: GHDHA:2021:132.

72 W Tiruneh 'Holding the parent company liable for human rights abuses committed abroad: the case of the *four Nigerian farmers and milieudefensie v Shell*' (19 February 2021) *EJIL Talk* http://ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/(accessed 7 February 2022).

new strategies are being developed by the local communities in the Niger Delta to respond to the continued violations of their basic rights by trying to pierce the corporate veil. This strategy will likely set new beacons in the litigation against oil multinationals and might at the long run even be more efficient in addressing the African Commission's recommendations than the way it is provided in the Commission's rules of procedure.

4 NARRATING DATA: VOICES OF ANGUISH FROM THE DELTA

While the euphoria after the decision of the African Commission has transformed into frustration for human rights advocates and alternatives had to be found for the Nigerian justice system, it has also brought disillusionment to the local communities in Ogoniland and the entire Niger Delta who have seen no change in their situation after all these years. Through the narrative inquiry methodology, we have tried to give the communities in Ogoniland and other parts of the Niger Delta a voice. The information was collected during field research undertaken in 2018-2019. Some of the collected material is accompanied by field research notes contextualising the interventions.

9:00am 13 June 2019: Ogoniland – We had been in Ogoniland Rivers State for over one week, surveying the level of environmental degradation in the hotbeds of oil spill communities of Bomu, Korokoro and Bodo. The villages were lined with dilapidated buildings used as homes for the dwellers, although a few modern structures interrupt the shanty-looking horizons. The coastal waters were jet black and glistening from the previous spill from the oil companies' oil wellheads around all the creeks. But on this day, we approached and spoke to a group of local fishermen who were about to embark on a probably futile journey to fish in the Atlantic Ocean. This is because the common knowledge among the villagers is that the many oil spills over the last thirty-five years across the Ogoni waters and coast have literally wiped out the marine life. Already used to the stream of researchers and investigators coming to verify the level of damage, Mr G, a semi-literate young man, said the following:

> It seems we are still suffering from the actions of our main son and leader Ken Saro Wiwa who spoke to the world about the activities of Shell in our land. If not so, why has the government, during the time of Abdusalam Abubakar, Obasanjo, Yar'Adua, even our or clansman, Goodluck Jonathan, and now Muhammad Buhari, not come to help us. We know a big court has told them to come and repair our land, houses and give us money and jobs. But since, we 'never see anything'. The worse thing is that the oil still spills into our waters every day, as you must have read or heard about Bodo which made the community take Shell to court. We cannot find fish anymore.

At this point, a young man heading toward a sturdier boat with three others, Mr Tee, interjected in pidgin English as follows:

> *We don tell you to forget the fish, dem don die finish from oil. Una just dey waste una time. Come do sand job for inside water you no wan gree. This government no go ever do anything for us, na so we go do till we pai* (You are just wasting your time going into the deep waters to fish; we have told you repeatedly to forget about fishing in the waters as oil spills have wiped out the fish stock in our waters. We

> have told you to come join us in our new trade of sand dredging from the depth of the waters to sell to builders, but you are reluctant. This government will never do anything to alleviate our predicament till we all die).

What we gathered from the young man was that the main means of survival for many young men in Ogoniland and across the Niger Delta, who are not inclined to engage in militancy and oil bunkering is sand digging from the oil-ravaged waters. As we eventually saw them from the shore, two of the young men would dive into the water with buckets and soon emerge with the other two on the boat pouring the sand into the belly of the boat to be transported and sold to builders waiting at the shores. Across the creeks, this was the similar pattern of lived experiences that unfold every day.

9:00am 2 July 2019: Warri South Delta State – Arriving in the Ijaw parts of the Delta in early July, our observations took us through Egwa I, Egwa II and Jones Creek, all creek villages located in Warri South Local Government Area of Delta State. At this time, there was no expectation of a significant difference in the level of degradation we anticipated to find. Instead, it ran deeper into the mangroves which line the edges of the coastal waters. The remarkable thing common to these three communities is the absence of hospitals or health centres, neither is there electricity (everyone lives on power generators), and pipe-borne water. Drinkable water (sachets and bottles) is brought by boat from Warri to be sold to the community. More bizarrely for oil-bearing and wealth-making communities is the total disconnection from the rest of the world in terms of mobile telecommunication, and this in the twenty-first century! It is only at Jones Creek that the youths have managed to contribute towards purchasing a 'receiver'. Yet to be able to receive or make a call, you would have to come from your house to sit under the receiver to get any sort of signal. At Egwa II, there was an eerie silence and inactivity on the Tuesday morning we arrived, just like a ghost community. The edges of the community have loose wooden structures serving as their bathrooms and toilets. Youths hung around idly, the women of the village tending to their paltry merchandise and children. However, an octogenarian man, who claimed to have worked for one of the oil multinationals, welcomed us warmly and was eager to share the community's story of displacement and dispossession. Pointing in the direction of the oil wellhead and pipeline along the sandy coast, Pa Gbe, as we tag him narrated:

> The oil company that operates here in Egwa II first arrived in 1968. I was lucky to be picked to work to get a job at Port Harcourt in 1970 with the company and have been retired since 1990. When they came, we had our homes, shrines, and market very close to the shore. But we were told to pack our belongings as the government needed the land for big projects. We had to move deeper into the land and all our ancestral history was destroyed. No one would listen to us then. And even now, how many people have heard about Egwa II? Everybody talks about the Ogoniland but we have seen worse. There are two wellheads close to us here that have been disused since 1998 but oil still leaks into our waters from them.

At Jones Creek, we were treated to probably the most glaring life contrasts we witnessed. On one side of the creek is the location of an oil platform with all the modern amenities provided for the staff workers. However, the jetties to the village side are thick and dark with oil residues. Yet, it is from here that the local community gets the water to bath and cook. In our interaction with the community's youth leader,

simply called Pastor, we discovered a new dimension to the complexities of the human and environmental violations we read about every day regarding the Niger Delta. As he narrated:

> We are happy you are here to see how go through our days and night in total submission to the wishes of Chevron and Shell who control the oilwells in our areas. As you can see, we live bare life here, yet, the barrels of oil moved by foreign ships from our backyards are enough to feed other countries. Our mothers suffer; the boys and girls have no access to quality education; we all live in poverty. But we must not blame the oil companies alone. The federal and state governments have never done anything to develop our community. So, if our own leaders abandon us, why would the oil companies care?

The youth leader then suddenly put a twist to his narrative, saying:

> And even our so-called community leaders who negotiate with the oil companies, we have found out, have been making our case worse because of their corruption. They take money from the oil companies with the promise to execute projects for us, but we see nothing. Five weeks ago, our mothers and women took matters into their hands by protesting naked across on the premises of Chevron facility whose Community Liaison Officer promised to address our lack of electricity. The CDC (Community Development Committee) went behind to negotiate after the protest but since nothing has been done. We have been made to understand that the Committee has been given money to commence the project but all we know is that most of the members have recently acquired new cars in Warri where they mostly live.

Going back to the allegation of corruption of community leaders, we took this seriously and decided to get responses from the leaders to whom we were directed. However, they refused to meet us to answer the allegations. The conclusions we reached was that there must be a truism to the allegations. Thus, the violation of the human and environmental rights of the communities of the Niger Delta must be seen holistically as a 'collusion' by all the powerful stakeholders in the Nigerian oil and gas industry.

By presenting our data through the narratives of the local oil communities, we have given the marginalised voices in the Niger Delta a higher value through a kind of empiricism Deleuze sees as 'transcendental', creating with 'intensity', a difference in the perception of effects of their daily lived experience.[73] Hearing the inhabitants of Ogoniland and the larger Niger Delta speaking shows that not much has changed for the last decades. They are still facing the effects of extreme environmental degradation caused by oil exploitation and the responses proposed by the Nigerian authorities to initiate more human rights-friendly ways to run the industry have not been sufficiently effective to make a difference on the ground. To further validate these realities and to show the extent of the state's non-compliance with the Commission's recommendations, one could highlight some cases of oil spills in the Niger Delta reported by NGOs and the international media. The community of Bodo near the island of Bonny (Ogoniland), hosts a Shell export terminal and a liquified natural gas facility. Between 2008 and 2009, several leaks from the feeder pipelines to the terminal

73 G Deleuze *Difference and repetition* (1994) 56-57.

devastated the creek community.[74] According to Environmental Rights Action, the last large leak late in 2009 has made local people continue, and we confirmed this during our trip in 2019, to contending with the consequences with the restoration of the natural environment.[75] Fishermen can barely find any fish fit for consumption and the mangrove forests where many fish and crustaceans had been caught traditionally have been burnt off in previous leaks.[76] Another report states that in the early morning of 4 June 2011, at a Shell-controlled collecting station near the village of Ikarama, a 'fountain of oil' began spouting into the river flowing into the creek. Although Shell technicians quickly succeeded in solving the problem, the cause of the accident was never investigated by Shell.[77] On 15 August 2011, in the same locality, a leak developed from a pipeline to an oil well with a local security guard promptly informing Shell.[78] However, a joint investigation visit required by law was not carried out and the village community 'only found out something was going on when Shell personnel were seen leaving in an all-terrain vehicle after inspecting the leak'.[79] The last highlighted case is the massive Shell Bonga Spill of 20 December 2011, emanating from a Shell facility near Bonga village. Approximately 40,000 barrels of crude oil spilled into the Atlantic Ocean affecting the fishermen 'whose source of livelihood is the ocean waters'.[80] Although the Nigerian agency responsible for oil spill response, the National Oil Spill Detection and Response Agency (NOSDRA) took swift action by ordering the fishermen out of the waters, the effect was to suspend the fishermen's activities[81] and livelihood. It caused hardship and 'loss of income for about 30,000 fishermen across five states of the Niger Delta'.[82]

The daily life of the local oil community dwellers shows a radical shift from the normal understandings of the rule of law,[83] human rights

74 Environmental Rights Action 'Shell's oil leaks in Nigeria continue' (2011) Environmental Rights Action/Milieudefensie, January 2011 Action http://www.eraction.org. See also Amnesty International 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/ and Deutsche Welle 'Oil spills keep devastating Niger Delta' http://www.dw.com/en/oil-spills-keep-devastating-niger-delta/a-18327732 (accessed 7 February 2022).

75 Environmental Rights Action (n 74).

76 Environmental Rights Action (n 74).

77 Environmental Rights Action (n 74).

78 Environmental Rights Action (n 74).

79 Environmental Rights Action (n 74).

80 UN Human Rights Council 'Cases of environmental human rights violations by Shell in Nigeria's Niger Delta' joint written statement submitted by the Europe-Third World Centre (CETIM) and Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN) A/HRC/26/NGO/100 (26 May 2014) https://www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%E2%80%99s-niger-delta/ (accessed 7 February 2022).

81 UN Human Rights Council (n 80).

82 UN Human Rights Council (n 80).

83 LM Coleman 'Rights in a state of exception: The deadly colonial ethics of voluntary corporate responsibility for human rights' (2018) 8(6) *Oñati Socio-legal Series* 879.

and of democracy. On the one hand, the state and the oil multinationals have assumed a position of total domination of the communities' life. Yet on the other hand, militant activities on the part of disaffected youths have taken the law into their own hands by brazenly blowing up oil pipelines, setting up illegal refineries through oil bunkering, and also contributing to the violations of the people's and environmental rights. Also, significantly, the spectacle of kidnapping of expatriates for ransom, sometimes resulting in the killing of these expats has continued to portray the oil communities as those of 'environmental terrorists'.[84] That arguably accounts for why today, a majority of the creeks hosting oil facilities are heavily militarised. What we can draw from these dynamics is that the oil communities have been forced into living in an Agamben-like state of exception. However, in this case, the Nigerian state through the regulation of the oil environment, prioritised by the petro-dollar, has made the rule of law to operate between a 'paradoxical threshold' of legality and exception, by authorising 'deadly economic policies that are – from the perspective of formally recognised rights – illegal'.[85] As a 'society of spectacle', therefore, capital logic has abstracted all commodities into 'a kind of representation, and what people consume is not commodity itself, but its representation relationship a value system'.[86] This value system shows in the region's social power relations, mediated by images of 'oppression and inequality in reality and nonparticipation and non-dialogicality'[87] of the oil community as important strategies of control.

5 CONCLUSIONS: LOOKING INTO THE FUTURE FOR THE NIGER DELTA

The inability of the African Commission to fully enforce its recommendations in the cases it has adjudicated often hampers the full enjoyment of individual and people's rights which constantly are being sacrificed by state parties who, interestingly, subscribe to the African Charter. It is not different with the inhabitants of Ogoniland who despite the Commission's findings and recommendations two decades ago continue to face the dire effects of environmental degradation in the Niger Delta. The recommendations requested that violence against the Ogoni people should be investigated and stopped not to forget that the Ogoni victims should be compensated for the human rights violation they had encountered. The whole approach to oil extraction should also be revised and made more human rights friendly so that safe operations should be guaranteed more specifically through the introduction of

84 A Zalik 'The Niger Delta: "Petro violence" and partnership development' (2004) 31(101) *Review of African Political Economy* 401.

85 Coleman (n 83).

86 Z Haibo 'The critique of society of spectacle and production of urban space' (2008) *International Symposium in Developing Economies: Commonalities Among Diversities* 620 http://www.irbnet.de/daten/iconda/CIB18169.pdf (accessed 7 February 2022).

87 Haibo (n 86).

environmental and social impact assessments and the creation of independent oversight bodies but also give a voice to the affected communities in the decision making with regard to oil operations. While some small steps have been made addressing the recommendations, the voices emerging from the affected communities prove that twenty years after the Commission's pronouncement little has changed for the local communities. The Ogoni are to a great extent still facing the same human rights violations today for which Social and Economic Rights Action Centre and the Centre for Economic and Social Rights petitioned the African Commission in 1996.

All involved stakeholders in the *Ogoni* case could play a role in addressing the situation. Now that it works in tandem with the African Court on Human and Peoples' Rights, it is time that the African Commission took advantage of the Court's important procedural route to enforce state compliance in cases of evidenced and established violations and non-compliance with prior Commission's recommendations.[88]

On the state's part, our suggestion is for Nigeria to go back, regardless of the current HYPREP exercise, to the African Commission's recommendations and put in process, more concrete measures to implement them. This is not just to ensure that the Ogoniland and the wider Niger Delta environment that has been severally devastated is remediated; it must do so with a strong political will and transparency. Alongside this, we align with Jaja and Obuah's suggestion of the institutionalisation of independent mechanisms for monitoring the performance of oil companies regarding their compliance with international human rights and environmental standards and contribution to developing the communities in the Niger Delta.[89]

Civil society organisations and NGOs also have a role to play to initiate new cases before the African Commission. However, in addition to these, we suggest that they push for automatic access to the African Court, instead of relying on the indirect access status they are granted through the Commission. As noted by Okolosie, in the current regime, state party's civil societies can only access the Court directly where the state in which they operate and make a complaints has ratified the Protocol and made a declaration pursuant to article 34(6).[90] This was also demonstrated in *Alexandre v Cameroon and Nigeria*.[91] Thus, as Okolosie opines, without such declaration, civil societies cannot directly access the Court to 'either seek redress for a breach of the substantive Charter provisions or enforce compliance with recommendations'.[92] The implementation gap can only be bridged

88 African Court Protocol art 5(1)(a).

89 JM Jaja & E Obuah (2019) 'The politics of the Ogoni clean-up: challenges and prospects' (2019) 13(3) *African Research Review* 111.

90 Art 5(3) African Court Protocol. See also Okoloise (n 9) 54.

91 *Alexandre v Cameroon and Nigeria*, App 008/2011, para 10. The case is also cited in Okoloise as above.

92 Okoloise (n 9) 54-55.

when all involved stakeholders take their responsibility to address the dysfunction that the *Ogoni* case had exposed twenty years ago. Without that it will be difficult for the communities of the Niger Delta region to cherish the hope to one day be delivered from this continuous state of human rights violations.